Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 8/23/2024 1:47:42 PM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 8/23/2024 by Zenate Ali, Deputy Clerk

S283639

IN THE SUPREME COURT OF CALIFORNIA

JOHN HR DOE et al.,
Plaintiffs and Appellants,

v.

MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, THIRD APPELLATE DISTRICT
CASE NO. C095446

APPEAL FROM YUBA COUNTY SUPERIOR COURT
DEBRA GIVENS, JUDGE • CASE NO. CVPO2100697

ANSWER BRIEF ON THE MERITS

HORVITZ & LEVY LLP
*ROBERT H. WRIGHT (BAR NO. 155489)
JOHN F. QUERIO (BAR NO. 235524)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
rwright@horvitzlevy.com
jquerio@horvitzlevy.com

MCCORMICK BARSTOW SHEPPARD WAYTE & CARRUTH LLP
LAURA A. WOLFE (BAR NO. 266751)
7647 NORTH FRESNO STREET
FRESNO, CALIFORNIA 93720-2578
(559) 433-1300 • FAX: (559) 433-2300
laura.wolfe@mccormickbarstow.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 4

INTRODUCTION 13

STATEMENT OF THE CASE 16

A. John HR Doe files and dismisses an action in Yuba County Superior Court. 16

B. The other Does file and dismiss an action in Yuba County Superior Court. 17

C. The Does file and dismiss an action in United States District Court for the Eastern District of California. 18

D. The Does file this action in Ventura County Superior Court where it is transferred back to Yuba County Superior Court and dismissed. 19

LEGAL ARGUMENT 20

I. Federal law governs the claim preclusive effect of judgments in federal question cases and bars the refiling of this action. 20

A. Federal common law governs the preclusive effect of judgments and dismissals in all federal cases. 20

B. Federal courts have developed a uniform common law to govern the preclusive effect of judgments and dismissals in federal question cases. 23

C. Under federal law, a second dismissal of an action as of right in federal court constitutes an adjudication on the merits. 25

D. Federal common law incorporates the state rule of preclusion for diversity cases, but not federal question cases..... 27

E. The second dismissal in the federal question action bars any claim that was brought or could have been brought in that action. 33

F. The Does' arguments about a second dismissal in a diversity action have no bearing on their second dismissal of the federal question action. 38

G. Incorporating the state rule of preclusion for supplemental claims in federal question cases would undermine federal interests. 43

II. The School District's assertion of sovereign immunity as to some claims did not deprive the district court of jurisdiction. 46

A. The Does' voluntary dismissal as of right prevented the district court from considering the School District's sovereign immunity argument. 46

B. Even ignoring the Does' voluntary dismissal as of right, the district court was not required to reach the issue of sovereign immunity. 48

C. If the district court had reached the issue of sovereign immunity, it would have found immunity lacking as to at least one claim and perhaps all. 51

CONCLUSION 55

CERTIFICATE OF WORD COUNT 56

TABLE OF AUTHORITIES

Page(s)

Cases

American Cyanamid Co. v. McGhee
(5th Cir. 1963) 317 F.2d 295..... 25, 26, 45, 46, 47

Ames v. JP Morgan Chase Bank, N.A.
(Ga. 2016) 783 S.E.2d 614 24

ASX Inv. Corp. v. Newton
(11th Cir. 1999) 183 F.3d 1265..... 26, 43, 45

Beard v. Sheet Metal Workers Union, Local 150
(9th Cir. 1990) 908 F.2d 474..... 44

Belanger v. Madera Unified School Dist.
(9th Cir. 1992) 963 F.2d 248..... 53

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation
(1971) 402 U.S. 313 [91 S.Ct. 1434, 28 L.Ed.2d 788].....*passim*

Bowers v. National Collegiate Athletic Ass'n
(3d Cir. 2003) 346 F.3d 402 ..... 49, 51

Bragg v. Flint Bd. of Educ.
(6th Cir. 2009) 570 F.3d 775..... 40

Bridgeport Music, Inc. v. Universal-MCA Music Pub.,Inc.
(6th Cir. 2009) 583 F.3d 948..... 44

Brownback v. King
(2021) 592 U.S. 209 [141 S.Ct. 740, 209 L.Ed.2d 33]..... 34

Calderon v. Ashmus
(1998) 523 U.S. 740 [118 S.Ct. 1694, 140 L.Ed.2d 970]..... 49

Central Virginia Community College v. Katz (2006) 546 U.S. 356 [126 S.Ct. 990, 163 L.Ed.2d 945] 52

Commercial Space Management Co., Inc. v. Boeing Co., Inc. (9th Cir. 1999) 193 F.3d 1074..... 37, 42, 46

Cooper v. Glasser (Tenn. 2013) 419 S.W.3d 924 31

Cooter & Gell v. Hartmarx Corp. (1990) 496 U.S. 384 [110 S.Ct. 2447, 110 L.Ed.2d 359] .....*passim*

Costello v. U.S. (1961) 365 U.S. 265 [81 S.Ct. 534, 5 L.Ed.2d 551]..... 41

DeNardo v. Barrans (Alaska 2002) 59 P.3d 266..... 41

Deposit Bank of Frankfort v. Board of Councilmen of City of Frankfort (1903) 191 U.S. 499 [24 S.Ct. 154, 48 L.Ed. 276] 20

Doe v. Marysville Joint Unified School Dist. (2023) 98 Cal.App.5th 95..... 20

Donnelly v. Eklutna, Inc. (Alaska 1999) 973 P.2d 87 24

Eason v. Clark County School Dist. (9th Cir. 2002) 303 F.3d 1137..... 53

Engelhardt v. Bell & Howell Co. (8th Cir. 1962) 299 F.2d 480..... 26, 45

Erie R. Co. v. Tompkins (1938) 304 U.S. 64 [58 S.Ct. 817, 82 L.Ed. 1188] 27

Exxon Corp. v. Maryland Cas. Co. (5th Cir. 1979) 599 F.2d 659..... 40

Exxon Mobil Corp. v. Allapattah Services, Inc. (2005) 545 U.S. 546 [125 S.Ct. 2611, 162 L.Ed.2d 502].... 21, 22

