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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN HR DOE, ET AL.,
Plaintiffs and Appellants,

v.

MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT,
Defendant and Respondent.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
THIRD APPELLATE DISTRICT, CASE NO. C095446
HON. DEBRA L. GIVENS, TRIAL JUDGE
YUBA COUNTY SUPERIOR COURT CASE NO. CVPO21-00697

PETITION FOR REVIEW

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I.
ISSUES PRESENTED FOR REVIEW

1. Federal Rule of Civil Procedure ("FRCP") 41 subdivision (a)(1)(B) provides that "if the plaintiff previously dismissed any federal-or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." The issue presented here is whether under *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64 and its progeny, California Court's should apply this federal "two-dismissal" rule, or California law which has no equivalent two-dismissal rule, to a second-dismissal-judgment from federal court to determine whether that judgment is deemed to be "on the merits" and therefore a bar to the state court claims asserted in a subsequently filed state court action? As held by the Majority in the subject published opinion, California's courts are to apply the FRCP and not California law. However, in *Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932, the Sixth District Court of Appeal applied the United States Supreme Court's decision in *Semtek Intern. Inc. v. Lockheed Martin Corp.* (2001) 531 U.S. 497 to hold that California Court's are to apply state law, and not the FRCP. Review is this warranted to resolve this issue and harmonize California law.

2. Here, Plaintiffs elected to dismiss their federal action after the defendant School District asserted that Plaintiffs' state law claims alleged in that action were subject to sovereign immunity of the Eleventh Amendment, divesting the federal court of subject matter jurisdiction. Plaintiffs then filed this California action alleging the dismissed state law claims the School District had argued were subject to the Eleventh Amendment. The issue presented here is whether a defendant's assertion of sovereign immunity under the Eleventh Amendment divests a federal court

of subject matter jurisdiction over state law claims, preventing any subsequent judgment in that federal action of those state law claims from being deemed to be "on the merits" for claim preclusion purposes?

II.
INTRODUCTION: WHY REVIEW IS WARRANTED

Plaintiffs are all victims of horrendous childhood sexual abuse perpetrated by a school counselor during an eight-year period. Defendant and Respondent Marysville Joint Unified School District ("District") negligently retained and supervised that counselor. This action began as a collection of state court lawsuits. However, plaintiffs elected to add certain federal claims, and dismissed these actions without prejudice to refile a consolidated action in federal court. At the pleading stage in federal court, the District raised California's sovereign immunity under Eleventh Amendment in an FRCP 12(B)(6) motion, asserting that the federal court lacked subject matter jurisdiction over the state law claims against the District. Acknowledging that the District's assertion of the Eleventh Amendment was valid, and not wanting to prosecute a split action, Plaintiffs again dismissed without prejudice. Re-filing in state court, Plaintiffs instituted this action asserting only their state law claims.

Having motivated Plaintiffs to dismiss the federal action through its assertion of the Eleventh Amendment, the District now argued that Plaintiffs should be barred from prosecuting this action by application of the "two-dismissal" rule under FRCP 41 subdivision (a)(1)(B). That rule deems a second dismissal to "operate[] as an adjudication on the merits." The trial court agreed and dismissed this action on this procedural technicality.

During the pendency of this appeal, however, the Sixth District decided *Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932, addressing the exact same issue on the same relevant factual basis. The Sixth District turned to the United States Supreme Court's decision in *Semtek Intern. Inc. v. Lockheed Martin Corp.* (2001) 531 U.S. 497, which addressed the exact

same operative language in FRCP 41, though from a different provision, and holding that state law, and not federal law by way of the FRCP, governs what force and effect a federal judgment on state law claims is to be given. Applying California law, *Gray* held that, since California did not have the equivalent of the federal "two dismissal" rule, the federal dismissal was not an adjudication on the merits of the state law claim and thus did not bar the state court action there.

However, in its published two-to-one opinion here, the Majority ("Majority") disagreed with *Gray* and concluded that the federal voluntary-dismissal resulted in a judgment on the merits for claim preclusion purposes, barring this action in its entirety. The Majority reached this conclusion even though in this case the federal court did not even have subject matter jurisdiction over Plaintiffs' state law claims because the District had asserted Eleventh Amendment sovereign immunity.

In this Petition, Plaintiffs will explain why *Gray* correctly decided how to evaluate the res judicata effect of a federal judgment of state law claims, and why the Majority here was wrong. In short, there is no basis for departing from the United States Supreme Court rule in *Semtek*, merely because federal jurisdiction over Plaintiffs claims was based on supplemental jurisdiction and not diversity (as was the case in *Semtek*). Moreover, by applying federal law instead of California law, the Majority contravenes Constitutional principles of federalism protected under *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64 and its progeny ("*Erie* Doctrine") by imposing a federal rule where a different result would be obtained under state law. Further, this petition will explain how the Majority's opinion limits California's sovereign immunity under the Eleventh Amendment by deeming the federal dismissal to be a judgment on the merits, even though the District's assertion of sovereign immunity stripped the federal court of subject matter jurisdiction over Plaintiffs' state claims, prohibiting it from

entering a judgment on the merits. Simply put the court could not have resolved the merits of a claim as to which it had no jurisdiction.

Under California Rules of Court, rule 8.500 (b)(1), review is warranted to correct these errors concerning issues of statewide import, and to create uniformity of decision.

III.
STATEMENT OF FACTS AND PROCEEDINGS

A. PLAINTIFFS, RANGING IN AGE FROM 6 TO 11 YEARS OLD, WERE REPEATEDLY SEXUALLY ABUSED BY AN EMPLOYEE OF MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT AS A RESULT OF THE DISTRICT'S FAILURE TO PROPERLY SUPERVISE THE STUDENTS AND DESPITE THE DISTRICT BEING ON NOTICE OF ITS EMPLOYEE'S UNSUITABILITY

Throughout the eight-year period from 1993 and 2001, William Babcock, a school counselor at Kynoch Elementary School, a school within the District, sexually harassed, molested, and abused elementary students, including Plaintiffs John HR Doe, John JH Doe, John RH Doe, John GL Doe, John JO Doe, Jane CJ Doe, and John RD Doe. (1AA:20-29.) From his position of power and authority as a school counselor, and in concert with the District's utter failure to take any measures to protect its students, Babcock took advantage of his unfettered access to young, elementary school age children to sexually abuse these students in the most vile and disgusting way. (1AA:7-8, 12-13, 20-29.)

Much of the abuse occurred in Babcock's office, during "counseling" sessions. Babcock would isolate elementary students, including Plaintiffs, in his office, close the door, turn off the lights, and play "hide and seek." (1AA:17, 24-28.) As alleged by the individual Plaintiffs, the abuse involved the following:

- Between 1993 and 1994, when GL Doe was 8 to 11 years old, Babcock repeatedly groped and fondled GL Doe's entire body, including but not limited to, his torso, lower stomach, inner thighs, and groin. (1AA:26.)
- Between 1994 to 1996, when RH Doe was 9 and 11 years old, Babcock repeatedly groped and fondled RH Doe's legs and thighs and would attempt to grope and fondle his genitals. (1AA:25-26.)
- Between 1996 to 1998, when HR Doe was ages 9 and 11 years old, Babcock would grope HR Doe's genitals and buttocks, both over and under his clothing, force HR Doe to touch Babcock's genitals, and force HR Doe to sit on Babcock's lap to feel his erection. (1AA:24.)
- Between 1999 to 2000, when RD Doe was 9 to 10 years old, Babcock repeatedly wrestled RD Doe on the ground and grope and fondle RD Doe's legs, thighs, chest, and genitals. Babcock would also place his face and lips on RD Doe's body, including RD Doe's neck, genitals, and buttocks. (1AA:28.)
- Between 1999 and 2001, when CJ Doe was ages 8 to 10 years old, Babcock would grope her buttocks, breasts, stomach, and legs, force her to sit on Babcock's lap, and attempt to grope and fondle her vagina. (1AA:27-28.)
- Between 2000 to 2001, when JH Doe was ages 6 to 8 years old, Babcock would grope, fondle, and tickle JH Doe's genitals; Babcock would also grope JH Doe's buttocks. (1AA:25.)
- Between 2000 to 2001, when JO Doe was ages 7 to 9 years old, Babcock would grope, tickle, and fondle John JO Doe's body, including Plaintiff's genitals and buttocks. (1AA:25.)

As alleged, the District learned of Babcock's conduct and knew that he posed a risk to minors. (1AA:17.) But despite possessing this knowledge and the power to stop the abuse, the District did the opposite and concealed it to avoid scandal and maintain a false appearance of propriety. Thus, the abuse continued unabated, including sexual abuse of Plaintiffs. (1AA:29.)

B. PROCEDURAL HISTORY

1. John HR Doe v. Marysville Joint Unified School District, et al., Case No. CVP020-00213

On February 20, 2020, HR Doe commenced an action in Yuba County Superior Court. (1AA:57; 2AA:346.) Plaintiff alleged causes of action for: (1) negligence, negligence per se, negligent supervision, negligent hiring and/or retention, negligent failure to warn, train or educate; (2) intentional infliction of emotional distress; (3) assault; (4) sexual battery; (5) sexual harassment; (6) gender violence; (7) breach of fiduciary duty; (8) constructive fraud; and (9) public entity liability for failure to perform mandatory duty. (1AA:57-58; 2AA:346.) On November 12, 2020, HR Doe filed a Request for Dismissal without prejudice. (2AA:474.)

