

S283639

**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

PLAINTIFFS' OPENING BRIEF ON THE MERITS

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I.
ISSUES PRESENTED

(1) Did the plaintiffs’ second voluntary dismissal of their federal court action preclude a subsequent state court action based on the same claims?

(2) Did the defendant’s assertion of sovereign immunity over plaintiffs’ state law claims in federal court divest that court of subject matter jurisdiction over those claims?

II.
INTRODUCTION

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, involving the various Plaintiffs. However, electing to add certain federal claims, Plaintiffs dismissed these actions without prejudice and refiled a single, consolidated action in federal court. At the pleading stage in federal court, the District raised California’s sovereign immunity under Eleventh Amendment in a Federal Rule of Civil Procedure 12(B)(6)¹ 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 filed a

¹ All subsequent undesignated “Rule” references are to the Federal Rules of Civil Procedure.

voluntary dismissal without prejudice under Rule 41 subdivision (a)(1)(B). Re-filing in state court, Plaintiffs instituted this action reasserting 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 Rule 41 subdivision (a)(1)(B). The provisions of that rule on which the District relied to make this argument deems a *second* dismissal to “operate[] as an adjudication on the merits.” The trial court agreed that Rule 41’s language invoked *res judicata*, or claim preclusion,² of Plaintiff’s state law claims and dismissed this action. Plaintiffs appealed.

During the pendency of the appeal, 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 procedural 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 “adjudication on the merits” language from Rule 41 subdivision (a)(1)(B), but as used in subdivision (b), as it applied to state law claims in a diversity jurisdiction action.

Construing both instances of the “adjudication on the merits” language in Rule 41 together, *Semtek* held that this language did not trigger claim preclusion, but, rather, only barred refiling of the same claim in the same federal district court. (*Id.* at 506.) *Semtek* noted that while this is “undoubtedly a necessary condition, ... *it is not a sufficient one*, for claim-

² This Court has indicated its preference for the term “claim preclusion” over *res judicata*, and this brief will reflect that preference outside of quoted language. (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.)

preclusive effect in other courts.” (*Id* [emphasis added].) Having concluded Rule 41 did not dictate a result, *Semtek* next addressed what rule to apply to determine the claim preclusive effect of a federal judgment on state law claim. Conclusively holding that it had the exclusive authority to make this determination, the High Court was guided by *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64 and its progeny (“*Erie Doctrine*”) in its analysis. *Semtek* explained that “[s]ince state, rather than federal, substantive law is at issue there is ***no need for a uniform federal rule***,” and then held “[t]his 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.” (*Id.* at 508.) in other words, the federal rule for the claim preclusive effect of a judgment on state law claims incorporated the law of the forum state.

Following the analysis of *Semtek*, *Gray* held that the same rule applied to the state law claims before it, even though the federal subject matter jurisdiction over the state law claims was based in supplemental jurisdiction and not diversity. (*Id.*, 95 Cal.App.5th at 962.) *Gray* then noted 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 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.

First, irrespective of whether California or federal law governs, under *Semtek*, Rule 41 is not competent to create a judgment that triggers claim preclusion.

Second, *Gray* correctly decided how to evaluate the claim preclusive effect of a federal judgment of state law claims. In short, there is no basis for departing from the United States Supreme Court's rule in *Semtek*, merely because federal jurisdiction over Plaintiffs state law claims was based on supplemental jurisdiction and not diversity (as was the case in *Semtek*). The *Erie* Doctrine does not stop applying to state law claims merely because they are before the federal court through supplemental jurisdiction, and by applying federal law instead of California law, the Majority contravenes Constitutional principles of federalism protected therein by imposing a federal rule where a different result would be obtained under state law.

Finally, by invoking the Eleventh Amendment, the District's assertion of sovereign immunity stripped the federal court of subject matter jurisdiction over Plaintiffs' state law claims. As such, the federal dismissal was not jurisdictionally capable of rendering a judgment that triggers claim preclusion. Simply put the court could not have resolved the merits of a claim as to which it had no constitutionally recognized jurisdiction.

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 (“Federal Action”). (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) asserting sovereign immunity and argued that the federal court thus lacked subject matter jurisdiction under the Eleventh Amendment for Plaintiffs' state law claims. (1AA:101; 2AA:172-177.) Conceding that the district court lacked subject matter jurisdiction over the District for their state law claims, Plaintiffs filed a voluntary dismissal without prejudice under Federal Rule of Civil Procedure 41 subdivision (a)(1). (RJN, Ex. A, pp. 6-7.)

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 Rule 41 subdivision (a)(1)(B), Plaintiff's dismissal of the Federal Action triggered claim preclusion, and barred them from bringing this action. (1AA:47, 60-62.) In opposition, Plaintiffs argued that because the District had raised Eleventh Amendment sovereign immunity, 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.)

Following a hearing on November 1, 2021, (RT:1), the superior court sustained the District's demurrer without leave to amend, ruling that under the two-dismissal rule of Rule 41 subdivision (a)(1)(B), Plaintiffs' claims were subject to claim preclusion, (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 claim preclusive effect of a voluntary dismissal under Rule 41 subdivision (a)(1) was to be determined by the rules of the forum jurisdiction in which the judgment of dismissal was entered, and not under federal common law, including Rule 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 forum jurisdiction in which the federal judgment was entered—should govern the analysis.