Federated Dept. Stores, Inc. v. Moitie
(1981) 452 U.S. 394 [101 S.Ct. 2424, 69 L.Ed.2d 103] 33, 35, 36, 38, 43

Floyd v. Thompson
(7th Cir. 2000) 227 F.3d 1029 49

Garcia v. Prudential Ins. Co. of America
(Nev. 2013) 293 P.3d 869 24

Gasperini v. Center for Humanities, Inc.
(1996) 518 U.S. 415 [116 S.Ct. 2211, 135 L.Ed.2d 659] 28

Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.
(2005) 545 U.S. 308 [125 S.Ct. 2363, 162 L.Ed.2d 257] 29

Gray v. La Salle Bank, N.A.
(2023) 95 Cal.App.5th 932 31

Gruver v. Louisiana Board of Supervisors for Louisiana State University Agricultural and Mechanical College
(5th Cir. 2020) 959 F.3d 178 52

Guerrero v. Department of Corrections & Rehabilitation
(2018) 28 Cal.App.5th 1091 ..... 24, 47, 48

Hale v. Mann
(2d Cir. 2000) 219 F.3d 61 50

Hanna v. Plumer
(1965) 380 U.S. 460 [85 S.Ct. 1136, 14 L.Ed.2d 8] 28

Hardy v. America's Best Home Loans
(2014) 232 Cal.App.4th 795 32

Hately v. Watts
(4th Cir. 2019) 917 F.3d 770 32

Health Freedom Defense Fund, Inc. v. Carvalho
(9th Cir. 2024) 104 F.4th 715 ..... 53, 54

Heck v. Humphrey
(1994) 512 U.S. 477 [114 S.Ct. 2364, 129 L.Ed.2d 383] 23

Heiser v. Woodruff
(1946) 327 U.S. 726 [66 S.Ct. 853, 90 L.Ed. 970] 23

Herington v. City of Wichita
(Kan. 2021) 500 P.3d 1168 31

Holz v. Nenana City Public School Dist.
(9th Cir. 2003) 347 F.3d 1176 53

In re Bailleaux
(1956) 47 Cal.2d 258 ..... 23, 29, 38

In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation
(7th Cir. 2003) 333 F.3d 763 44

In re PersonalWeb Technologies LLC
(Fed.Cir. 2020) 961 F.3d 1365 37

In re Russell
(1974) 12 Cal.3d 229 24

In re Schimmels
(9th Cir. 1997) 127 F.3d 875 42

In re Sonus Networks, Inc, Shareholder Derivative Litigation
(1st Cir. 2007) 499 F.3d 47 42

In re Stevenson
(Pa. 2012) 40 A.3d 1212 33

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee
(1982) 456 U.S. 694 [102 S.Ct. 2099, 72 L.Ed.2d 492] 49

Jian Yang Lin v. Shanghai City Corp
(2d Cir. 2020) 950 F.3d 46 ..... 37, 42

Johnson v. City of Loma Linda
(2000) 24 Cal.4th 61 39

Kohn v. State Bar of California
(9th Cir. 2023) 87 F.4th 1021 53

Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.
(Fed.Cir. 2010) 599 F.3d 1277 33

Lane v. Pena
(1996) 518 U.S. 187 [116 S.Ct. 2092, 135 L.Ed.2d 486] 52

Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.
(Fed.Cir. 2013) 719 F.3d 1367 37

Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.
(2020) 590 U.S. 405 [140 S.Ct. 1589, 206 L.Ed.2d 893] 34

Manning v. South Carolina Dept. of Highway and Public Transp.
(4th Cir. 1990) 914 F.2d 44 ..... 37, 42

Martin v. Kansas
(10th Cir. 1999) 190 F.3d 1120 50

McClendon v. Georgia Dept. of Community Health
(11th Cir. 2001) 261 F.3d 1252 50

Mid-Century Ins. Co. v. Superior Court
(2006) 138 Cal.App.4th 769 39

Mitchell v. Los Angeles Community College Dist.
(9th Cir. 1988) 861 F.2d 198 52

Montana v. U.S.
(1979) 440 U.S. 147 [99 S.Ct. 970, 59 L.Ed.2d 210] 33

Munoz v. Superior Court of Los Angeles County
(9th Cir. 2024) 91 F.4th 977 52

Nasser v. Isthmian Lines
(2d Cir. 1964) 331 F.2d 124 41

Nevada v. U.S.
(1983) 463 U.S. 110 [103 S.Ct. 2906, 77 L.Ed.2d 509] 33, 38

Owens v. Kaiser Foundation Health Plan, Inc.
(9th Cir. 2001) 244 F.3d 708 41

Paramount Pictures Corporation v. Allianz Risk Transfer AG
(N.Y. 2018) 96 N.E.3d 737 ..... 24, 32

Parella v. Retirement Bd. of Rhode Island Employees' Retirement System
(1st Cir. 1999) 173 F.3d 46 50

Pedrina v. Chun
(9th Cir. 1993) 987 F.2d 608 ..... 25, 46, 47

Plaut v. Spendthrift Farm, Inc.
(1995) 514 U.S. 211 [115 S.Ct. 1447, 131 L.Ed.2d 328] 35, 36, 38, 39, 40

Randall v. Merrill Lynch
(D.C. Cir. 1987) 820 F.2d 1317 25

Sato v. Orange County Department of Education
(9th Cir. 2017) 861 F.3d 923 53

Savage v. Glendale Union High School, Dist. No. 205, Maricopa County
(9th Cir. 2003) 343 F.3d 1036 53

Seaborn v. State of Fla., Dept. of Corrections
(11th Cir. 1998) 143 F.3d 1405 50

Sealey v. Branch Banking and Trust Company
(11th Cir. 2017) 693 F.Appx. 830 37

Seminole Tribe of Florida v. Florida
(1996) 517 U.S. 44 [116 S.Ct. 1114, 134 L.Ed.2d 252] 52