2. John JH Doe, et al. v. Marysville Joint Unified School District, et al., Case No. CVP020-00543

On July 20, 2020, Plaintiffs JH Doe, RH Doe, GL Doe, JO Doe, CJ Doe, and RJ Doe also filed an action in Yuba County Superior Court. (1AA:58; 2AA:496.) Plaintiffs alleged causes of action for: (1) negligence; (2) negligent supervision; (3) negligent hiring and/or retention; (4) negligent failure to warn, train or educate; (5) intentional infliction of

emotional distress; (6) assault; (7) sexual battery; (8) sexual harassment; (9) gender violence; (10) breach of fiduciary duty; (11) constructive fraud; and (12) public entity liability for failure to perform mandatory duty. (1AA:58; 2AA:496.) On November 12, 2020, these Plaintiffs filed a Request for Dismissal without prejudice. (1AA:59; 2AA:550.)

3. John HR Doe, et al. v. Marysville Unified School District, et al., Case No. 2:20-cv-02290

On November 12, 2020, all Plaintiffs from the previous two matters jointly filed a complaint in the United States District Court for the Eastern District of California. (1AA:59; 2AA:562.) Plaintiffs alleged causes of action for (1) negligence; (2) negligent supervision; (3) negligent hiring and/or retention; (4) negligent failure to warn, train or educate; (5) intentional infliction of emotional distress; (6) assault; (7) sexual battery; (8) sexual harassment; (9) gender violence; (10) breach of fiduciary duty; (11) constructive fraud; (12) public entity liability for failure to perform mandatory duty; (13) violations of Title IX; (14) violations of 42 U.S.C. § 1983; and (15) violations of Title VIII. (1AA:59; 2AA:562.)

On January 13, 2021, the District moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) arguing, among other things, that the federal court lacked subject matter jurisdiction under the Eleventh Amendment. (1AA:101; 2AA:172-177.) Conceding that the district court lacked subject matter jurisdiction over the District with respect to Plaintiffs' state law claims, Plaintiffs filed a voluntary dismissal under Federal Rule of Civil Procedure 41 subdivision (a)(1).

4. The Underlying Proceedings

On March 11, 2021, Plaintiffs commenced the instant action in Ventura County Superior Court. (1AA:6.) Plaintiffs alleged causes of action for: (1) negligence; (2) negligent supervision; (3) negligent hiring and/or retention; (4) assault; (5) sexual battery; and (6) gender violence. (1AA:6.) The parties stipulated that an order could issue transferring the venue to Yuba County, and on July 15, 2021, the matter was transferred. (1AA:60; 3AA:679-680.)

On September 9, 2021, the District demurred to the complaint, arguing among other things that under the two-dismissal rule of FRCP 41 subdivision (a)(1)(B) plaintiffs were precluded from bringing this action. (1AA:47, 60-62.) In opposition, Plaintiffs argued that because the District had raised the Eleventh Amendment, the federal court lacked subject matter jurisdiction over the state law claims, and thus, was not capable of entering a judgment on the merits on these claims. (1AA:101-103.) The District replied. (3AA:638.)

Following a hearing on November 1, 2021, (RT:1), the trial court sustained the District's demurrer without leave to amend, ruling that under the two-dismissal rule of FRCP 41 subdivision (a)(1)(B), Plaintiffs' claims were claim precluded, (3AA:653-655). Judgment on the ruling was entered on November 23, 2021, (3AA:657-661), which Plaintiffs timely appealed, (3AA:663).

After briefing was completed before the court of appeal, Plaintiffs filed a letter identifying *Gray*, 95 Cal.App.5th 932, as new case authority on September 7, 2023. Addressing identical relevant factual and procedural circumstances to the proceedings in this matter, *Gray* held that under the United States Supreme Court's analysis in *Semtek*, 531 U.S. 497, the res judicata effect of a voluntary dismissal under FRCP 41 subdivision (a)(1)

was to be determined by the rules of the jurisdiction in which the judgment was being relied on, and not under federal law, including FRCP 41 subdivision (a)(1)(B)'s "adjudication on the merits" language. (*Gray*, 95 Cal.App.5th at 951–966.) The court of appeal invited the parties to file supplemental letter briefs addressing the effect of this ruling on the appeal.

Nevertheless, in its published, decision filed on December 21, 2023, the Majority affirmed the trial courts order sustaining the District's demurrer. The Majority summarily rejected Plaintiffs' argument that the District's invocation of the Eleventh Amendment divested the federal court of subject matter jurisdiction to rule on Plaintiffs' state law claims. The Majority then addressed *Gray*, acknowledged that it was directly on point, but holding that *Gray* was wrongly decided.

In a separately filed Dissent, Justice J. Mesiwala reached the opposite conclusion. The Dissent concluded that *Gray's* construction of *Semtek* was correct, and that California law—the jurisdiction in which the federal judgment was being asserted as res judicata—should govern the analysis.

IV.
DISCUSSION

A. REVIEW IS WARRANTED OF THE TWO-TO-ONE PUBLISHED OPINION SO THAT THIS COURT CAN RESOLVE THE DIRECT SPLIT OF AUTHORITY THE MAJORITY CREATES WHETHER. UNDER UNITED STATES SUPREME COURT'S DECISION *SEMTEK* AND THE *ERIE* DOCTRINE, THE FORCE AND EFFECT OF FEDERAL JUDGMENTS ON STATE LAW CLAIMS IS EVALUATED UNDER CALIFORNIA LAW OR THE FEDERAL RULES OF CIVIL PROCEDURE

As things currently stand, Plaintiffs' state law claims for the horrendous abuse they suffered as children have been dismissed because the superior court concluded, and the Majority agreed, that these claims were subject to *res judicata* under the "two-dismissal rule" of FRCP 41 subdivision (a)(1)(B). (3AA:653-655.) The central issue is whether this federal rule applies to preclude an action filed in California State Court as to state law claims, even though under California law no equivalent "two-dismissal" rule exists and Plaintiffs claims would not be claim precluded.

The Majority, directly rejecting the contrary result in *Gray*, 95 Cal.App.5th 932, concluded that federal law, by way of the FRCP, prevailed over California law. By so holding, the Majority erred in at least three respects:

First, by relying on Federal law, the Majority improperly infringes on the Federal Constitutional federalism boundaries protected under the *Erie* doctrine by disposing of Plaintiffs' state law claims under a rule of federal civil procedure which is directly at odds with California state procedure. Under California law the earlier, voluntary dismissals would not have been a bar to Plaintiffs' prosecution of this action.

Second, as explained in the Dissent, in rejecting the directly contrary California Opinion in *Gray*, the Majority misapplies the United States

Supreme Court's interpretation of the operative language of FRCP 41 in *Semtek*, 531 U.S. 497, and creates a split of appellate authority.

Third, the Majority improperly limits California's Sovereignty by holding that, where federal question jurisdiction exists, a federal court retains subject matter jurisdiction to enter a judgment on the merits on state law claims even after a California state actor invokes the Eleventh Amendment.

Review by this court is thus warranted to reconcile a direct split of California authority and to resolve: (1) the federalism issues arising under the *Erie* Doctrine; (2) how, precisely, California Courts are to give weight to federal judgments under FRCP 41 as they apply to California state law claims; and (3) the scope of California's sovereignty under the Eleventh Amendment.

1. The Majority Violates The *Erie* Doctrine, In That Its Application Of Federal Law Creates A Different Outcome Than What Is Permissible Under California State Law

As explained in *Semtek* 531 U.S. 497, the United States Supreme Court has exclusive authority to determine what "force and effect" state courts—such as the Court of Appeal and this Court—are allowed or required to afford federal judgments. As the High Court stated: "even when States are allowed to give federal judgments (notably, judgments in diversity cases) no more than the effect accorded to state judgments, that disposition **is by direction of *this* Court**, which has the last word on the claim-preclusive effect of *all* federal judgments." (*Id.* at 507 [italics original, bold added].) Thus, where, as here, a state court's decision—such as the Majority's opinion—addresses the res judicata effect of a federal judgment on state law claims, the constitutionally enshrined system of

federalism is at play, a system that is protected under the doctrine arising from *Erie*, 304 U.S. 64. Indeed, this was explicitly anticipated by the United States Supreme Court in *Semtek*. (*Id.*, 531 U.S. at 498, 504, 508-509.)

The *Erie* Doctrine, which arose concurrently with the modern rules of civil procedure, sought to resolve the federalism issues that emerge when a federal court, governed by federal law, exercises jurisdiction over state law claims. Under its traditional formulation, the *Erie* Doctrine instructs that "federal courts exercising diversity jurisdiction must follow state substantive law and federal procedural law when adjudicating state law claims. *See Hanna v. Plumer*, 380 U.S. 460, 465, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965)." (*Sonner v. Premier Nutrition Corporation* (9th Cir. 2020) 971 F.3d 834, 839.)

It has long been recognized that the primary challenge of properly applying the *Erie* Doctrine lies in ascertaining the meaning of the labels "substantive state law" and "federal procedural law." (See *Guaranty Trust Co. of N.Y. v. York* (1945) 326 U.S. 99, 108.) Indeed, the focus of the *Erie* Doctrine has shifted away from any intuitive meaning and come to rest squarely on realizing its long standing dual objectives: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." (*Gasperini v. Center for Humanities, Inc.* (1996) 518 U.S. 415 (quoting *Hanna*, 380 U.S. at 468, 85 S.Ct. 1136); *see also Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001).)

With the dual objectives in mind, the United States Supreme Court fashioned the "'outcome-determination' test" which turns on whether the application of federal law over state law would "significantly affect" the result of litigation. (*Gasperini v. Center for Humanities, Inc.* (1996) 518 U.S. 415, 416 citing *York*, 326 U.S. 99.) Broadly stated, the United States

Supreme Court has explained that "the outcome of the litigation in the federal court ***should be substantially the same, so far as legal rules determine the outcome of a litigation,*** as it would be if tried in a State court." (*York*, 326 U.S. at 109.)