IV. DISCUSSION

A. UNDER BOTH RULE 41 SUBDIVISION (a)(1)(B) AND THE FEDERAL RULE GOVERNING THE CLAIM PRECLUSIVE EFFECT OF FEDERAL JUDGMENTS, PLAINTIFFS' SECOND VOLUNTARY DISMISSAL OF THE FEDERAL ACTION DID NOT CREATE A JUDGMENT THAT IS CLAIM PRECLUSIVE OF A SUBSEQUENT STATE COURT ACTION

Plaintiffs' state law claims for the horrendous abuse they suffered as children were dismissed by the superior court because that court concluded, and the Majority agreed, that these claims were subject to claim preclusion under the two-dismissal rule of Rule 41 subdivision (a)(1)(B). (3AA:653-655.) With respect to this holding, the issue for this Court to resolve is whether Rule 41 subdivision (a)(1)(B) operates to preclude a subsequent action filed in California State Court as to Plaintiff's state law claims, even though under California Law, Plaintiffs' claims would not be subject to claim preclusion based on a second voluntary dismissal. In other words, the issue is whether a second voluntary dismissal of state law claims under Rule 41 subdivision (a)(1)(B) triggers the doctrine of claim preclusion.

Though the identical issue was addressed by the Sixth District Court of in *Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932, the Majority rejected *Gray's* holding that Rule 41 subdivision (a)(1)(B) did not trigger claim preclusion in California. Instead, the Majority concluded that the FRCP prevailed over California law and barred Plaintiffs from bringing a state court action based on their previously dismissed state law claims. By so holding, the Majority erred.

As now explained, by concluding that Rule 41 subdivision (a)(1)(B) invoked the doctrine of claim preclusion the Majority misconstrued Rule 41 in contravention of the United States Supreme Court’s holding in *Semtek Intern. Inc. v. Lockheed Martin Corp.* (2001) 531 U.S. 497, which categorically held that the relevant provision of Rule 41 does not trigger claim preclusion. Moreover, the Majority’s holding improperly infringes upon the federalism boundaries set by the Federal Constitution as recognized under the *Erie* Doctrine by disposing of Plaintiffs’ state law claims under a federal procedural rule—Rule 41—generating a result that is directly at odds with what is permitted under California substantive law—California’s claim preclusion doctrine. Additionally, the Majority’s construction extends Rule 41 beyond the scope permitted under the Rules Enabling Act, by abridging, enlarging or amending a substantive right. (28 U.S.C. § 2072(b).)

Contrary to what the Majority concluded, *Gray* correctly decided that a second voluntary dismissal of state law claims under Rule 41 subdivision (a)(1)(B) does not trigger the doctrine of claim preclusion. Thus, Plaintiffs were entitled to reassert those claims in a subsequent state court action, a conclusion that holds irrespective of whether the state law claims were before the federal court on supplemental subject matter jurisdiction.

1. United States Supreme Court Decisional Law Unequivocally Holds That Rule 41’s “Adjudication On The Merits” Language Does Not Trigger Claim Preclusion For Either State Law Claims Or Federal Law Claims

The basis for both the superior court’s ruling and the Majority’s affirmance lies in the interplay between a term appearing in Rule 41 subdivision (a)(1)(B) and claim preclusion. In two locations within Rule 41,

including subdivision (a)(1)(B)—the dispositive provision here—the federal rule of civil procedure uses the phrase “adjudication on the merits.” (See *Id.* subs. (a)(1)(B) and (b).) Both the superior court and the Majority concluded that this phrase empowered Rule 41 to operate as an adjudication of the substantive merits of a claim for the purposes of invoking claim preclusion. The courts arrived at this conclusion even though the dismissal authorized under Rule 41 subdivision (a)(1)(B) does not reach the merits of any claims, but, rather, is a voluntary dismissal which is without prejudice, that may be unilaterally obtained by the plaintiff only at the very earliest stages of litigation. But, as now explained, the United States Supreme Court has expressly held that Rule 41’s use of the phrase “adjudication on the merits” does not invoke claim preclusion, irrespective of legal source of the claims or the basis of their federal subject matter jurisdiction.

Broadly speaking, claim preclusion “prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.’ [Citation.]” (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824) Though some differences exist between the claim preclusion doctrines of California and the federal judiciary, as formulated under California law, the doctrine arises where three conditions attend a second lawsuit, namely, the “second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. [Citations.]” (*Id.*; see *Guerrero v. Department of Corrections & Rehabilitation* (2018) 28 Cal.App.5th 1091, 1099.)

The sticky part for both the superior court and the Majority in their respective analyses lies in the use of the phrase “judgment on the merits” in both the formulation of the doctrine of claim preclusion and in the provisions of Rule 41. But while the identical phrase appears in both places, context is king, and these phrases do not mean the same thing. As the United States Supreme Court pointed out in *Semtek*, 531 U.S. 497, “the

unstated minor premise that all judgments denominated ‘on the merits’ are entitled to claim-preclusive effect ... is not necessarily valid.” (*Id.* at 501.)