Semtek Intern. Inc. v. Lockheed Martin Corp.
(2001) 531 U.S. 497 [121 S.Ct. 1021, 149 L.Ed.2d 32] ..... *passim*

Smith v. Bayer Corp.
(2011) 564 U.S. 299 [131 S.Ct. 2368, 180 L.Ed.2d 341] 44

Steel Co. v. Citizens for a Better Environment
(1998) 523 U.S. 83 [118 S.Ct. 1003,
140 L.Ed.2d 210] 48, 49, 50

Stoll v. Gottlieb
(1938) 305 U.S. 165 [59 S.Ct. 134, 83 L.Ed. 104] 21

Sunshine Anthracite Coal Co. v. Adkins
(1940) 310 U.S. 381 [60 S.Ct. 907, 84 L.Ed. 1263] 23

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency
(9th Cir. 2003) 322 F.3d 1064 34

Taragan v. Eli Lilly and Co., Inc.
(D.C. Cir. 1988) 838 F.2d 1337 44

Taylor v. Sturgell
(2008) 553 U.S. 880 [128 S.Ct. 2161,
171 L.Ed.2d 155] ..... *passim*

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.
(1984) 467 U.S. 138 [104 S.Ct. 2267, 81 L.Ed.2d 113] 50

Tritz v. U.S. Postal Service
(9th Cir. 2013) 721 F.3d 1133 34

Tuitama v. Bank of America, NA
(11th Cir. 2014) 552 F.Appx. 881 41

U.S. ex rel. Long v. SCS Business & Technical Institute, Inc.
(D.C. Cir. 1999) 173 F.3d 890 49

U.S. v. Texas Tech University
(5th Cir. 1999) 171 F.3d 279 50

Wellfount, Corporation v. Hennis Care Centre of Bolivar, Inc.
(6th Cir. 2020) 951 F.3d 769 ..... 44, 45, 46

Wisconsin Dept. of Corrections v. Schacht
(1998) 524 U.S. 381 [118 S.Ct. 2047, 141 L.Ed.2d 364] 49

Constitutions

United States Constitution
art. III 48, 49
11th Amend. ..... *passim*

Statutes

20 U.S.C.
§ 1681(a) et seq. 18, 19, 24, 52
§ 6301 et seq. 18, 24

28 U.S.C.
§ 1331 21
§ 1332 ..... 22, 27
§ 1367(a) 22

42 U.S.C.
§ 1983 ..... 18, 24
§ 2000d-7(a)(1) 52

Rules of Court

Federal Rule of Civil Procedure
rule 41 ..... *passim*
rule 41(a) 27, 36, 44
rule 41(a)(1) ..... *passim*
rule 41(a)(2) 15, 44, 45, 47
rule 41(a)(1)(A) 25
rule 41(a)(1)(B) ..... *passim*
rule 41(b) 27, 41, 42

Miscellaneous

Rest.2d Judgments
§ 19, com. a 36, 42
§ 87, com. b 21

Wright & Miller, Federal Practice and Procedure
(3d ed. 2024) Res Judicata, § 4435 36

ANSWER BRIEF ON THE MERITS

INTRODUCTION

Federal common law governs the preclusive effect of federal judgments and dismissals in cases where a federal court's subject matter jurisdiction is based on the presence of a federal question. Dismissals in these federal question cases have preclusive effect if they are adjudications on the merits under federal law, even if they do not pass on the substantive merits of the claims. This case involves such an adjudication on the merits, meaning that this lawsuit is barred by claim preclusion. This Court should therefore affirm the Court of Appeal's judgment.

Federal Rule of Civil Procedure 41(a)(1)(B), also known as the two-dismissal rule, provides that a second voluntary dismissal of an action operates as an adjudication on the merits.[1] This limitation on repeated dismissals benefits courts and litigants by preventing abuse of the unilateral right of dismissal. Those same policies inform federal common law, which gives preclusive effect to such dismissals.

Plaintiffs (the Does) twice filed and dismissed actions raising the same nucleus of operative facts against defendant Marysville Joint Unified School District, first in state court and then in federal court. In the federal action, the Does asserted federal and state-law claims and invoked federal question jurisdiction. Under the federal common law governing claim

---

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

preclusion, the Does' federal court dismissal bars this action, because they now assert claims that they brought or could have brought in the federal action against the same defendant based on the same nucleus of operative facts.

Semtek Intern. Inc. v. Lockheed Martin Corp. (2001) 531 U.S. 497, 507 [121 S.Ct. 1021, 149 L.Ed.2d 32] (*Semtek*) holds that, for judgments and dismissals in federal court cases predicated on *diversity* jurisdiction, federal common law incorporates the preclusion rules of the state where the federal court sits. The Does ask this Court to extend *Semtek* to voluntary dismissals in federal court of state-law claims appended to federal question cases under supplemental jurisdiction. But the United States Supreme Court has repeatedly cautioned that, in federal question cases, courts are to apply the uniform federal common law rule of claim preclusion. Under that uniform rule, a judgment or dismissal in a federal question case bars any claims that were brought or could have been brought in the action.

If this Court were to accept the Does' contrary arguments, federal common law would not be uniform. Even if a federal court issued a judgment or dismissal in a federal question action, litigation could continue. Despite the conclusion of the federal action, a plaintiff (under the Does' theory) could still pursue a state-law claim in state court on the same nucleus of operative facts against the same defendants without regard to federal common law. That result would contravene decades of United States Supreme Court precedent.