Further nuance in the *Erie* Doctrine stems from the manner in which federal jurisdiction over state claims arises. Though the rote formulation of *Erie* expressly identifies diversity subject matter jurisdiction, which is the primary domain of non-federal issue claims in federal court, diversity is not the only form of subject matter jurisdiction permitting a federal court to hear state law claims. Where subject matter jurisdiction is based on a federal question, litigants may seek to assert concomitant state law claims by invoking a federal court's "supplemental jurisdiction" (historically called "ancillary" or "pendant" jurisdiction). (28 U.S.C. 1367.)

As the United States Supreme Court has stated on at least two occasions, notwithstanding the federal question underpinning of this form of subject matter jurisdiction, *Erie* nevertheless applies to claims arising under supplemental jurisdiction. In other words, *Federal courts adjudicating state law claims based on supplemental jurisdiction should apply state law in the same way as they would in a diversity action*. (*Felder v. Casey* (1988) 487 U.S. 131, 151; *United Mine Workers v. Gibbs* (1966) 383 U.S. 715, 726; *see also Bass v. First Pacific Networks, Inc.* (9th Cir. 2000) 219 F.3d 1052, 1055 fn 2; *Mangold v. California Pub. Utils. Comm'n* (9th Cir.1995) 67 F.3d 1470, 1478; *Promisel v. First Am. Artificial Flowers, Inc.* (2d Cir.1991) 943 F.2d 251, 257; *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.* (3d Cir. 2012) 692 F.3d 283, 302 fn.11; *Kelley as Trustee for PCI Liquidating Trust v. Boosalis* (8th Cir. 2020) 974 F.3d 884, 902.)

Thus, this case involves the proper application of the United States Supreme Court's rules regarding the force and effect to be given to a

federal judgment on California state law claims arising under—at most[1]—pendant jurisdiction.

While the *Erie* Doctrine guideposts are important to and ultimately determinative of the issues in this case, this case nevertheless does involve a matter that has not directly been resolved by the United States Supreme Court. As the Dissent notes, "'[t]he United States Supreme Court has never addressed the issue presented here[,]' specifically what law governs the claim preclusive effect of a federal court disposition of a state law claim under Federal Rules of Civil Procedure, rule 41(a) (28 U.S.C.) in a case in which federal court jurisdiction over the state law claim was based on supplemental jurisdiction. (*Herington*, *supra*, 500 P.3d at p. 1176.)" (Dissent at 2.) It is in this precise jurisprudential lacuna that the Majority's opinion falls.

Omitting any mention of *Erie*, and largely sidestepping the issue of supplemental jurisdiction, the Majority provided a concise summary of the core of its holding:

> Because a second voluntary dismissal in federal court is claim preclusive in a federal question case, ***the plaintiff cannot strip out the federal claims and file the action in state court solely as a California law action***. As we have explained, "a single cause of action is based on the harm suffered, rather than on the particular legal theory asserted or relief sought by the plaintiff. [Citations.]" [Citations.] Rule 41(a)(1)(B) speaks in terms of a "claim," not a specific theory supporting a claim. "Rule 41(a)(1)(B)'s two-dismissal rule would be toothless if a plaintiff could evade it merely by adding to his original, voluntarily dismissed complaint a new cause of action arising from the same operative facts . .

[1] As discussed below, because the District asserted sovereign immunity under the Eleventh Amendment, the federal court was divested of even pendant jurisdiction over Plaintiffs' state law claims.

> . .” [Citations.] Here, the Doe plaintiffs’ claims constitute a single claim for res judicata purposes because they are based on the same alleged harm: the injury and damages caused by the school counselor’s abuse. Thus, stripping out the federal claims and refiling the state claims does not change the fact that a claim-preclusive judgment has already been entered concerning the Doe plaintiffs’ alleged harm.

(Opinion at 15-16 [emphasis added].) In other words, the Majority holds that because the primary actionable right of Plaintiffs’ claims is actionable under both federal law and state law, it is not possible to separate the federal claims from the state claims, and thus, federal law governs.

But herein lies the Majority’s violation of the *Erie* Doctrine; by couching its analysis in terms of a primary actionable right, the Court of Appeal misses the deeper notions of federalism underlying *Erie*. As explained by the United States Supreme Court in a case involving diversity jurisdiction: “The source of substantive rights enforced by a federal court under diversity jurisdiction, it cannot be said too often, ***is the law of the States***. ***Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court*** and whether the remedies be sought at law or may be had in equity.” (*Guaranty Trust Co. of N.Y. v. York* (1945) 326 U.S. 99, 112 [emphasis added].)

In this case, there is no question, and the Majority itself acknowledges, that the claims Plaintiffs brought in this action were based exclusively on California’s substantive law. That there exists a set of federal law claims that are also made actionable based on the same set of facts and occurrences that gives rise to these state law claims does not change the fact that the source of the substantive rights Plaintiffs are

seeking to enforce is the law of California. This, as noted by the United States Supreme Court, is true whether the forum of application is state court or federal court, or even whether it is in a diversity action or a federal question action with supplemental jurisdiction. Indeed, and perhaps ironically, by invoking the Eleventh Amendment, the District sought to force Plaintiff to split their state law claims from their federal law claims and litigate them in State Court.

Further, as aptly explained in *Gray*, "[t]here is no improper claim splitting practice here that would be promoted by applying state law concerning claim preclusion." (95 Cal.App.5th at 963.) As such, absent some compelling reason, the outcome of the litigation in federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be in State court. (*York*, 326 U.S. at 109.)

Finally, in *Semtek*, the United States Supreme Court specifically cautioned against a construction of the operative language at issue here that required a judgment from a federal court be given claim preclusive effect in state court precisely because of the *Erie* Doctrine. As the High Court explained in rejecting the very construction the Majority now gives to the same "adjudication on the merits" provision of FRCP 41 subdivision (a)(1)(B): "as so interpreted, the Rule would in many cases violate the federalism principle of *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78–80, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), by engendering '"substantial" variations [in outcomes] between state and federal litigation' which would '[l]ikely ... influence the choice of a forum,' [Citations.]" (*Semtek*, 531 U.S. at 504.)

Thus, the Majority has violated the *Erie* Doctrine by holding that where state law claims are voluntarily dismissed from a federal action under FRCP 41(a)(1) for a second time, the resulting judgment is claim

preclusive in any subsequent State court action, even though under California law such claims would be permitted to be refiled.

Review is warranted then to address the Majority's holding that, notwithstanding *Semtek*, the United States Supreme Court would establish a rule requiring state courts to apply federal procedural law to a federal court judgment on state law claims arising under pendant jurisdiction.

2. By Concluding That *Gray* Was Wrongly Decided, And Declining To Follow *Gray's* Application of *Semtek*, The Majority Has Disregarded Controlling United States Supreme Court Precedent And Created a Split of Authority

The Majority was well aware that the exact issue before it was recently addressed by Sixth District Court of Appeal in *Gray*, 95 Cal.App.5th 932, 962, requesting briefing from the party as to that decision. The Majority nevertheless concluded that *Gray* was wrongly decided, holding that *Gray* misapplied *Semtek* by extending its holding, which was set in the context of a diversity jurisdiction action, to a federal question action where the state law claims were before the federal court on supplemental jurisdiction. Citing *Semtek*, the Majority explained: "[w]hen a federal case is based on federal question jurisdiction, state law is not incorporated, and states cannot give those judgments the effect they would give their own judgments. ([531 U.S.] at p. 507.)" (Opinion at 11.) The Majority thus not only creates a clear split of appellate authority, but does so by misconstruing *Semtek*.

The Majority appears to misapprehend the central holding of *Semtek*: that federal common law applies to *all* federal judgments irrespective of their jurisdictional basis, and that under federal common law the source of

the substantive right on which a particular claim is based—i.e. state law or federal law—will dictate which jurisdiction's laws will apply.

Indeed, the citations to *Semtek* that the Majority relies on for the proposition that state law cannot be incorporated into any judgment arising from federal question jurisdiction irrespective of the nature of the claim does not actually support that conclusion. Instead, that portion of *Semtek* states that "no federal textual provision addresses the claim-preclusive effect of a ***federal-court judgment in a federal-question case***, yet we have long held that States cannot give those judgments merely whatever effect they would give their own judgments, but ***must accord them the effect that this Court prescribes***. [Citations.]" (531 U.S. at 507, emphasis added.) Shortly thereafter, *Semtek* also unequivocally states that "***federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity***." (*Semtek*, 531 U.S. at 508, emphasis added.) In other words, the provision of *Semtek* cited by the Majority is not differentiating outcomes based on the form of the federal court's subject matter jurisdiction. Instead, the High Court is unequivocally consolidating within itself the power to fashion an "appropriate federal rule" that applies to *all federal judgments* irrespective of their jurisdictional basis, whether it is federal question, diversity, or supplemental. (*Semtek*, 531 U.S. at 508.)

With the central tent pole of the Majority's argument removed, its analysis falters. As explained in the *Dissent*, and set forth in *Gray*, the Majority's conclusion improperly formulates the rule from *Semtek*. Citing *Gray*, which, in turn, quotes the very language *Semtek,* 531 U.S. at 509, the Dissent concisely and accurately explains that for federal judgments on state law claims, irrespective of their subject matter jurisdictional basis, "State claim preclusion law governs unless that law is ***incompatible with federal interests***. [Citations] [¶] Here, Doe plaintiffs have sued in state court asserting only state law claims, and there is no 'incompatibility

between applying California claim-preclusion law with federal interests.' [Citation.] In these circumstances, California's claim preclusion law governs, allowing plaintiffs who voluntarily dismiss an action without prejudice to refile, not federal law." (Dissent at 1.)