With respect to claim preclusion, this Court has identified the following guiding principle: “[a] judgment is on the merits for purposes of res judicata ‘if the substance of the claim is tried and determined’ [Citation.]” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 77; see *Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932, 950.) For judgments of dismissal, the manner in which this principle applies depends on the form of the dismissal—whether it is voluntary or involuntary—as well as its underlying legal basis.

For involuntary dismissals, “a judgment ... will constitute a bar to the later suit if it is shown that “the judgment was given upon a consideration of the merits of the controversy.” (*Campanella v. Campanella* (1928) 204 Cal. 515, 521, 269 P. 433.)” (*Gray*, 95 Cal.App.5th at 950.) Nevertheless, there are a wide variety of involuntary dismissals that are not deemed to be judgments on the merits, and thus have no claim-preclusive effect. These include: “(1) a finding of laches (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th [61,] 77, 99 Cal.Rptr.2d 316, 5 P.3d 874); (2) application of the statute of limitations (*Mid-Century Ins. Co v. Superior Court* (2006) 138 Cal.App.4th 769, 41 Cal.Rptr.3d 833 (*Mid-Century*)); (3) absence of jurisdiction (*Nichols v. Canoga Industries* (1978) 83 Cal.App.3d 956, 967, 148 Cal.Rptr. 459); (4) lack of prosecution (*Mattern v. Carberry* (1960) 186 Cal.App.2d 570, 572, 9 Cal.Rptr. 137); or (5) mootness and/or lack of ripeness of the issues (*Association of Irrigated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1220, 218 Cal.Rptr.3d 517).” (*Gray*, 95 Cal.App.5th at 950 fn. 9.)

For voluntary dismissals, the category of dismissal at issue here, “[i]t is established in California that a voluntary dismissal *without* prejudice is not a judgment on the merits, and, as such, has no claim-preclusive effect

upon a later suit. (See *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 784, 176 Cal.Rptr. 104, 632 P.2d 217 (*Wells*); *Tokerud, supra*, 38 Cal.App.4th at p. 778, 45 Cal.Rptr.2d 345; *Shuffer v. Board of Trustees* (1977) 67 Cal.App.3d 208, 216, 136 Cal.Rptr. 527 (*Shuffer*).)” (*Gray*, 95 Cal.App.5th at 950.) As pointed out in *Gray*, “[t]his follows the Restatement, which explains that a judgment in favor of the defendant will not bar a later action by the plaintiff on the same claim, when the prior judgment is based upon the plaintiff’s agreement or election to ‘a nonsuit (or voluntary dismissal) without prejudice ...’ (Rest.2d, Judgments, § 20(1)(b).)” However, where a voluntary judgment of dismissal is denominated by the dismissing party as “with prejudice,” the resulting judgment is claim preclusive. (*Gray*, 95 Cal.App.5th at 950 citing *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 793.)

In dismissing their federal action, Plaintiff’s invoked the voluntary dismissal provisions of Rule 41 subdivision (a)(1)(B), and specifically designated the dismissal as “without prejudice.” (RJN, Ex. A, p. 7.) Thus, as recognized by the superior court and the Majority, Plaintiff’s voluntary dismissal without prejudice is only claim preclusive to the extent the “adjudication on the merits” language in Rule 41 makes it so. But as made clear by the United States Supreme Court, Rule 41’s “adjudication on the merits” language never operates to create judgments of dismissal that are conclusively claim preclusive.

The meaning of Rule 41’s phrase “adjudication on the merits” and its relationship with the doctrine of claim preclusion was expressly addressed and decided by the United States Supreme Court in *Semtek*, 531 U.S. 497. Though *Semtek* addressed this language as it appears in the “involuntary dismissal” provision of Subdivision (b), *Semtek*’s holding explicitly addresses and synchronizes the second appearance of that language in Rule 41’s subdivision (a)(1)(B). (*Semtek*, 531 U.S. at 505.) In

other words, *Semtek*'s construction of "adjudication on the merits" in subdivision (a)(1)(B) is necessary to its construction of that same language in subdivision (b).

In addressing the dispositive language, the High Court began its analysis where the superior court and Majority ended theirs: the historic meaning of "on the merits." The Supreme Court noted that "[t]he original connotation of an 'on the merits' adjudication is one that actually 'pass[es] directly on the substance of [a particular] claim' before the court," and that it is "the meaning intended in those many statements to the effect that a judgment 'on the merits' triggers the doctrine of res judicata or claim preclusion." (*Semtek*, 531 U.S. at 501–502.) But rather than rest its holding on this meaning, as was done by the superior court and Majority, the High Court rejected it, explaining that "over the years the meaning of the term 'judgment on the merits' 'has gradually undergone change,' [citation], and it has come to be applied to some judgments (such as the one involved here) that do *not* pass upon the substantive merits of a claim and hence do *not* (in many jurisdictions) entail claim-preclusive effect." (*Semtek*, 531 U.S. at 502–503.)