Further, *Semtek* cautions that federal common law should not incorporate the state rule of decision if state law is incompatible with federal interests. Yet the Does' arguments would undermine federal interests. When the Does filed actions in state court, the School District demurred to their complaints. After the superior courts sustained the demurrers with leave to amend as to some claims and without leave to amend as to other claims, the Does dismissed those actions. The Does then filed an action in federal district court. The School District filed a motion to dismiss. But before the district court could rule on that motion, the Does unilaterally dismissed their federal action. They had the option of seeking a court-ordered dismissal of their federal action without prejudice under rule 41(a)(2). But they opted instead for the certainty and efficiency of a unilateral dismissal under rule 41(a)(1). By their unilateral action, they deprived the district court of the opportunity to exercise its discretion to consider their dismissal request on terms favoring the School District. This Court should not condone such an evasive maneuver because it would impair federal interests by undermining the authority of the district courts to determine the conditions for dismissals.

The Does' brief also raises constitutional questions regarding the order of decision that federal district courts should apply in resolving Eleventh Amendment sovereign immunity and merits issues. Those questions would require this Court to resolve a split of authority not addressed in the opening brief. But this Court should not reach those issues. The Does'

dismissal under rule 41(a)(1) closed the case and prevented a hearing and dispositive ruling on the School District's motion. The district court did not, and could not, decide the Eleventh Amendment sovereign immunity issue or any other issue in the case. And even ignoring the Does' dismissal as of right, which divested the court of authority to decide sovereign immunity, the Does have not shown any possibility that the district court actually lacked jurisdiction. This Court should decline to issue an advisory opinion about the order in which federal district courts should decide arguments that the district court here could not decide because of the Does' dismissal as of right.

STATEMENT OF THE CASE

A. John HR Doe files and dismisses an action in Yuba County Superior Court.

John HR Doe filed a complaint in Yuba County Superior Court against the School District. (2 AA 346–403.) The complaint alleged causes of action for negligence, negligent supervision, negligent hiring, negligent failure to educate, intentional infliction of emotional distress, sexual harassment, breach of fiduciary duty, constructive fraud, and failure to perform a mandatory duty. (2 AA 346, 364, 380, 385, 391, 394, 399.)

HR Doe alleged that a counselor at Kynoch Elementary School, William Babcock, sexually assaulted him. (2 AA 351–352.) Babcock allegedly committed the assaults from 1996 to 1998. (2 AA 359.) The assaults allegedly occurred at school locations including Babcock's office. (*Ibid.*) HR Doe alleged that

Babcock pleaded guilty to eight felony counts of child molestation. (2 AA 348.)

The School District demurred to HR Doe's complaint. (See 2 AA 408–409.) The superior court sustained the demurrer with leave to amend as to some causes of action. (*Ibid.*) The court also sustained the demurrer *without* leave to amend as to the causes of action for negligent failure to educate, intentional infliction of emotional distress, and sexual harassment. (*Ibid.*)

HR Doe filed a first amended complaint. (2 AA 413–470.) About one month later, HR Doe filed a request for voluntary dismissal without prejudice. (2 AA 474.)

B. The other Does file and dismiss an action in Yuba County Superior Court.

The other Does filed a separate complaint against the School District in Yuba County Superior Court. (2 AA 496–541.) That complaint alleged the same causes of action based on similar facts as HR Doe's complaint. (2 AA 496, 501, 503–505, 508–512, 516, 520–523, 527, 531, 533, 538.)

The School District demurred to the complaint. (See 2 AA 547.) The superior court sustained the demurrer with leave to amend as to some causes of action. (*Ibid.*) The court also sustained the demurrer *without* leave to amend as to the causes of action for negligence, negligent failure to educate, intentional infliction of emotional distress, and sexual harassment. (*Ibid.*)

The other Does filed a request for voluntary dismissal without prejudice. (2 AA 550.)

C. The Does file and dismiss an action in United States District Court for the Eastern District of California.

On the same day the requests for dismissal were entered in the Yuba County Superior Court, the Does filed a complaint against the School District in the United States District Court for the Eastern District of California. (2 AA 562–623.)

The complaint reasserted the causes of action that the Does had alleged in superior court based on the same nucleus of operative facts. (2 AA 562–563, 570, 572–573, 580–585, 590, 593, 595, 597–598, 602, 607–608, 613.)

The complaint also added causes of action under Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681(a) et seq.) (Title IX), 42 U.S.C.§ 1983, and Title VIII of the No Child Left Behind Act of 2001 (20 U.S.C. § 6301 et seq.) (Title VIII). (2 AA 616, 618, 620.)

The complaint thus realleged the causes of action for negligent failure to educate, intentional infliction of emotional distress, and sexual harassment as to which the superior courts in both state court actions had sustained demurrers without leave to amend. (2 AA 562, 597–598, 602.) And the complaint realleged the general cause of action for negligence as to which the superior court in one of the actions had also sustained a demurrer without leave to amend. (2 AA 562, 590.)

The Does alleged the district court had original jurisdiction on the basis of the federal law claims and supplemental jurisdiction over the state law claims. (2 AA 569.)

The School District moved to dismiss the Does' federal complaint, arguing that the Eleventh Amendment to the United States Constitution provided immunity in federal court on most of the claims against the School District. (2 AA 172–178, 188–189.) But the School District acknowledged that the Eleventh Amendment did not provide such immunity on the Title IX claim. (*Ibid.*)

The School District's motion also raised the defenses of res judicata and claim preclusion. (2 AA 189–190.) The motion argued that the sustaining of a demurrer without leave to amend prevents further litigation of that cause of action. (*Ibid.*) The motion thus sought dismissal of the causes of action as to which the superior courts had sustained demurrers without leave to amend in the earlier actions: negligent failure to educate, intentional infliction of emotional distress, and sexual harassment as to all plaintiffs, and negligence as to all plaintiffs other than HR Doe. (*Ibid.*)

The Does voluntarily dismissed their federal complaint under rule 41(a)(1). (RJN 6–7.)

D. The Does file this action in Ventura County Superior Court where it is transferred back to Yuba County Superior Court and dismissed.

After dismissing the federal complaint, the Does filed this action against the School District in Ventura County Superior Court. (1 AA 6–45.) The complaint asserted causes of action for negligence, negligent supervision, and negligent hiring based on the same facts as in the previous lawsuits. (1 AA 6, 13, 15–16,

24–29, 33, 37, 39.) The action was transferred to Yuba County Superior Court. (1 RA 8–10, 13.)