The Dissent's reliance on *Gray* is not misplaced; it provides the more accurate reading of *Semtek*, reaching the correct conclusion. *Gray* involved a dispute arising from the foreclosure and sale of a property that secured a loan taken by the plaintiff borrowers. (*Id.*, 95 Cal.App.5th at 944–945.) The borrowers sued the defendant lenders in a series of three sequential actions. The first two were in federal court under federal question jurisdiction when they were dismissed without prejudice under FRCP 41. (*Id.* at 950–951.) The third action was then brought in California state court asserting only California state law claims. (*Id.*) After lengthy proceedings in California state court, the lenders moved for summary judgment, asserting that *res judicata* barred the borrowers claims because, under FRCP 41 subdivision (a)(1)(B), the second dismissal from federal court acted as an "adjudication on the merits." (*Id.* at 944.) The superior court granted the lender's motion, and the borrowers appealed. (*Id.*)

While *Gray* ultimately affirmed summary judgment on alternative grounds, it did so only after rejecting the superior court's reliance on FRCP 41 and the two-dismissal rule to find the claims barred under *res judicata*. In rejecting the superior court's finding of res judicata based on the federal two-dismissal rule, the court of appeal held:

> Guided by the United States Supreme Court's decision in *Semtek, supra,* 531 U.S. 497, 121 S.Ct. 1021, we conclude that the voluntary dismissal filed in the second federal suit did not bar Appellants' present lawsuit under the doctrine of claim preclusion. The two-dismissal rule under Rule 41(a)(1)(B), which applies to proceedings in federal courts, did not necessarily have claim-preclusive

> effect upon Appellants' present suit in which they alleged only state-law claims. ***The claim-preclusion inquiry here is governed by a federal rule that, in turn, incorporates the law of this state.*** Accordingly, ***under California law, a plaintiff may file and dismiss without prejudice more than one action successively and not be precluded from bringing another suit.*** The voluntary dismissal of the second federal suit did not bar the present action.

(*Id.*, 95 Cal.App.5th at 976 [emphasis added].)

Further consideration of *Gray's* analysis reveals that the Sixth District faithfully followed *Semtek's* analysis, recognizing that the proper claim-preclusive application of FRCP 41 subdivision (a)(1)(B)'s "adjudication on the Merits" provision required the resolution of two questions: "(1) whether the two-dismissal rule under Rule 41(a)(1)(B) necessarily precludes Appellants from bringing the present action alleging state-law claims; and (2) answering the first question in the negative, whether, based upon the law determined applicable to these circumstances, this state court suit is barred by claim preclusion." (*Gray*, 95 Cal.App.5th at 954–955.)

To answer the first of these two questions, *Gray* turned to *Semtek*, where the High Court addressed the "involuntary dismissal" provision of FRCP 41, found in Subdivision (b). But, as *Gray* explained, *Semtek* "construed Rule 41(b) by referring to the exact same '"adjudication [on] the merits"' language found in Rule 41(a)(1)(B) involving the impact of a second voluntary dismissal by the plaintiff. (*Semtek, supra*, 531 U.S. at p. 505, 121 S.Ct. 1021.)" (*Gray*, 95 Cal.App.5th at 954.) Based on its comparison, "[t]he high court concluded that 'the effect of the "adjudication [on] the merits" default provision of Rule 41(b) ... is simply that, unlike a dismissal "without prejudice," the dismissal in [*Semtek*] barred refiling of

the same claim *in the United States District Court for the Central District of California. That is undoubtedly a necessary condition,* ***but it is not a sufficient one, for claim-preclusive effect in other courts***.' (*Id.* at p. 506, 121 S.Ct. 1021, fn.omitted, italics added.)" (*Gray*, 95 Cal.App.5th at 954 [italics in original, emphasis added].)

In other words, *Semtek* held that FRCP 41 subdivision (b)'s use of the term "adjudication on the merits" was not sufficient to conclusively establish the involuntary dismissal from federal court necessitated claim-preclusion in other jurisdictions. Acknowledging the highly persuasive holding in *Semtek*, *Gray* concluded: "We perceive of no reason that the high court's conclusion regarding the lack of claim-preclusive effect under Rule 41(b) would not apply equally to a second voluntary dismissal under Rule 41(a). [Citations.]" (*Gray*, 95 Cal.App.5th at 960.) As such, *Gray* held that the use of the term "adjudication on the merits" in FRCP subdivision (a)(1)(B) also was not sufficient to conclusively establish the second voluntary dismissal from federal court necessitated claim-preclusion in California. (*Gray* at 960.)

Having resolved the first question in the negative, *Gray* then turned to the second issue to determine whether, under the law applicable to the action before it, the state court suit was nevertheless barred by claim preclusion. *Gray* explained that this required resolving two further questions: "(a) what law applies to determine claim preclusion, and (b) applying that law, whether this case is barred by claim preclusion because there has been a final judgment on the merits of the claims asserted here." (*Gray*, 95 Cal.App.5th at 961.)

For the first of these two issues, *Gray* again turned to *Semtek* in which the Supreme Court "noted that it was the United States Supreme Court that had 'the last word on the claim-preclusive effect of *all* federal judgments.' [Citation.]" (*Gray*, 95 Cal.App.5th at 961 quoting *Semtek*, 531

U.S. at 507 [original italics].) *Gray* then observed that "the Supreme Court concluded that whether the involuntary dismissal of the action filed in federal court in California was claim preclusive ***was 'governed by a federal rule that in turn incorporates California's law of claim preclusion.'*** [Citation.]" (*Id.* [emphasis added] quoting *Semtek*, 531 U.S. at 509.) From this, *Gray* applied this reasoning to FRCP 41 subdivision (a)(1)(B), concluding that "*Semtek*'s choice-of-law holding controls our decision here." (*Gray* at 962.) In other words, *Gray* held that under *Semtek*, California state law controlled the determination of claim preclusion for state law claims pending in California state court which were subject to FRCP 41 subdivision (a)(1)(B)'s two-dismissal rule based on supplemental jurisdiction. (*Gray* at 957 citing *Styskal v. Weld County Bd. of County Comm'rs* (10th Cir. 2004) 365 F.3d 855, 859 [applying *Semtek*, federal court's dismissal "with prejudice" of state-law claims based upon lack of supplemental jurisdiction to consider them did not necessarily act as a bar to the plaintiff's subsequent filing of a state court suit; "with prejudice" denomination of dismissal meant only that the plaintiff could not refile the claims in the same federal court].)

Gray then turned to *Hardy v. America's Best Home Loans* (2014) 232 Cal.App.4th 795, to decide whether California law required claim-preclusion. *Hardy*, in turn, "applied *Semtek* in the context of a federal court's involuntary dismissal of an action for lack of prosecution." (*Gray*, 95 Cal.App.5th at 957.) *Gray* explained: "[i]n the case before it, the *Hardy* court found that 'while the federal order dismissed both federal and state-law claims, ***the claims asserted in this [state court] action involve only state claims***. In that respect, the district court's dismissal of the state law claims is similar to a federal court's dismissal in a diversity action. Accordingly, under *Semtek*, the preclusive effect of the district court's dismissal is determined under California law.' (*Hardy, supra*, at p. 806.)

The appellate court went on to hold that, because under established California law, a dismissal for failure to prosecute was not a final judgment on the merits invoking claim preclusion (*id.* at p. 803), and because 'the district court's penalty dismissal did not clearly decide any issue in the case' (*id.* at p. 807), the federal court dismissal did not bar the plaintiff's subsequent state-law claims alleged in the California state action. (*Id.* at p. 806.)" (*Gray*, 95 Cal.App.5th at 962.)

As noted in the Dissent, *Semtek* supports this outcome with the proviso that "State claim preclusion law governs ***unless that law is incompatible with federal interests***. (*Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932, 962 (*Gray*); *see also Hardy v. America's Best Home Loans* (2014) 232 Cal.App.4th 795, 806; *Hately v. Watts* (4th Cir. 2019) 917 F.3d 770, 777 [when a federal court exercises supplemental jurisdiction over a state law claim, "[t]he federal rule of decision in such cases is to apply state preclusion law, unless the state preclusion law is incompatible with federal interests"]; *Cooper v. Glasser* (Tenn. 2013) 419 S.W.3d 924, 927-930; *Herington v. City of Wichita* (Kan. 2021) 500 P.3d 1168, 1176 (*Herington*) ["a federal court must apply state law to state law claims in both diversity and supplemental jurisdiction cases"]; *Paramount Pictures Corp. v. Allianz Risk Transfer AG* (N.Y.Ct.App. 2018) 96 N.E.3d 737, 754-755 (dis. opn. of Wilson, J.)." (Dissent at 1; *see Semtek*, 531 U.S. at 509.) But as recognized in the Dissent and in *Gray*, there is "no incompatibility between applying California claim-preclusion law with federal interests." (*Gray*, 95 Cal.App.5th at 962.)

Proceeding to apply California's claim preclusion law, *Gray* identified the relevant procedural facts in the case before it, explaining: "Appellants filed the first federal suit (which they later dismissed without prejudice). They filed a second lawsuit in state court that was removed to federal court (i.e., the second federal suit). Within months of filing the

second case, Appellants filed a notice of dismissal without prejudice of the second federal suit. There was no trial and determination of Appellants' claims. (See *Goddard v. Security Title Ins. & Guarantee Co.* (1939) 14 Cal.2d 47, 54, 92 P.2d 804 ["the nature of the action and the character of the judgment [are what] determines whether it is *res judicata*"].)" (*Gray*, 95 Cal.App.5th at 965.)