From this, the Supreme Court explained that "it is no longer true that a judgment 'on the merits' is necessarily a judgment entitled to claim-preclusive effect; and there are a number of reasons for believing that the phrase 'adjudication upon the merits' does not bear that meaning in Rule 41(b)." (*Semtek*, 531 U.S. at 503.) The "number of reasons" noted by the High Court were summarized in *Gray*:

First, the Supreme Court noted that "Rule 41(b) sets forth nothing more than a default rule for determining the import of a dismissal (a dismissal is '[on] the merits,' with the three stated exceptions, unless the court 'otherwise specifies'). This would be a highly

peculiar context in which to announce a federally prescribed rule on the complex question of claim preclusion, saying in effect, ‘All federal dismissals (with three specified exceptions) preclude suit elsewhere, unless the court otherwise specifies.’ ” (*Semtek, supra*, 531 U.S. at p. 503, 121 S.Ct. 1021.)¹¹

Second, the high court reasoned that “it would be peculiar to find a rule governing the effect that must be accorded federal judgments by other courts ensconced in rules governing the internal procedures of the rendering court itself. Indeed, such a rule would arguably violate the jurisdictional limitation *954 of the Rules Enabling Act: that the Rules ‘shall not abridge, enlarge or modify any substantive right,’ [citations. [Citation.]] In the present case, for example, if California law left petitioner free to sue on this claim in Maryland even after the California statute of limitations had expired, the federal court’s extinguishment of that right (through Rule 41(b)’s mandated claim-preclusive effect of its judgment) would seem to violate this limitation.” (*Semtek, supra*, 531 U.S. at pp. 503-504, 121 S.Ct. 1021.)

Third, the Supreme Court stated that a contrary interpretation of Rule 41(b) would result in a potential violation of “the federalism principle of *Erie R. Co. v. Tompkins* [(1938)] 304 U.S. 64, 78-80 [, 58 S.Ct. 817, 82 L.Ed. 1188], by engendering ‘ “substantial” variations [in outcomes] between state and federal litigation’ which would ‘likely ... influence the choice of a forum,’ [citation].” (*Semtek, supra*, 531 U.S. at p. 504, 121 S.Ct. 1021.) It reasoned that, although a finding in one jurisdiction that an action is time-barred is generally not claim-preclusive to a suit in another jurisdiction with a longer limitations period, acceptance of the defendant’s position would mean that “[o]ut-of-state defendants sued on stale claims in California and in other States adhering to this traditional rule would systematically remove state-law suits brought against them to federal court—where, unless otherwise specified, a statute-of-limitations dismissal would bar suit everywhere.” (*Ibid.*, fn. omitted.)

Fourth, if the “on the merits” language of Rule 41(b) were to have claim-preclusive effect, the Supreme Court reasoned that it would have previously so held. “[I]f Rule 41(b) did mean what respondent suggests, we would surely have relied upon it in our cases recognizing the claim-preclusive effect of federal judgments in federal-question cases. Yet for over half a century since the promulgation of Rule 41(b), we have not once done so. [Citations.]” (*Semtek, supra*, 531 U.S. at pp. 504-505, 121 S.Ct. 1021.)

(*Id.*, 95 Cal.App.5th at 953–954.)

It is at this point in its analysis that the Supreme Court pointed to the identical language in subdivision (a) of Rule 41 and stated: “[w]e think ***the key to a more reasonable interpretation*** of the meaning of ‘operates as an adjudication upon the merits’ in Rule 41(b) is to be found in Rule 41(a)...” (*Semtek*, 531 U.S. at 505 [emphasis added].) From this, the 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 506 [fn. omitted, emphasis added]; see *Gray*, 95 Cal.App.5th at 953–954.)

In short, the Supreme Court explicitly concluded that the phrase “adjudication on the merits” as used in both subdivision (a)(1)(B) and subdivision (b) of Rule 41 operates as a narrow form of a “with prejudice” dismissal. To this end, at most, it operates to bar the refiling of the same claim in the same federal district court that it had previously been dismissed from under Rule 41.

Notably, the United States Supreme Court arrived at this holding without ever addressing or differentiating between the different forms of

federal subject matter jurisdiction. As such, under this interpretation, Rule 41 never compels a judgment obtained from a dismissal under its provisions to invoke claim preclusion irrespective of the nature of the claim or its federal subject matter jurisdictional basis.

Based on this alone, the Majority's holding is in error. Even as to Plaintiffs' federal claims, the second dismissal under Rule 41 subdivision (a)(1)(B), Plaintiffs are only barred from refileing in the United States District Court for the Eastern District of California. The judgment arising from the second voluntary dismissal under Rule 41 does not bar Plaintiff from refileing their claims in another federal district court, let alone California State Courts.

2. Guided By Relevant United States Supreme Court Precedent And Under The *Erie* Doctrine, The Federal Rule For The Force And Effect A Judgment On State Law Claims Arising Under Supplemental Subject Matter Jurisdiction Would Be To Apply The Law Of The Forum State To The same Extent As Would Occur If The Case Was Based In Diversity Jurisdiction

Because the United States Supreme Court has unequivocally held that Rule 41's "adjudication on the merits" language does *not* invoke claim preclusion, the dispositive issue becomes whether the voluntary judgment of dismissal Plaintiffs' obtained in their federal action on its own acts to bar Plaintiffs from refileing their state law claims in California's courts.