The School District demurred to the complaint on the ground of claim preclusion. (1 AA 47–49.) The School District argued that the Does' second voluntary dismissal of the complaint in federal court precluded the refiling of this action. (1 AA 60–62.) The superior court ruled that claim preclusion barred the action and on that basis sustained the demurrer without leave to amend. (3 AA 653–655.)

The superior court entered a judgment of dismissal (3 AA 660), and plaintiffs appealed from the judgment (3 AA 663). The Court of Appeal agreed that the Does' lawsuit was barred by claim preclusion and affirmed the judgment. (*Doe v. Marysville Joint Unified School Dist.* (2023) 98 Cal.App.5th 95, 110.)

LEGAL ARGUMENT

I. Federal law governs the claim preclusive effect of judgments in federal question cases and bars the refiling of this action.

A. Federal common law governs the preclusive effect of judgments and dismissals in all federal cases.

Federal common law governs the preclusive effect of a district court's judgment or dismissal. (*Taylor v. Sturgell* (2008) 553 U.S. 880, 891 [128 S.Ct. 2161, 171 L.Ed.2d 155] (*Taylor*); *Semtek*, *supra*, 531 U.S. at p. 507 [the effect of such "disposition is by direction of *this* Court"]; *Deposit Bank of Frankfort v. Board of Councilmen of City of Frankfort* (1903) 191 U.S. 499, 515 [24 S.Ct. 154, 48 L.Ed. 276] ["whether a Federal judgment has been

given due force and effect in the state court is a Federal question reviewable by this court"].)

On this issue, the United States Supreme Court has not only the final say but also the greatest institutional interest. (See *Semtek*, *supra*, 531 U.S. at p. 509 [the interest of the federal courts in the "integrity of their own processes" includes the effect of their judgments]; *Stoll v. Gottlieb* (1938) 305 U.S. 165, 171 [59 S.Ct. 134, 83 L.Ed. 104] [the preclusive effect of a federal judgment implicates "the power of the Federal courts to protect those who come before them"]; Rest.2d Judgments, § 87, com. b, p. 317 [the rules of preclusive effect "define finality and hence go to the *essence of the judicial function*" (emphasis added)].)

District courts of the United States may exercise jurisdiction only when authorized by the Constitution or statute. (*Exxon Mobil Corp. v. Allapattah Services, Inc.* (2005) 545 U.S. 546, 552 [125 S.Ct. 2611, 162 L.Ed.2d 502] (*Exxon Mobil*).) But regardless of the source of the district court's jurisdiction, federal law controls the preclusive effect of a federal judgment or dismissal. (See *Taylor*, *supra*, 553 U.S. at p. 891; *Semtek*, *supra*, 531 U.S. at p. 507.)

Thus, to provide a federal forum for those who seek to vindicate federal rights, Congress has conferred on the district courts original jurisdiction in federal question cases—civil actions that arise under the Constitution, laws, or treaties of the United States. (28 U.S.C. § 1331; *Exxon Mobil*, *supra*, 545 U.S. at p. 552.) In these cases, the "preclusive effect of a federal-court

judgment is determined by federal common law." (*Taylor*, *supra*, 553 U.S. at p. 891.)

To provide a neutral forum, Congress has also conferred original jurisdiction in diversity cases—civil actions between citizens of different states, between U.S. citizens and foreign citizens, or by foreign states against U.S. citizens. (28 U.S.C. § 1332; *Exxon Mobil*, *supra*, 545 U.S. at p. 552.) In such actions, federal common law also determines the preclusive effect of the federal judgment. (*Semtek*, *supra*, 531 U.S. at p. 507.)

Once a district court has original jurisdiction over a claim, it may exercise supplemental jurisdiction over additional claims that are "part of the same case or controversy." (28 U.S.C. § 1367(a); see *Exxon Mobil*, *supra*, 545 U.S. at p. 552.) But in such actions, federal law still controls the preclusive effect of a judgment. (*Semtek*, *supra*, 531 U.S. at p. 507 [the United States Supreme Court "has the last word on the claim-preclusive effect of *all* federal judgments"].)

The Does acknowledge that the United States Supreme Court has the exclusive authority to determine the preclusive effect of a federal court judgment. (OBOM 25.) Even so, they address at length decisions discussing the California state rule of preclusion. (OBOM 18–20.) Those state court decisions are inapposite. Federal common law—not state law—governs the preclusive effect of federal judgments and dismissals.

B. Federal courts have developed a uniform common law to govern the preclusive effect of judgments and dismissals in federal question cases.

In nondiversity, federal question cases " 'the federal courts will apply their own rule of res judicata.' " (*Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation* (1971) 402 U.S. 313, 324, fn. 12 [91 S.Ct. 1434, 28 L.Ed.2d 788] (*Blonder-Tongue*), quoting *Heiser v. Woodruff* (1946) 327 U.S. 726, 733 [66 S.Ct. 853, 90 L.Ed. 970]; see *Heck v. Humphrey* (1994) 512 U.S. 477, 488, fn. 9 [114 S.Ct. 2364, 129 L.Ed.2d 383] [applying federal law of claim preclusion to federal judgment in nondiversity case]; *Sunshine Anthracite Coal Co. v. Adkins* (1940) 310 U.S. 381, 401–403 [60 S.Ct. 907, 84 L.Ed. 1263] [same].)

In developing the federal common law that governs the preclusive effect of federal judgments, the federal courts seek uniformity. (See *Taylor*, *supra*, 553 U.S. at p. 891.) Federal courts thus "participate in developing '*uniform* federal rule[s]' of res judicata." (*Ibid.*, emphasis added, quoting *Semtek*, *supra*, 51 U.S. at p. 508.) Although no statute addresses the preclusive effect of a federal judgment in a federal question case, the United States Supreme Court has "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." (*Semtek*, at p. 507.)