Based on these facts, *Gray* then held that for a dismissal under FRCP 41 subdivision (a)(1)(B), "[t]he third element of claim preclusion relevant here—there having been "a final judgment on the merits in the first suit" [Citation.]—***was not met***." (*Gray*, 95 Cal.App.5th at 965.) *Gray* explained that no substantive element of the claim had been tried or determined. (*Id.*) *Gray* further explained that "one of the key policy considerations of claim preclusion under California law would not be served if we were to conclude that Appellants are barred from bringing the present action: This is plainly *not* a case in which a finding of claim preclusion would serve the goal of 'preventing a party who has had one fair trial on an issue from again drawing it into controversy.' [Citation.]" (*Id.* at 966) Finally, *Gray* noted that "it is established law in California that a voluntary dismissal without prejudice does *not* have claim preclusive effect. [Citations.]" (*Id.*)

Notwithstanding the Majority, *Gray* clearly applies to and governs the facts of this case. Plaintiffs filed the first lawsuit in state court, which was voluntarily dismissed. (AOB at 9, 13-14; see 2AA:346, 408-409, 413, 474, 550.) Thereafter, they filed the same action, alleging claims based in both state law and federal law, in federal court. This action was then voluntarily dismissed pursuant to FRCP 41 (a)(1)(B). (AOB at 14, 15; see 2AA:496, 547, 550.) As refiled and now pending, Plaintiffs now assert *only California state law claims*. (AOB at 15; see 1AA:6-46.) No aspect of this case has been tried or determined on its merits, nor is there a reason to find that precluding the claims in this action would serve the foal of preventing

a party who has had a fair trial on an issue form having the proverbial second bite of the apple. Following *Gray*: "under the federal rule, as enunciated by the Supreme Court, that the claim-preclusive effect of the federal court dismissal is to be determined by reference to state (in this instance, California) law (*Semtek, supra*, 531 U.S. at p. 508, 121 S.Ct. 1021), ***Appellants' voluntary dismissal without prejudice of the second federal action did not bar the present suit***." (*Gray*, 95 Cal.App.5th at 966 [emphasis added].)

Nevertheless, in rejecting *Gray*, and over the objections of the Dissent, the Majority has staked out a position that not only is inconsistent with applicable Supreme Court decisional law, including *Semtek*, but also creates a clear split of appellate authority on a foundational issue of federalism and the power of California Court's to adjudicates state law claims. Review is warranted to resolve this foundational issue of law and to resolve this split of authority.

B. REVIEW IS ALSO WARRANTED BECAUSE, ONCE THE DISTRICT ASSERTED SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT, IT STRIPPED THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION OVER THE STATE LAW CLAIMS, AND THE DISTRICT SHOULD NOT HAVE BEEN ABLE TO SUCCESSFULLY ASSERT THAT THOSE VERY SAME STATE LAW CLAIMS WERE RESOLVED ON THEIR MERITS BY THE DISTRICT COURT

Finally, the Majority held that because the federal court had federal question jurisdiction, it had jurisdiction to enter a judgment on the merits over Plaintiff's state law claims, despite the fact that the District had invoked Eleventh Amendment Sovereign Immunity. As such, the Majority has expanded the scope of Federal Jurisdiction over claims against State entities beyond its constitutional limits, permitting federal court judgments

on state law claims against States to be entered on the merits even where the state has asserted its Eleventh Amendment immunity.

The United States Supreme Court has made clear that federal courts may not adjudicate the merits of a case without *first finding that there is subject matter jurisdiction* over the asserted claims. (*Steel Co. v. Citizens for a Better Environment* (1998) 523 U.S. 83, 84, 94 [explaining "without proper jurisdiction, a court cannot proceed at all, but can ***only note the jurisdictional defect and dismiss the suit***."].) This is a structural limitation that arises out of the United States Constitution; Federal judicial power derives from Article III, section 2 of the Constitution; "[t] his section delineates the absolute limits on the federal courts' jurisdiction." (*Ankenbrandt v. Richards* (1992) 504 U.S. 689, 695-697.)

The Eleventh Amendment was asserted by the District as a grounds for dismissal in its FRCP 12(b)(6) motion to dismiss (1AA:101; 2AA:172-177) and acts as a bar to Federal subject matter jurisdiction. (See, e.g., *Pennhurst State School & Hosp. v. Halderman* (1984) 465 U.S. 89, 100 [describing the Eleventh Amendment as a jurisdictional bar]; *Jackson v. Hayakawa* (9th Cir. 1982) 682 F.2d 1344, 1351, fn. 5 [same]; *Krainski v. Nevada ex rel. Bd. of Regents of Nevada System of Higher Educ.* (9th Cir. 2010) 616 F.3d 963, 967 [same].) Under the Eleventh Amendment, a State is granted "immunity from suit in federal court by citizens of other states, and by its own citizens as well," absent a valid abrogation of that immunity or an express waiver by the State. (*Lapides v. Bd. of Regents of Univ. Sys. of Georgia* (2002) 535 U.S. 613, 616 (citations omitted; emphasis added); see *Hans v. Louisiana* (1890) 134 U.S. 1, 10.)

While Congress may in certain circumstances abrogate the Eleventh Amendment by federal enactment—Plaintiff asserted claims based on such congressional abrogation in its federal action, (1AA:59; 2AA:562)—no such claims were asserted by Plaintiff in this action. (see *Seminole Tribe of*

Florida v. Florida (1996) 517 U.S. 44, 55.) Rather, Plaintiffs' claims are all based on California state law. (1AA:6.)

The Eleventh Amendment has been held to apply broadly to all claims brought under state law in federal court. (*Pennhurst State Sch.*, 465 U.S. at 106 ["[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state claims law."].) And for such state law claims, the Eleventh Amendment's jurisdictional limitations have been construed in the broadest terms, vitiating not just subject matter jurisdiction but supplemental jurisdiction, such as pendant or ancillary jurisdiction, as well. (*Oneida County, N.Y. v. Oneida Indian Nation of New York State* (1985) 470 U.S. 226, 251 ["'[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment."]; *Cholla Ready Mix, Inc. v. Civish* (9th Cir. 2004) 382 F.3d 969, 973 [noting the Eleventh Amendment "precludes the adjudication of pendant state law against nonconsenting state defendants in federal courts"].)

Despite having pending federal claims, once the District asserted its Eleventh Amendment defense, the federal court was divested of subject matter jurisdiction over all of Plaintiffs' state law claims. Because the U.S. Constitution prohibits federal court subject matter jurisdiction over Plaintiffs' state claims, the district court was constitutionally prohibited by judgment or by any Rule of Civil Procedure, including Rule 41, from entering any judgment of dismissal or otherwise disposing the merits of Plaintiffs' state law claims.

By holding that the District's invocation of the Eleventh Amendment did not divest the federal court of subject matter jurisdiction, the Majority has held that the Eleventh Amendment does not act to insulate the State of California from federal judgments on state law claims where the federal

court has federal question jurisdiction. Review is warranted to correct this constitutional issue of law.

V.
CONCLUSION

For the foregoing reasons, plaintiff urges this Court to grant review.

Dated: January 30, 2024

MANLY, STEWART & FINALDI

ESNER, CHANG, BOYER & MURPHY

By: *s/ Shea S. Murphy*
Shea S. Murphy
Attorneys for Plaintiffs and Appellants

CERTIFICATE OF WORD COUNT

This Petition for Review contains 7,892 words per a computer generated word count.

s/ Shea S. Murphy
Shea S. Murphy

Filed 12/21/23

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

JOHN HR DOE et al., Plaintiffs and Appellants, v. MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	C095446 (Super. Ct. No. CVPO2100697)

APPEAL from a judgment of the Superior Court of Yuba County, Debra L. Givens, Judge. Affirmed.

MANLY, STEWART & FINALDI, John C. Manly, Morgan A Stewart, Saul E. Wolf, Cristina J. Nolan; ESNER, CHANG, BOYER & MURPHY, Shea S. Murphy, Kevin K. Nguyen, and Holly N. Boyer for Plaintiffs and Appellants.

SPINELLI, DONALD & NOTT and Lynn A. Garcia for Defendant and Respondent.

John HR Doe filed and dismissed a state court action against the Marysville Joint Unified School District (the School District). Other Does filed and dismissed their own

state court action against the School District. After that, John HR Doe and the other Does (collectively the Doe plaintiffs) filed and dismissed a federal court action. And then the Doe plaintiffs filed the instant state court action, their third action against the School District. All of the lawsuits alleged that William Babcock, a counselor at an elementary school in the School District in the 1990's and 2000's, committed sexual misconduct causing the Doe plaintiffs to sustain injury and damages.

In this third action, the trial court sustained the School District's demurrer and dismissed the Doe plaintiffs' complaint. The trial court ruled that, under rule 41(a)(1)(B) of the Federal Rules of Civil Procedure (28 U.S.C.),[1] the Doe plaintiffs' dismissal of the second action in federal court constituted res judicata.

In their original briefing on appeal, the Doe plaintiffs asserted that the trial court erred in sustaining the demurrer based on res judicata. They did not dispute that they dismissed their federal action or that rule 41(a)(1)(B) provides that such a dismissal, a second voluntary dismissal, operates as an adjudication on the merits. Rather, they contended that, because the School District argued in the federal court that the Eleventh Amendment to the United States Constitution provided immunity on most of the Doe plaintiffs' claims, it divested the federal court of subject matter jurisdiction to adjudicate the claims on the merits.