Resolving this issue, in turn, depends on what rules, or, more precisely, what jurisdiction's rules, govern the claim preclusive effect of Plaintiffs' federal judgment.

This is, in fact, the exact analytical path followed by the United States Supreme Court in *Semtek*, where in a subsequent subsection of the opinion, the court states "[h]aving concluded that *the claim-preclusive*

effect, in Maryland, of this California federal diversity judgment is [not] dictated ... by Rule 41(b), as respondent contends, we turn to consideration of what determines the issue.” (*Id.*, 531 U.S. at 506–507 [emphasis added].) That issue being the “claim-preclusive effect of a judgment in a federal diversity action.” (*Id.* at 507.) Notably, it is only in this subsection of *Semtek*—and not the prior subsection addressing the construction of Rule 41—that the United States Supreme Court incorporates the federal subject matter jurisdiction of the claims at issue into its analysis.

In *Semtek* 531 U.S. 497, the United States Supreme Court held that it has the *exclusive* authority to determine what “force and effect” state courts are allowed or required to give federal judgments. As the High Court admonished: “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 a state court—here, California’s courts—addresses the claim preclusive effect of a federal judgment, the claim preclusion rule identified by the United States Supreme Court governs. Nevertheless, as explicitly anticipated in *Semtek*, any rule fashioned by the Supreme Court is necessarily limited by the constitutionally enshrined system of federalism protected under the doctrine described in *Erie*, 304 U.S. 64. (*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 from an intuitive meaning of these concepts to an analysis that attempts to realize *Erie*’s long-standing dual objectives of “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 (emphasis added); see also *Semtek*, 531 U.S. at 508–09.)

To this end, the United States Supreme Court fashioned the “‘outcome-determination’ test” which focuses on whether the application of federal law over state law will “significantly affect” the result of litigation. (*Gasperini*, 518 U.S. at 416 citing *York*, 326 U.S. 99.) The United States Supreme Court has broadly explained that under *Erie*, “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 arises from the way federal jurisdiction over state claims arises. Though the rote formulation of *Erie* expressly identifies diversity subject matter jurisdiction—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 questions underpinning this form of subject matter jurisdiction, *Erie* applies to claims arising under supplemental jurisdiction. (See *Felder v. Casey* (1988) 487 U.S. 131, 151 [“Under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), when a federal court exercises diversity or pendent jurisdiction over state-law claims, “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.” *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470, 89 L.Ed. 2079 (1945).”]; see also *United Mine Workers of America v. Gibbs* (1966) 383 U.S. 715, 726.) In other words, “a federal court exercising supplemental jurisdiction over state law claims ***is bound to apply the law of the forum state to the same extent as if it were exercising its diversity jurisdiction.***” (See *Bass v. First Pacific Networks, Inc.* (9th Cir. 2000) 219 F.3d 1052, 1055 fn. 2 [emphasis added]; see also *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.)

This leads back to where the analysis started: what is the federal rule for the “force and effect” to be given to federal judgments in light of the *Erie* doctrine and its interplay with the various forms of subject matter jurisdiction federal courts may have over state law claims. (*Semtek* 531 U.S. at 507.) As the Majority correctly points, at least two aspects of this rule have been ironed out by the United States Supreme Court. *Semtek*

holds that “[i]f the federal court exercised diversity jurisdiction, federal common law incorporates the claim preclusion law of the [forum] state. (*Semtek Internat., Inc. v. Lockheed Martin Corp.* (2001) 531 U.S. 497, 507-508, 121 S.Ct. 1021, 149 L.Ed.2d 32 (*Semtek*).)” (Opinion at 7.) And “[i]f the prior federal judgment was in a federal question case, ... federal common law requires application of “uniform federal rule[s]” of res judicata,’ not state law. [Citations.]” (Id. citing *Taylor v. Sturgell* (2008) 553 U.S. 880 at 891.) But this is not the end of the analysis.

Because Plaintiff’s federal action was based on federal question jurisdiction, the subject matter jurisdiction permitting the federal judiciary to hear Plaintiffs’ state law claims was supplemental jurisdiction. As such, this case involves the proper application of the federal “force and effect” rule for a federal judgment on California state law claims arising under—at most³—supplemental jurisdiction. As explained by the Dissent: “[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.) Despite its novel presentation, the *Erie* Doctrine guideposts as they apply in Diversity actions are ultimately determinative of the issues in this case.

The solution proposed by the Majority is to subject state law claims arising under supplemental jurisdiction to the same rule applicable to the underlying federal law claims which then provides the federal question jurisdiction. (Opinion at 15-16.) But this solution appears to miss the

³ 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.

deeper truth of federalism protected under *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].) There is no reason in law or logic to conclude that this understanding of the source of substantive rights does not also describe state law claims arising under supplemental jurisdiction.

Here, 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. (Opinion at 4.) 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 were seeking to enforce in the federal action was the law of California. This, as noted by the United States Supreme Court in *Guaranty Trust*, is true whether the forum of application is state court or federal court. And this should also be true whether the state law claims arise under diversity jurisdiction or in a federal question action under supplemental jurisdiction.