This Court has also recognized that the preclusive effect of federal judgments in federal question cases is "determined in accordance with federal law." (*In re Bailleaux* (1956) 47 Cal.2d

258, 262 (*In re Bailleaux*), overruled on another ground in *In re Russell* (1974) 12 Cal.3d 229, 235; see *Guerrero v. Department of Corrections & Rehabilitation* (2018) 28 Cal.App.5th 1091, 1101 (*Guerrero*) [in federal question case, federal claim preclusion law applies "without reference to California law"].)

Like this Court, the highest courts of other states have also recognized the importance of applying this body of federal law uniformly. (See *Donnelly v. Eklutna, Inc.* (Alaska 1999) 973 P.2d 87, 92 [state courts must look to federal law to determine the preclusive effect of federal court judgments in federal question cases; "Otherwise, federal judgments would be subject to the uncertainties of state law wherever a litigant chose to bring a subsequent suit"]; *Ames v. JP Morgan Chase Bank, N.A.* (Ga. 2016) 783 S.E.2d 614, 618 [in federal question cases, "the uniform federal rules of preclusion declared by the United States Supreme Court are applied"]; *Garcia v. Prudential Ins. Co. of America* (Nev. 2013) 293 P.3d 869, 872 [in federal question cases, "federal common law endeavors to develop a uniform rule of preclusion"]; *Paramount Pictures Corporation v. Allianz Risk Transfer AG* (N.Y. 2018) 96 N.E.3d 737, 742 (*Paramount Pictures*) [in federal question cases, "the 'federal courts' interest in the integrity of their own processes' " justifies displacement of state law by federal law on the issue of claim preclusion].)

These uniform federal rules apply here because the Does' federal action was based on federal question jurisdiction. (2 AA 562–622.) They alleged causes of action under three federal laws, Title IX, 42 U.S.C.§ 1983, and Title VIII. (2 AA 562–563, 616–

621.) And they alleged the district court had original jurisdiction on the basis of those federal law claims. (2 AA 569.) The federal courts have developed a uniform common law to govern the preclusive effect of judgments and dismissals in such actions, and that law applies here.

C. Under federal law, a second dismissal of an action as of right in federal court constitutes an adjudication on the merits.

Rule 41 governs the dismissal of federal court actions. A plaintiff may dismiss an action without a court order by filing a notice of dismissal before the defendant files an answer or summary judgment motion. (Rule 41(a)(1)(A).)

Plaintiffs have an "absolute right" under rule 41(a)(1)(A) to dismiss an action without leave of court. (*Pedrina v. Chun* (9th Cir. 1993) 987 F.2d 608, 610 (*Pedrina*).) The dismissal is "self-executing" and "takes effect automatically." (*Randall v. Merrill Lynch* (D.C. Cir. 1987) 820 F.2d 1317, 1320.)

The right of dismissal " 'may *not* be extinguished or circumscribed by adversary or court.' " (*Pedrina*, *supra*, 987 F.2d at p. 610, emphasis added, quoting *American Cyanamid Co. v. McGhee* (5th Cir. 1963) 317 F.2d 295, 297 (*American Cyanamid*).) The defendant cannot " 'fan the ashes of that action into life.' " (*Ibid.*) And the court " 'has no role to play.' " (*Ibid.*)

But the filing of a second voluntary dismissal has consequences. If the plaintiff has previously dismissed any federal or state court action that is based on or includes the same claim, the notice of dismissal "operates as an adjudication on the

merits." (Rule 41(a)(1)(B); see *Cooter & Gell v. Hartmarx Corp.* (1990) 496 U.S. 384, 394 [110 S.Ct. 2447, 110 L.Ed.2d 359] (*Cooter & Gell*) [when the plaintiff invokes rule 41(a)(1) a second time in an action based on or including the same claim, "the action must be dismissed *with prejudice*" (emphasis added)]; *American Cyanamid*, *supra*, 317 F.2d at p. 297 ["But this quick and ready tool may be used once, and only once, if clear consequences are to be avoided. A second notice of dismissal not only closes the file, it also closes the case with prejudice to the bringing of another."].)

Courts refer to this limitation on voluntary dismissals as the "two dismissal rule." (*ASX Inv. Corp. v. Newton* (11th Cir. 1999) 183 F.3d 1265, 1265 (*ASX*).) This limitation on repeated dismissals prevents abuse of the unilateral right of dismissal. (*Cooter & Gell*, *supra*, 496 U.S. at p. 397; *ASX*, *supra*, 183 F.3d at p. 1268; *Engelhardt v. Bell & Howell Co.* (8th Cir. 1962) 299 F.2d 480, 482 (*Engelhardt*) [the two-dismissal rule protects defendants by ensuring that plaintiffs "may not repeat the process with impunity"].)

The Does twice dismissed their actions based on the same operative facts. They filed and dismissed complaints in the Yuba County Superior Court. (2 AA 474, 550.) And they filed and dismissed their complaint in the Eastern District of California federal court. (RJN 6–7.) Under rule 41(a)(1)(B), their second dismissal operates as an adjudication on the merits that bars this third action.

D. Federal common law incorporates the state rule of preclusion for diversity cases, but not federal question cases.

For judgments and dismissals in *diversity* cases, federal law incorporates the state rule of preclusion. (*Taylor*, *supra*, 553 U.S. at p. 891, fn. 4; *Semtek*, *supra*, 531 U.S. at p. 508.) In such cases, a second voluntary dismissal in federal court does not necessarily give rise to claim preclusive effect. (*Semtek*, at p. 506.)