After the original briefing was completed, the Doe plaintiffs filed a letter identifying new case authority, and we directed the parties to file supplemental letter briefs addressing the effect of the authority on the res judicata issue. In their supplemental letter brief, the Doe plaintiffs argued that, in considering the effect of rule 41(a)(1)(B) in this context, California state law controls, under which a second voluntary

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[1] Undesignated rule references are to the Federal Rules of Civil Procedure (28 U.S.C.).

dismissal does not constitute res judicata. They contend rule 41(a)(1)(B) does not support dismissal of this third action.

Finding no merit in the Doe plaintiffs' contentions, we will affirm the judgment.

BACKGROUND

On February 20, 2020, John HR Doe (HR) filed a complaint in Yuba County Superior Court against the School District, Babcock, and a church. Because Babcock and the church are not parties to this appeal, we will summarize the procedure only with respect to the School District. As to the School District, the complaint alleged causes of action for negligence, intentional infliction of emotional distress, sexual harassment, breach of fiduciary duty, constructive fraud, and failure to perform a mandatory duty.

The School District demurred to HR's complaint, and the trial court sustained the demurrer with leave to amend as to some causes of action but without leave to amend as to others. On October 9, 2020, HR filed a first amended complaint in Yuba County Superior Court. However, he subsequently filed a request for a voluntary dismissal without prejudice, which was entered as requested on November 12, 2020.

Meanwhile, on July 20, 2020, the other Does filed a similar complaint against the School District in Yuba County Superior Court. The School District demurred to the complaint and the trial court sustained the demurrer with leave to amend as to some causes of action but without leave to amend as to others. The other Does filed a request for a voluntary dismissal without prejudice, which was entered as requested on November 12, 2020.

On the same day the requests for dismissal were entered in the two Yuba County Superior Court actions, the Doe plaintiffs filed a complaint against the School District in the United States District Court for the Eastern District of California. The complaint asserted the causes of action that had previously been alleged in the superior court but also added causes of action under title VIII of the No Child Left Behind Act of 2001

(20 U.S.C. § 7926) (Title VIII), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681(a) et seq.) (Title IX), and 42 U.S.C § 1983.

On January 13, 2021, the School District moved to dismiss the Doe plaintiffs' federal complaint. The motion argued the Eleventh Amendment to the United States Constitution provided immunity in the federal court on most of the claims against the School District. However, the School District acknowledged that the Eleventh Amendment did not provide such immunity on the Title IX claim. On February 18, 2021, the Doe plaintiffs voluntarily dismissed their federal complaint under rule 41(a).

On March 11, 2021, the Doe plaintiffs filed the instant action against the School District in Ventura County Superior Court. The complaint asserted causes of action for negligence, negligent supervision, and negligent hiring; it did not assert any federal claims. The parties stipulated that the action should have been filed in Yuba County Superior Court, and the action was transferred to that court. After the transfer, the Doe plaintiffs filed a peremptory challenge disqualifying the judge who sustained the demurrer in the original action, and the action was assigned to a different judge.

The School District demurred to the complaint, asserting that the action was barred by res judicata because of the Doe plaintiffs' second voluntary dismissal of the complaint in federal court. The trial court sustained the demurrer and dismissed the complaint. It ruled that res judicata barred the action because the dismissal in federal court operated as an adjudication on the merits.

DISCUSSION

I

The Doe plaintiffs contend their dismissal of the federal action did not constitute an adjudication on the merits because the federal court did not have subject matter jurisdiction over their claims.

Federal courts have two different sources of subject matter jurisdiction as relevant here. Diversity jurisdiction arises when opposing parties are citizens of different states

(28 U.S.C. § 1332), and federal question jurisdiction gives the federal courts jurisdiction if the action arises under federal law (28 U.S.C. § 1331). If the federal court has subject matter jurisdiction, it may also exercise supplemental jurisdiction over related claims that would not otherwise have been within the federal court's jurisdiction. (28 U.S.C. § 1367.)

In the Doe plaintiffs' federal case, the federal court had subject matter jurisdiction because the Doe plaintiffs filed their federal action as a federal question case (based on Title VIII, Title IX, and 42 U.S.C. § 1983) with supplemental federal jurisdiction over the Doe plaintiffs' state-law claims. All parties in this action are California-based, so the federal court never had diversity jurisdiction.

The Doe plaintiffs nevertheless argue that because the School District relied on the Eleventh Amendment in its motion to dismiss the federal complaint, it divested the federal court of authority to adjudicate the Doe plaintiffs' claims on the merits. For this proposition, the Doe plaintiffs cite *Wages v. Internal Revenue Service* (9th Cir. 1990) 915 F.2d 1230, 1234.) In that case, a person sued the Internal Revenue Service in a federal district court, but the district court dismissed the action because it did not have subject matter jurisdiction over the claims and the complaint failed to state a claim on which relief could be granted. (*Id*. at p. 1233.) The United States Court of Appeals held it was improper for the district court to consider whether the complaint stated a claim on which relief could be granted because that went to the merits, and once the district court determined it lacked subject matter jurisdiction it had no power to address the merits. (*Id*. at p. 1234.)

Wages is distinguishable from this case. The federal court involved in the Doe plaintiffs' action did not determine that it lacked subject matter jurisdiction. Rather, the School District acknowledged that the federal court had subject matter jurisdiction over

the Title IX claim,[2] which was predicated on the same harm as the other causes of action. The Doe plaintiffs voluntarily dismissed the lawsuit.

Under the circumstances, there is no merit to the Doe plaintiffs' contention that the federal court lacked subject matter jurisdiction.

II

After briefing was completed in this case, the Doe plaintiffs filed a notice of additional citations for oral argument. In that notice, they cited a recent case relevant to the application of rule 41(a)(1)(B). That case is *Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932 (*Gray*) decided by the Court of Appeal for the Sixth Appellate District. We directed the parties to provide supplemental letter briefs on the effect of *Gray*, which held that a second dismissal in a federal district court did not, under rule 41(a)(1)(B), preclude filing the same claim in a third action in state court. (*Gray*, at p. 1225.) Before discussing *Gray*, we will describe the relevant background law and the legal developments preceding *Gray*.

Res judicata or claim preclusion bars a second suit on the same cause of action when the cause of action has already been adjudicated on the merits. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Needelman v. DeWolf Realty Co., Inc.* (2015) 239 Cal.App.4th 750, 757.) "[A] single cause of action is based on the harm suffered, rather than on the particular legal theory asserted or relief sought by the plaintiff. [Citations.]" (*Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 991 (*Balasubramanian*); see also *Hi-Desert Medical Center v.*

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[2] The Eleventh Amendment bars suit against a state by its own citizens in federal court unless the state has waived its immunity or Congress has abrogated the state's immunity. (*Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 54, 68 [134 L.Ed.2d 252].) The latter is the situation for a Title IX action against a state by its own citizens in federal court. "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title IX of the Education Amendments of 1972. . . ." (42 U.S.C. § 2000d-7(a)(1).)

Douglas (2015) 239 Cal.App.4th 717, 733 (*Hi-Desert Medical Center*).) Here, the Doe plaintiffs' claims constitute a single cause of action for res judicata purposes because they are based on the same alleged harm: the injury and damages caused by Babcock's sexual misconduct.

Rule 41(a)(1)(A) allows a plaintiff to dismiss an action without a court order by filing a notice of dismissal before the defendant files an answer or motion for summary judgment. But rule 41(a)(1)(B) provides: "[I]f the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits." Res judicata bars any subsequent action based on the same alleged harm. (See *Engelhardt v. Bell & Howell Co.* (8th Cir. 1962) 299 F.2d 480, 484 (*Engelhardt*).)

"The preclusive effect of a federal-court judgment is determined by federal common law." (*Taylor v. Sturgell* (2008) 553 U.S. 880, 891 [171 L.Ed.2d 155] (*Taylor*).) If the federal court exercised diversity jurisdiction, federal common law incorporates the claim preclusion law of the state. (*Semtek Internat., Inc. v. Lockheed Martin Corp.* (2001) 531 U.S. 497, 507-508 [149 L.Ed.2d 32] (*Semtek*).) If the prior federal judgment was in a federal question case, however, federal common law requires application of " 'uniform federal rule[s]' of res judicata," not state law. (*Taylor,* at p. 891; see also *Guerrero v. Department of Corrections & Rehabilitation* (2018) 28 Cal.App.5th 1091, 1101-1102 (*Guerrero*) [summarizing the differences in claim preclusion in diversity and federal question cases].)

With respect to the effect of a second voluntary dismissal under rule 41(a)(1)(B), federal law is that a second voluntary dismissal under rule 41(a)(1)(B) is claim preclusive. (*Jian Ying Lin v. Shanghai City Corp.* (S.D.N.Y. 2018) 329 F.R.D. 36 (*Jian Ying Lin*); *McGhee v. High Mt. Health LLC* (D.Ariz. Apr. 21, 2020, No. CV-19-08145-PCT-DWL) 2020 U.S.Dist. Lexis 69721.)

The primary federal precedent relied on by the Doe plaintiffs in their supplemental letter brief, and by the *Gray* court, is *Semtek, supra*, 531 U.S. 497. In that United States Supreme Court case, the plaintiff filed an action in California state court, but the defendant removed the action to the federal court based on the federal court's diversity jurisdiction. The federal district court dismissed the action based on California's statute of limitations, as the action arose under California law. The plaintiff also filed an action in a Maryland state court, where the limitations period had not expired. The Maryland court concluded that, because the federal court's dismissal was designated as "on the merits" under rule 41(b), the federal dismissal was res judicata and precluded the Maryland state action.[3] (*Semtek*, at pp. 499-500.)