In fact, the United States Supreme Court specifically cautioned against a construction of Rule 41’s “adjudication on the merits” language that required a judgment from a federal court be given claim preclusive effect in state court with respect to state law claims, precisely because of the *Erie* Doctrine. *Semtek* rejected the very construction the Majority now gives to that language, explaining: “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.)

But the High Court did not end its analysis by merely identifying the problem of violating the *Erie* Doctrine and admonishing against such an outcome. Instead, the Court fashioned a solution:

Since state, rather than federal, substantive law is at issue ***there is no need for a uniform federal rule***. And indeed, 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*, 531 U.S. at 508 [emphasis added].)

There is no reason why this nonuniform rule applicable to state law claims in Diversity jurisdiction cannot also apply to those state law claims arising under Supplemental jurisdiction. Absent a declaration of a contrary rule by the United States Supreme Court, it would appear that subjecting the federal claims in a judgment to federal common law rules, and the state law claims to the forum state’s law, would both be rooted in Supreme Court *Semtek* precedent while also obtaining compliance with constitutional federalism under *Erie*.

Thus, under this rule, for Plaintiffs’ state law claims, the federal rule incorporates California’s claim preclusion rules for determining whether the voluntary dismissal of Plaintiffs’ federal action without prejudice is

afforded preclusive effect. Because a voluntary dismissal without prejudice is not claim preclusive under California law, Plaintiffs were not barred from re-alleging those claims in this state court action.

But even if federal common law governed the judgment in this matter, as explained above, *Semtek* holds that the “adjudication on the merits” language from Rule 41 does not create a judgment that invokes federal claim preclusion. As such, Plaintiffs’ voluntary dismissal of their claims only bars them from returning to the Federal District Court for the Eastern District of California. Rule 41 does not bar them from refileing those claims in California state court.

3. The Reasoning Relied On By The Majority In Support Of Its Conclusion That Rule 41 Subdivision (A) Invokes Claim Preclusion In All Cases Involving Federal Question Subject Matter Jurisdiction, Including Those With State Law Claims Arising Under Supplemental Jurisdiction, Is Mistaken

Nevertheless, in reaching its holding, the Majority employs two further tent pole assertions that do not withstand scrutiny. *First*, notwithstanding the contrary holding in *Semtek*, the Majority concludes that under federal common law, the “adjudication on the merits” language from Rule 41 subdivision (a)(1)(B) has a different meaning, and thus operates differently, depending on the nature of the underlying federal subject matter jurisdiction; for claims rooted in supplemental jurisdiction/federal question jurisdiction, it acts to trigger claim preclusion. (Opinion at 9, 13.) *Second*, the Majority asserts that state law claims that are attached to federal question claims cannot be separated from those federal question claims for the purposes of applying the state law aspect of *Semtek*’s federal judgment force and effect rule. (Opinion at 15.) From these two points, the Majority

concludes that Plaintiffs' voluntary dismissal without prejudice of their federal court action barred all the claims asserted in the federal action, including state law claims. But as now explained, and also discussed in both *Gray* and the Dissent, the Majority is mistaken.

With respect to the first point, at its heart, the Majority's opinion rests on its assertion that a voluntary dismissal under Rule 41 subdivision (a)(1)(B) is claim preclusive for federal question claims, i.e. arising under federal question subject matter jurisdiction. The Majority reaches this conclusion by grappling with *Semtek*, and what it acknowledges is the United States Supreme Court's determination "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, 121 S.Ct. 1021.)" (Opinion at 9.)

First, the Majority cryptically asserts with no explanation that "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." (Opinion at 9.) Thereafter, the Majority explains:

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, 121 S.Ct. 1021.) 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, 121 S.Ct. 1021.) *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, 121 S.Ct. 1021.) ***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.**

(Opinion at 13.) In other words, the Majority contends that *Semtek* expressly “states” that Rule 41 operates differently depending on the nature of subject matter jurisdiction for the claims to which the rule is being applied. And that for federal question claims, Rule 41 operates to invoke claim preclusion.

As explained above, this reading of *Semtek* is mistaken.

In fact, in the separately denominated subsection of *Semtek* in which the United States Supreme Court addresses Rule 41—the High Court very deliberately separated this section from the section in which it addresses the federal rule for the “force and effect” of federal judgments—the court does not mention subject matter jurisdiction, and does not include subject matter jurisdiction in its construction of the “adjudication on the merits” language of Rule 41.

There is every reason to conclude that *Semtek* deliberately elected not to condition Rule 41’s operation on the nature of the underlying subject matter jurisdiction for the very reasons that the High Court identified in its construction of that Rule’s language. Specifically, the four justifications identified by the High Court are explicitly universal, applying irrespective of the underlying nature of the federal subject matter jurisdiction: (1) Rule 41 would be a “highly peculiar context in which to announce a federally prescribed rule on the complex question of claim preclusion...;” (2) such a construction of Rule 41 would potentially violate the Rules Enabling Act by abridging, enlarging or modifying a substantive right; (3) such a

construction would potentially violate the *Erie* Doctrine; and, (4) the Supreme Court would have previously held that Rule 41 had a preclusive effect. (*Semtek*, 531 U.S. at 503.)