In *Semtek*, the defendant had removed the action to federal court based on the federal court's diversity jurisdiction. (*Semtek*, *supra*, 531 U.S. at p. 499; see 28 U.S.C. § 1332.) In that diversity context, the United States Supreme 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." (*Semtek*, at p. 508.)[2]

Semtek drew on the principles recognized in *Erie R. Co. v. Tompkins* (1938) 304 U.S. 64 [58 S.Ct. 817, 82 L.Ed. 1188] (*Erie*). Under those principles, known as the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal

---

[2] *Semtek* addressed the claim preclusive effect of an involuntary, rather than a voluntary, dismissal. (*Semtek*, *supra*, 531 U.S. at p. 501.) That said, the decision applies in both contexts. Both rule 41(a), addressing voluntary dismissals, and rule 41(b), addressing involuntary dismissals, use the phrase "adjudication on the merits." The high court concluded the phrase should be read consistently in both places. (*Semtek*, at p. 505.)

procedural law. (E.g., *Gasperini v. Center for Humanities, Inc.* (1996) 518 U.S. 415, 427 [116 S.Ct. 2211, 135 L.Ed.2d 659].) The *Erie* doctrine seeks to reduce forum shopping and inequitable outcomes based on the citizenship of the parties. (*Hanna v. Plumer* (1965) 380 U.S. 460, 467 [85 S.Ct. 1136, 14 L.Ed.2d 8].)

The facts of *Semtek* underscored the risk of forum shopping that the *Erie* doctrine seeks to avoid. (See *Semtek*, *supra*, 531 U.S. at pp. 508–509.) The district court had dismissed the plaintiff's diversity jurisdiction lawsuit based on California's two-year statute of limitations. (*Id.* at p. 499.) After that dismissal, plaintiff brought the same claims in Maryland, which had a three-year statute of limitations. (*Id.* at pp. 499–500.) The claims were timely in Maryland. Yet the Maryland state court dismissed the plaintiff's action based on the dismissal's preclusive effect under federal law. (*Ibid.*)

On these facts, the high court cautioned that litigants might be encouraged to remove cases to federal court "by the divergent effects" that litigants could anticipate from likely grounds of dismissal. (*Semtek*, *supra*, 531 U.S. at p. 509.) If different states had different limitations periods for bringing claims, out-of-state defendants sued on potentially stale claims could systematically remove those state cases to federal court where a statute of limitations dismissal "would bar suit everywhere." (*Id.* at p. 504.)

Semtek found these facts to present a "classic case" for federal common law to adopt the state rule of claim preclusion. (*Semtek*, *supra*, 531 U.S. at p. 508.) And because a state rule of

preclusion applied, rule 41(a)(1)(B) did not prevent refiling in state court. (*Id.* at pp. 505–506.)

The Does argue that the *Erie* doctrine requires application of state law here, as in *Semtek*. (OBOM 24–31.) But *Semtek* itself explains why its analysis does not extend to federal question cases. In that case, only state, rather than federal, substantive law was at issue. So there was "*no need for a uniform federal rule*." (*Semtek*, *supra*, 531 U.S. at p. 508, emphasis added.)

By contrast, when federal courts exercise jurisdiction in federal question cases, the federal system benefits from the "experience, solicitude, and hope of *uniformity* that a federal forum offers on federal issues." (*Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.* (2005) 545 U.S. 308, 312 [125 S.Ct. 2363, 162 L.Ed.2d 257], emphasis added.) These federal interests explain why federal common law applies a uniform rule to determine the preclusive effect of federal judgments in federal question cases. (E.g., *Taylor*, *supra*, 553 U.S. at p. 891; *Semtek*, *supra*, 531 U.S. at p. 507; *Blonder-Tongue*, *supra*, 402 U.S. at p. 324, fn. 12; *In re Bailleaux*, *supra*, 47 Cal.2d at p. 262.)

It would be curious indeed were the *Erie* doctrine, which is designed to prevent forum shopping and inequitable outcomes based on the citizenship of the parties, somehow required state courts to encourage forum shopping and inequitable outcomes by making the effect of federal judgments in federal question cases depend on state law. To avoid such inequities, *Semtek* expressly

limited its holding to diversity cases. (See *Semtek*, *supra*, 531 U.S. at p. 508.)

If this Court were to accept the Does' contrary arguments, federal common law governing the preclusive effect of federal court judgments in federal question cases would depend in large measure on the law of the states. Plaintiffs who lost their actions in federal court could avoid the effect of federal common law by refiling their actions in state court and asserting only state law claims. According to the Does, state law would supply the rule of preclusive effect in such actions. But under the Does' theory, federal common law would be anything but uniform. It would vary depending on the dictates of state law. The United States Supreme Court has repeatedly cautioned against any such nonuniform approach. (See *ante*, § I.A; e.g., *Taylor*, *supra*, 553 U.S. at p. 891; *Semtek*, *supra*, 531 U.S. at p. 507; *Blonder-Tongue*, *supra*, 402 U.S. at p. 324, fn. 12.)

The Does argue that the Rules Enabling Act requires application of state preclusion law. (OBOM 17, 33–34.) But *Semtek* considered and rejected that argument. As *Semtek* held, the preclusive effect of federal court judgments is determined by federal *common law*, not by rule 41 alone. (*Semtek*, *supra*, 531 U.S. at p. 508.) The Does mistakenly assume the School District's preclusion argument depends solely on rule 41(a)(1)(B). It does not. Instead, it is founded on the uniform federal common law of claim preclusion for federal court judgments in federal question cases. The Rules Enabling Act is no obstacle to the School District's position.

The Does rely on *Gray v. La Salle Bank, N.A.* (2023) 95 Cal.App.5th 932, 961–962 (*Gray*), *Herington v. City of Wichita* (Kan. 2021) 500 P.3d 1168, 1176 (*Herington*), and *Cooper v. Glasser* (Tenn. 2013) 419 S.W.3d 924, 927–930 (*Cooper*). (OBOM 21–23, 38–41.) But these cases err by focusing on the substantive law governing the state law claim rather than the law governing the federal court judgment in a federal question case. Stated simply, the Does would have this Court consider only the preclusive effect of the dismissal of the state law claims and not, as it must, the preclusive effect of the dismissal of the federal court action.