On review in the United States Supreme Court, the plaintiff argued that the dismissal in the federal court did not bar the Maryland action because, under California procedural law, the dismissal based on the statute of limitations was not claim preclusive. The defendant disagreed, arguing that the dismissal in the federal court was claim preclusive under rule 41(b). (*Semtek, supra*, 531 U.S. at pp. 500-501.)

The *Semtek* court reversed the Maryland judgment. It held: "Because the claim-preclusive effect of the California federal court's dismissal 'upon the merits' of [the plaintiff's] action on statute-of-limitations grounds is governed by a federal rule that in turn incorporates California's law of claim preclusion . . . , the Maryland Court of Special Appeals erred in holding that the dismissal necessarily precluded the bringing of this action in the Maryland courts." (*Semtek, supra*, 531 U.S. at p. 509.)

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[3] Rule 41(b) deems certain *involuntary* dismissals in federal court "adjudication[s] on the merits." Rule 41(a)(1)(B), on the other hand, deems a *second voluntary* dismissal in federal court "an adjudication on the merits." This case involves rule 41(a)(1)(B) only, not rule 41(b), which was the rule relevant to the outcome in *Semtek*. Rule 41(b) states that an involuntary dismissal "operates as an adjudication on the merits" unless the dismissal order states otherwise.

The court in *Semtek* reasoned that an "adjudication on the merits" under rule 41(b) does not necessarily mean the judgment has claim-preclusive effect in a case involving diversity jurisdiction. (*Semtek, supra*, 531 U.S. at p. 503.) *Semtek* noted that in such cases involving diversity jurisdiction there is no need for a uniform federal rule concerning when a federal judgment has preclusive effect because "state, rather than federal, substantive law is at issue . . . ." (*Semtek, supra*, 531 U.S. at p. 508.) On the other hand, *Semtek* counseled that, with respect to cases involving federal question jurisdiction, "States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes. [Citations.]" (*Id*. at p. 507.)

The court in *Semtek* determined that the words "operates as an adjudication upon the merits" in rule 41(b) should be interpreted in a manner consistent with rule 41(a), which "makes clear that an 'adjudication upon the merits' is the opposite of a dismissal without prejudice." (*Semtek, supra*, 531 U.S. at p. 505.) Rule 41(a) makes that distinction by indicating that a second voluntary dismissal, like in this case, is an adjudication on the merits, i.e., has the same effect as a dismissal with prejudice.

In the diversity context of the *Semtek* case, however, the court explained that "nationwide uniformity in the substance of the matter is better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court. This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the *federal diversity court* sits." (*Semtek, supra*, 531 U.S. at p. 508, italics added.)

The United States Supreme Court again considered the claim-preclusive effect of federal judgments in *Taylor, supra*, 553 U.S. 880, which, unlike *Semtek*, involved federal question jurisdiction. In that case, the court considered whether a prior judgment against the petitioner's friend in a Freedom of Information Act case precluded the petitioner's own suit. The court determined that the friend was not the petitioner's virtual

representative, and therefore the prior judgment did not preclude the petitioner's action. (*Id*. at pp. 884-885.) In its opinion, the court stated: "The preclusive effect of a federal-court judgment is determined by federal common law. See [*Semtek, supra,* 531 U.S. at pp. 507-508]. For judgments in federal-question cases . . . federal courts participate in developing 'uniform federal rule[s]' of res judicata, which this Court has ultimate authority to determine and declare. [*Semtek*], at 508." (*Taylor,* at p. 891.) In a footnote associated with that quote regarding the preclusive effect of judgments in federal question cases, the *Taylor* court, citing *Semtek*, observed: "For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits." (*Taylor,* at p. 891, fn. 4.)

In *Melamed v. Blue Cross* (9th Cir. 2014) 557 F.Appx. 659, a plaintiff filed and voluntarily dismissed two federal court actions against defendants, after which the plaintiff filed a third action in California state court. The defendants successfully removed the action to the federal district court because it involved a federal question. (*Id*. at pp. 660-661.) On the defendant's motion, the federal district court dismissed under the two-dismissal rule of rule 41(a)(1)(B), and the Ninth Circuit Court of Appeals affirmed. (*Melamed,* at pp. 661-662.) Even after *Semtek,* federal law provides that the two-dismissal rule of rule 41(a)(1)(B) has res judicata effect and bars a third action on the same claim.

Under these federal cases, as well as California precedent, "federal common law controls the preclusive effect of a federal judgment." (*Guerrero, supra,* 28 Cal.App.5th at p. 1100.) In federal cases based on diversity jurisdiction, the federal common law "effectively embeds state law into federal law unless some paramount federal interest calls for a departure from it." (*Ibid*.) However, if "a prior federal judgment was based on federal question jurisdiction, the preclusive effect of the prior judgment of a federal court is determined by federal law." (*Louie v. BFS Retail & Commercial Operations, LLC*

(2009) 178 Cal.App.4th 1544, 1553 (*Louie*), italics omitted, quoted in *Guerrero*, at p. 1102.)

Despite the foregoing authorities, in *Hardy v. America's Best Home Loans* (2014) 232 Cal.App.4th 795, 806 (*Hardy*), which was a second action filed in the state court after an involuntary rule 41(b) dismissal in federal court under its federal question jurisdiction, a state court of appeal held that the plaintiff could refile in the state court as long as it alleged only state-law claims. The court came to this conclusion by citing *Semtek* and reasoning: "Here, while the federal order dismissed both federal and state-law claims, the claims asserted in this action involve only state claims. In that respect, the district court's dismissal of the state law claims is similar to a federal court's dismissal in a diversity action. Accordingly, under *Semtek*, the preclusive effect of the district court's dismissal is determined under California law. . . . California law does not bar this action because the federal action was not an adjudication on the merits." (*Hardy*, at p. 806.)

Hardy indicated, without citation to supporting authority, that the federal court dismissal in that federal question case was similar to, and should be treated like, a dismissal in a diversity action because the federal claims were not renewed in the subsequent state court action. However, the United States Supreme Court has explained that it is in actual diversity jurisdiction cases where state law may be incorporated into federal law for the purpose of determining claim preclusion. (*Semtek, supra*, 531 U.S. at p. 509.) When a federal case is based on federal question jurisdiction, state law is not incorporated, and states cannot give those judgments the effect they would give their own judgments. (*Id*. at p. 507.)

That brings us to the appellate decision that prompted the supplemental letter briefs in this case, *Gray*, *supra*, 95 Cal.App.5th 932. In framing the issue presented, the court noted that, in California state court, the filing and voluntary dismissal without prejudice of successive lawsuits does not constitute a final judgment on the merits that

would preclude a subsequent lawsuit in a California state court. The question presented in *Gray* was whether a third suit filed in California state court alleging only state-law claims was subject to claim preclusion under rule 41(a)(1)(B) because the plaintiff had previously filed two federal question lawsuits in federal court alleging federal and state claims and had voluntarily dismissed them without prejudice. (*Gray, supra*, 95 Cal.App.5th at p. 941.)

The court in *Gray* held that the plaintiffs' voluntary dismissal of the second federal lawsuit was not a final adjudication on the merits barring the third case in state court. According to *Gray*, "[t]he two-dismissal rule of Rule 41(a)(1)(B) applies when there is a voluntary dismissal in state or federal court, a second voluntary dismissal in federal court, and the subsequent filing of an action in the *same federal court* where the second suit was dismissed. We hold that this rule is inapplicable here to the filing of [the plaintiffs'] *state court lawsuit* alleging state law claims only that succeeded the filing of voluntary dismissals without prejudice in two federal lawsuits. [The plaintiffs] are not precluded from asserting the claims in the present action because, under California law, (1) a dismissal without prejudice is not a judgment on the merits that precludes a subsequent action, and (2) there is no proscription against the filing of multiple actions that are voluntarily dismissed by the plaintiff." (*Gray, supra*, 95 Cal.App.5th at p. 942, original italics.) The *Gray* court relied mainly on *Semtek, supra*, 531 U.S. 497 to support its conclusions. (*Gray*, at p. 942.)

Gray applied California law to determine whether the second federal dismissal in a federal question case constituted res judicata. (*Gray, supra*, 95 Cal.App.5th at p. 942.) But its holding is contrary to authority, including *Semtek*, that res judicata is determined under federal law if the federal court jurisdiction was based on a federal question. (*Louie, supra*, 178 Cal.App.4th at p. 1553.) The court in *Gray* concluded rule 41(a)(1)(B) applies only to a third filing in the same federal court and does not apply

when the third filing alleges only state law claims. (*Gray*, at p. 942.) While those conclusions have superficial appeal, they are not supported under closer scrutiny.

According to *Gray*, rule 41(a)(1)(B) applies only to a third filing in the same federal court. (*Gray, supra*, 95 Cal.App.5th at p. 942.) In *Semtek*, the court held that "adjudication upon the merits" in rule 41(b) means that refiling is barred only in the same federal district court. (*Semtek, supra*, 531 U.S. at p. 506.) However, that holding in *Semtek* was dependent on its conclusion that, in a diversity jurisdiction case, state law controls whether the prior dismissal in federal court is claim preclusive. (*Id*. at pp. 506-507.) *Semtek* expressly differentiated between diversity cases and federal question cases, explaining that the United States Supreme Court has "long held that States cannot give [federal question] judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes. [Citations.]" (*Id.* at p. 507.) *Semtek* stated that, in a federal diversity case, rule 41(b) applies only to prevent refiling in the same federal district court; but that does not apply to cases involving jurisdiction based on a federal question. After *Semtek*, federal courts continue to hold that a second voluntary dismissal under rule 41(a)(1)(B) is claim preclusive, and not just in the federal district court where the plaintiff obtained the second dismissal. (See *Jian Ying Lin, supra*, 329 F.R.D. at p. 39 [holding that the two-dismissal rule of rule 41(a)(1)(B) applies to an action refiled in a different federal district court]; *Kerr Corp. v. Westside Resources, Inc.* (W.D.Wis. Sep. 27, 2007, No. 07-C-0177-C) 2007 U.S.Dist. Lexis 72862 [two prior voluntary dismissals in California federal court barred refiling in Wisconsin federal court].)