Contrary to the Majority's contention otherwise, nowhere does the Supreme Court mention let alone condition the effect of Rule 41's application to a given action on the nature of the underlying subject matter jurisdiction. Instead, as held by the Supreme Court, Rule 41's use of the phrase "adjudication on the merits" operates as the opposite of a dismissal without prejudice, by which the High Court meant that "unlike a dismissal 'without prejudice,' the dismissal in the present case barred refiling of the same claim in the United States District Court for the Central District of California." (*Semtek*, 531 U.S. at 506.) In other words, it only bars refiling in the same federal district court only. If this were not enough to make its point, the Court then unequivocally states that this "is undoubtedly a necessary condition, **but it is not a sufficient one**, for claim-preclusive effect in other courts." (*Id.*) And even further, in a footnote, the High Court even concedes that this very limited formulation of Rule 41 may, potentially, violate the Rules Enabling Act, insofar as a federal court's "'dismissal upon the merits' (in the sense we have described)" may be inconsistent with and thus abridge a substantive right in a circumstance "where a state court would decree only a 'dismissal without prejudice.'" (*Id.* at 506 fn. 2.)

Further, as explained in the Dissent, the Majority reliance 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, is misplaced. "*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.” (Dissent at 1–2.)

In light of this extensive effort on the part of the High Court to avoid a construction of Rule 41 that invokes claim preclusion, it simply cannot be that the High Court’s concerns vanish in the context of federal question subject matter jurisdiction. This is especially true where state law claims attend federal question claims by way of supplemental jurisdiction. Thus, the meaning of Rule 41’s operative language does not change depending on the jurisdictional context of application. Instead, only the applicable rules of claim preclusion change.

With respect to the Majority’s second contention, in an attempt to make its claim preclusion formulation of Rule 41 consistent with *Semtek*, but still applicable to Plaintiffs’ state law claims, it employs the following reasoning:

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, 95 Cal.Rptr.2d 837; see also *Hi-Desert Medical Center, supra*, 239 Cal.App.4th at p. 733, 190 Cal.Rptr.3d 897.) 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.*

(Opinion at 15-16 [emphasis added].) In other words, it appears that the Majority is reasoning that even if federal common law only applied to Plaintiffs' federal claims, thus limiting Rule 41 subdivision (a)(1)(B)'s claim preclusive effect to only those federal claims, this would nevertheless result in claim preclusion of Plaintiff's state law claims because the federal claims involve the same primary right as the state law claims, which, in turn, would invoke claim preclusion under California law. This conclusion is deeply problematic for several reasons.

First, as already addressed, *Semtek* holds that a judgment obtained from a dismissal under Rule 41 subdivision (a)(1)(B) does not have categorical claim preclusive effect on any claims, including federal question claims. Thus, while Plaintiff's federal claims may not be refiled in the Federal District Court for the Eastern District of California, under *Semtek* they are not claim precluded, and thus, that claim preclusion is not imported into Plaintiff's state law claims vis-à-vis a primary right analysis.

Second, a similar incarnation of this issue was addressed in *Guerrero v. California Department of Corrections & Rehabilitation* (2018) 28 Cal.App.5th 1091, a decision cited but left largely unaddressed by the Majority. There, the plaintiff filed a federal action alleging discriminatory failure-to-hire under both federal and state law against the California Department of Corrections and Rehabilitation ("CDCR"). (*Id.* at 1094.) The federal court dismissed the state law claims after the CDCR asserted its Eleventh Amendment immunity, but nevertheless proceeded to trial on the plaintiff's federal law claims, ultimately rendering a judgment. (*Id.* at 1095-

1098.) Plaintiff refiled his state law claims in state court, which the trial court dismissed based on claim preclusion.

Reversing the dismissal, *Guerrero* held that claim preclusion did *not* bar the plaintiff from pursuing his state law claims in state court. The court quoted *Louie*, 178 Cal.App.4th 1544, for what it found to be the statement of law controlling whether a state law claim is claim precluded by a federal judgment. The court stated: “[w]here a federal court, in a case brought under [federal] and state ... laws, does not resolve any issue of the state ... laws, the federal courts will dismiss the state claims without prejudice to their being filed in state court, even where the state ... statutes incorporate the [federal law].” (*Louie*, at p. 1555, 101 Cal.Rptr.3d 441.)” (*Guerrero*, 28 Cal.App.5th at 1102–1103.)

Despite the clear difference between *Guerrero* and this action, *Guerrero* clearly demonstrates the fallacy of the Majority’s reasoning. Acknowledging the unique jurisdictional interplay between federal and state courts, under *Guerrero*, the mere fact that a set of federal claims giving rise to federal question jurisdiction share a “primary right”—or a transactional nucleus of facts, as required under federal claim preclusion law, (*Frank v. United Airlines, Inc.* (9th Cir. 2000) 216 F.3d 845, 851)—does not mean that even a judgment following trial on the federal claims is claim preclusive of state law claims. Instead, where, as here, the state law claims have been voluntarily dismissed without prejudice along with the federal claims without prejudice, before any issue in the state law claims has been resolved, the state law claims may be refiled in state court.