Gray also based its decision on the fact that the plaintiff alleged only state-law claims in the third action. (*Gray, supra*, 95 Cal.App.5th at p. 942.) Referencing *Hardy's* conclusion that the federal court dismissal in *Hardy* was similar to a dismissal in a diversity action because the claims asserted in the ultimate state court action involved only state claims (*Gray*, at p. 962, citing *Hardy, supra*, 232 Cal.App.4th at p. 806), the

court in *Gray* held that whether the voluntary dismissal of the federal lawsuit was claim preclusive was governed by a federal rule that in turn incorporated the law of claim preclusion of the state where the federal lawsuit was brought. (*Gray*, at p. 962.) Such treatment of a voluntary dismissal in a federal question case is inconsistent with the United States Supreme Court's declaration that a federal-court judgment in a federal question case must be accorded the effect the federal courts prescribe. (*Semtek, supra*, 531 U.S. at p. 507.) While the United States Supreme Court allows that state law may determine the claim-preclusive effect in a diversity jurisdiction case, the same is not true in a federal question case. (*Taylor, supra*, 553 U.S. at p. 891; *Semtek, supra*, 531 U.S. at p. 507.)

To support its application of state law, the court in *Gray* relied on the federal district court opinion in *Project Drilling, LLC v. Ledya Oil & Gas Exploration & Production, SA* (N.D.Okla. Feb. 11, 2022, No. 21-CV-0427-CVE-CDL) 2022 U.S.Dist. Lexis 25408 (*Project Drilling*). (*Gray, supra*, 95 Cal.App.5th at pp. 958-960.) That case, however, was a diversity action. (*Project Drilling*, at pp. 7-8.) On the issue of whether the two-dismissal rule has claim-preclusive effect, the district court did not specify whether it was relying on Oklahoma law; instead, it merely cited *Semtek*. (*Id*. at pp. 18-21.) In any event, being a diversity jurisdiction case, *Project Drilling* is not authority on the effect of the two-dismissal rule in a federal question case.

Gray also relied on the decision of the Tennessee Supreme Court in *Cooper v. Glasser* (Tenn. 2013) 419 S.W.3d 924, in which the Tennessee court held a second dismissal in the federal court did not have claim-preclusive effect. (*Gray, supra*, 95 Cal.App.5th at p. 960.) Unlike *Semtek* and *Project Drilling*, *Cooper* was a federal question case. The court in *Cooper* recognized that *Semtek* "held that a federal district court exercising diversity jurisdiction should apply the claim-preclusion law of the state 'in which the federal court sits.' [Citation.]" (*Cooper*, at p. 927.) Nevertheless, the Tennessee Supreme Court applied Tennessee's claim-preclusion law even though the

federal court's subject matter jurisdiction was based on a federal question. (*Id*. at p. 930.) Like the decision in *Gray*, the decision in *Cooper* was inconsistent with the federal authority that federal law be applied to determine claim preclusion in a federal question case. (*Taylor, supra*, 553 U.S. at p. 891; see also *Guerrero, supra*, 28 Cal.App.5th at pp. 1101-1102.)

Why should a California state court apply the Federal Rules of Civil Procedure after a voluntary dismissal in a federal question case when that procedure will work to the detriment of California plaintiffs seeking to assert state claims in state court for the redress of alleged wrongful conduct? The first reason is that the United States Supreme Court requires it. As the court directed in *Semtek*, in cases involving federal question jurisdiction, "States cannot give those judgments merely whatever effect they would give their own judgments, but must accord them the effect that this Court prescribes. [Citations.]" (*Semtek, supra*, 531 U.S. at p. 507.) But the court also described one of the policy reasons for the claim-preclusive distinctions in federal question versus diversity cases, explaining that they avoid forum-shopping and inequitable administration of the laws. (*Id*. at pp. 508-509.) Moreover, as the court in *Gray* noted, the two-dismissal rule prevents unreasonable abuse and harassment by preventing a plaintiff from obtaining numerous dismissals without prejudice. (*Gray, supra*, 95 Cal.App.5th at pp. 951-952, citing *Sutton Place Development Co. v. Abacus Mortgage Investment Co.* (7th Cir. 1987) 826 F.2d 637, 640.)

Because a second voluntary dismissal in federal court is claim preclusive in a federal question case, the plaintiff cannot strip out the federal claims and file the action in state court solely as a California law action. As we have explained, "a single cause of action is based on the harm suffered, rather than on the particular legal theory asserted or relief sought by the plaintiff. [Citations.]" (*Balasubramanian, supra*, 80 Cal.App.4th at p. 991; see also *Hi-Desert Medical Center, supra*, 239 Cal.App.4th at p. 733.) Rule 41(a)(1)(B) speaks in terms of a "claim," not a specific theory supporting a claim.

"Rule 41(a)(1)(B)'s two-dismissal rule would be toothless if a plaintiff could evade it merely by adding to his original, voluntarily dismissed complaint a new cause of action arising from the same operative facts . . . ." (*Jian Ying Lin, supra*, 329 F.R.D. at p. 40.) Here, the Doe plaintiffs' claims constitute a single claim for res judicata purposes because they are based on the same alleged harm: the injury and damages caused by the school counselor's abuse. Thus, stripping out the federal claims and refiling the state claims does not change the fact that a claim-preclusive judgment has already been entered concerning the Doe plaintiffs' alleged harm.

Res judicata bars the Doe plaintiffs' claims in this action because the federal action was based on federal question jurisdiction, and federal law, which we are bound to follow in this context, deems the second dismissal claim preclusive. (See *Engelhardt, supra*, 299 F.2d at pp. 484-485 [validity and res judicata effect of the two-dismissal rule].)

DISPOSITION

The judgment is affirmed. The School District is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/S/
MAURO, Acting P. J.

I concur:

/S/
WISEMAN, J.*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

MESIWALA, J., Dissenting.

The problem with importing res judicata principles here is it applies Federal Rules of Civil Procedure, rule 41 too broadly, "clos[ing]the courthouse doors to an otherwise proper litigant." (*Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery* (2d Cir. 1976) 534 F.2d 1012, 1017.)

State claim preclusion law governs unless that law is incompatible with federal interests. (*Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932, 962 (*Gray*); see also *Hardy v. America's Best Home Loans* (2014) 232 Cal.App.4th 795, 806; *Hately v. Watts* (4th Cir. 2019) 917 F.3d 770, 777 [when a federal court exercises supplemental jurisdiction over a state law claim, "[t]he federal rule of decision in such cases is to apply state preclusion law, unless the state preclusion law is incompatible with federal interests"]; *Cooper v. Glasser* (Tenn. 2013) 419 S.W.3d 924, 927-930; *Herington v. City of Wichita* (Kan. 2021) 500 P.3d 1168, 1176 (*Herington*) ["a federal court must apply state law to state law claims in both diversity and supplemental jurisdiction cases"]; *Paramount Pictures Corp. v. Allianz Risk Transfer AG* (N.Y.Ct.App. 2018) 96 N.E.3d 737, 754-755 (dis. opn. of Wilson, J.).

Here, Doe plaintiffs have sued in state court asserting only state law claims, and there is no "incompatibility between applying California claim-preclusion law with federal interests." (*Gray, supra*, 95 Cal.App.5th at p. 962.) In these circumstances, California's claim preclusion law governs, allowing plaintiffs who voluntarily dismiss an action without prejudice to refile, not federal law.

The majority concludes that under Federal Rules of Civil Procedure, rule 41 (28 U.S.C.), a second voluntary dismissal in federal court of a case involving federal question jurisdiction has claim preclusive effect in a third case filed in state court, relying on *Taylor v. Sturgell* (2008) 553 U.S. 880, 891 and *Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1553. But *Taylor* and *Louie* did not

involve Federal Rules of Civil Procedure, rule 41 (28 U.S.C.), particularly a voluntary dismissal under Federal Rules of Civil Procedure, rule 41(a) (28 U.S.C.) and did not consider the effect of such a dismissal on a state court action asserting only state claims.

The majority also relies on *Melamed v. Blue Cross* (9th Cir. 2014) 557 Fed.Appx. 659 and *Jian Ying Lin v. Shanghai City Corp.* (S.D.N.Y. 2018) 329 F.R.D. 36. But those cases instruct that where a federal court is exercising federal question jurisdiction, the two-dismissal rule of Federal Rules of Civil Procedure, rule 41 (28 U.S.C.) bars a third action in federal court. They do not instruct what happens when the third action is brought in state court asserting only state law claims.

"The United States Supreme Court has never addressed the issue presented here[,]" specifically what law governs the claim preclusive effect of a federal court disposition of a state law claim under Federal Rules of Civil Procedure, rule 41(a) (28 U.S.C.) in a case in which federal court jurisdiction over the state law claim was based on supplemental jurisdiction. (*Herington*, *supra*, 500 P.3d at p. 1176.)

For these reasons, I would reverse the trial court's judgment and allow the Doe plaintiffs' claims to proceed in state court.

/S/
MESIWALA, J.

PROOF OF SERVICE

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s/ Kelsey Wong
Kelsey Wong

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John HR Doe, et al. v. Marysville Joint Unified School District
(S_____ | C095446 | CVP020-00543)

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Supreme Court of California

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/s/Kelsey Wong

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Last Name, First Name (PNum)

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