Third, under the eaves of its primary right analysis, the Majority attempts to work backwards into construing the term “claim” as found in Rule 41 subdivision (a)(1)(B), supplanting the United States Supreme Court’s analysis in *Semtek* with its own textual analysis. The Majority undertakes the task of construing the term “claim” as used in Rule 41

according to the meaning California Courts would give that term. But Rule 41 is a federal rule of civil procedure, subject to interpretation by the United States Supreme Court, and does not incorporate into its provisions concepts of California State Law.

Fourth, this issue was addressed in *Gray*, which 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 which resulted in a dismissal 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 claim preclusion 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 Rule 41 and the two-dismissal rule to find the claims barred under claim preclusion. In rejecting the superior court’s finding, 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].)

Gray then held that a dismissal under Rule 41 subdivision (a)(1)(B) is not claim preclusive because “[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)

Gray then addressed the argument that its rule would “promote an unauthorized practice of claim-splitting by permitting Appellants to ‘remov[e] their federal claims and pursu[e] a third complaint based exclusively on state[-]law claims that seek the same relief’ sought in the second federal suit.” (*Id.*, 95 Cal.App.5th at 962.) Rejecting this assertion, *Gray* held that “[t]here is no improper claim splitting practice here that would be promoted by applying state law concerning claim preclusion.” (*Id.*, at 963.)

Finally, as noted in the Dissent, *Semtek* supports this outcome with the provision 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.)

Contrary to the Majority’s conclusion, the analysis employed in *Gray* clearly applies to and governs the disposition of the issue in this case. Plaintiffs filed the first lawsuits in state court, which were voluntarily dismissed. (2AA:346, 408-409, 413, 474, 550.) Thereafter, they filed a consolidated action, alleging claims based in both state law and federal law, in federal court. This action was then voluntarily dismissed under Rule 41 subdivision (a)(1)(B). (2AA:496, 547, 550.) As refiled and now pending, Plaintiffs assert *only California state law claims*. (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 goal of preventing a party who has had a fair trial on an issue from 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].)

B. THE DISTRICT’S ASSERTION OF SOVEREIGN IMMUNITY UNDER THE ELEVENTH AMENDMENT IN THE FEDERAL ACTION STRIPPED THE DISTRICT COURT OF SUBJECT MATTER JURISDICTION OVER PLAINTIFFS’ STATE LAW CLAIMS, PRECLUDING THAT COURT FROM ENTERING A CLAIM PRECLUSIVE JUDGMENT

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. The Majority’s holding expands 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.)

Notably, the role and effect of Eleventh Amendment immunity, and the jurisdictional limitations it places on Article III courts, was addressed in *Guerrero*, 28 Cal.App.5th 1091, 1103–1104, which, while cited by the majority in its discussion of claim preclusion, played no role in its discussion of the Eleventh Amendment. In *Guerrero*, as noted above, a federal court dismissed the state law claims after the CDCR asserted its Eleventh Amendment immunity, but proceeded to trial on the plaintiff's federal law claims, obtaining a judgment. (*Id.* at 1095-1098.) In holding that the federal judgment was not claim preclusive of the state law claims, *Guerrero* noted that “the Eleventh Amendment—which is jurisdictionally disabling in an Article III court, absent a waiver—was a limitation on ‘the subject matter jurisdiction’ of the district court.” (*Id.* at 1103-1104.) *Guerrero* explained that “claim preclusion does not apply where ‘[t]he plaintiff was *unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts* ... and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.’ (See *Marrese v. American Academy of Ortho. Surgeons* (1985) 470 U.S. 373, 382, 105 S.Ct. 1327, 84 L.Ed.2d 274.)” (*Id.* at 1103.) From this, *Guerrero* concluded “this exception has been recognized in both federal law and California law, [and] [t]hus, claim preclusion does not apply here under either federal or California law.” (*Id.* at 1104.)

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.)

Congress may in certain circumstances abrogate the Eleventh Amendment by federal enactment, and the federal law claims asserted by Plaintiffs in the federal action giving rise to federal question jurisdiction are based on such congressional abrogation in their federal action. (1AA:59; 2AA:562.) However, these federal law claims were not reasserted by Plaintiff in this action. (see *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 55.) Plaintiffs’ claims in this action 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 United States Constitution prohibits federal court subject matter jurisdiction over Plaintiffs’ state claims, the district court was constitutionally prohibited from entering any judgment of dismissal or otherwise disposing the merits of Plaintiffs’ state law claims. As clearly held in *Guerrero*, federal judgments cannot act as claim preclusive of state law claims where the state entity has asserted their Eleventh Amendment immunity. (*Id.*, 28 Cal.App.5th at 1107 [“If there was a tactical choice on this record, it was exercised by the CDCR—to waive Eleventh Amendment immunity, or to face claims for damages in a separate action in state court.”].)

For this additional, if not more fundamental reason, the District’s invocation of the Eleventh Amendment divested the federal court of subject matter jurisdiction, and thus, any judgment entered in federal court cannot reach the merits of Plaintiff’s state law claims, and thus, cannot form the basis of claim preclusion.

V.
CONCLUSION

For the foregoing reasons, this Court should reverse the Majority Opinion of the Court of Appeal affirming the order sustaining demurrer without leave to amend.

Dated: June 10, 2024

MANLY, STEWART & FINALDI

**ESNER, CHANG, BOYER &
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s/ Shea S. Murphy

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