For example, *Gray* concludes that the fact the prior case involved federal claims "is of no consequence" because those claims "were not alleged in the present suit." (*Gray*, *supra*, 95 Cal.App.5th at p. 963.) *Herington* states that the primary justification for applying the state rule of preclusion is that "unlike federal-question jurisdiction cases, a federal court must apply state law to state law claims in both diversity and supplemental jurisdiction cases." (*Herington*, *supra*, 500 P.3d at p. 1176.) And *Cooper* applies the state rule of preclusion because "claims brought under either the supplemental or diversity-of-citizenship statutes require the federal court to apply and interpret substantive state law." (*Cooper*, *supra*, 419 S.W.3d at p. 930.) But this analysis gives no weight to the need for a uniform federal rule of claim preclusion in federal question cases. The United States Supreme Court has repeatedly cautioned that federal common law governing the preclusive effect of federal

court judgments in federal question cases is uniform. (*Taylor*, *supra*, 553 U.S. at p. 891; *Semtek*, *supra*, 531 U.S. at p. 507; *Blonder-Tongue*, *supra*, 402 U.S. at p. 324, fn. 12.) There can be no uniformity if state law supplies the rule of preclusion in such cases.

The Does also cite *Hardy v. America's Best Home Loans* (2014) 232 Cal.App.4th 795, 806, but the Court of Appeal in that case concluded it would have reached the same result whether it applied the federal or state rule of preclusion. (OBOM 40.) And they cite *Hately v. Watts* (4th Cir. 2019) 917 F.3d 770, 777–778, but the issue in that case was the issue preclusive effect of the dismissal of a state law claim, not the dismissal of an action that included federal law claims.

By contrast, the New York Court of Appeals has properly refused to extend *Semtek* to a federal court judgment in a federal question case. (*Paramount Pictures*, *supra*, 96 N.E.3d at pp. 741–742.) The New York Court of Appeals (the highest state court in New York) considered whether that federal court judgment precluded a state law claim. (*Id.* at p. 740.) The court held that the preclusive effect of that judgment was " 'determined by federal common law.' " (*Ibid.*, quoting *Taylor*, *supra*, 553 U.S. at p. 891.) The court reasoned that no other rule would account for the federal courts' interest in the integrity of their own processes. (*Id.* at p. 742.) And under federal common law, the judgment barred the state law claim. (*Id.* at pp. 748–749.)

The New York Court of Appeals is not alone in refusing to extend *Semtek* to apply a state rule of preclusion to federal court

judgments in federal question cases. (See *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.* (Fed.Cir. 2010) 599 F.3d 1277, 1286 ["*Semtek* is inapposite" in determining the effect of a judgment "not based on diversity"]; *In re Stevenson* (Pa. 2012) 40 A.3d 1212, 1223, fn. 9] ["*Semtek* is not applicable" to a judgment entered by a court that "was not sitting in diversity"].) This Court should join these better-reasoned authorities.

E. The second dismissal in the federal question action bars any claim that was brought or could have been brought in that action.

Under the federal common law doctrine of claim preclusion, a final judgment on the merits precludes the parties from relitigating issues that were or could have been raised in that action. (*Nevada v. U.S.* (1983) 463 U.S. 110, 128–129 [103 S.Ct. 2906, 77 L.Ed.2d 509] (*Nevada*); *Federated Dept. Stores, Inc. v. Moitie* (1981) 452 U.S. 394, 398 [101 S.Ct. 2424, 69 L.Ed.2d 103] (*Federated Dept. Stores*).)

The claim preclusion doctrine is "central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction." (*Montana v. U.S.* (1979) 440 U.S. 147, 153 [99 S.Ct. 970, 59 L.Ed.2d 210].) The rule "conserves judicial resources" and "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." (*Id.* at pp. 153–154.)

The doctrine applies when there is an identity of claims, a final judgment on the merits, and identity or privity between parties. (*Nevada*, *supra*, 463 U.S. at pp. 129–130; *Blonder-*

Tongue, *supra*, 402 U.S. at p. 323; *Tritz v. U.S. Postal Service* (9th Cir. 2013) 721 F.3d 1133, 1141 (*Tritz*).) This cases satisfies all three elements.

First, an identity of claims exists when the two suits arise from the same transaction or involve a common nucleus of facts. (*Brownback v. King* (2021) 592 U.S. 209, 215, fn. 6 [141 S.Ct. 740, 209 L.Ed.2d 33]; *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.* (2020) 590 U.S. 405, 412 [140 S.Ct. 1589, 206 L.Ed.2d 893] (*Lucky Brand*); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (9th Cir. 2003) 322 F.3d 1064, 1077.) The Does' lawsuits raise the same nucleus of facts. In each action, they allege that a counselor at Kynoch Elementary School, William Babcock, sexually assaulted them. (1 AA 15–16; 2 AA 351–352, 503–505, 572–573.) Babcock allegedly committed the assaults from 1993 through 2001. (1 AA 24–29; 2 AA 359, 508–512, 580–585.) And he allegedly did so at school locations including Babcock's office. (*Ibid.*) The first element of claim preclusion is established, and the Does do not contend otherwise.

Second, the requirements for identity or privity of parties are necessarily satisfied when the parties are the same. (*Lucky Brand*, *supra*, 590 U.S. at p. 412 [res judicata applies if a "later suit advances the same claim as an earlier suit between the same parties"]; *Blonder-Tongue*, *supra*, 402 U.S. at pp. 323–324; *Tritz*, *supra*, 721 F.3d at p. 1141.) In each of their actions, the Does sued the School District. (1 AA 6–9, 13; 2 AA 346–348, 496–501, 562–566, 570.) The second element of claim preclusion is established; again, the Does do not dispute this.

The third and final element of claim preclusion is a final adjudication on the merits, and this is where the parties disagree. As *Semtek* shows, the Does' voluntary dismissal in federal court satisfied this element. In that case, the United States Supreme Court contrasted its prior decisions with state court decisions, including from California, discussing the preclusive effect of dismissals or judgments that did not pass on the substantive merits of the claims. (*Semtek*, *supra*, 531 U.S. at p. 502.) The California state court decisions denied preclusive effect to such dismissals. (*Ibid.*) But *Semtek* cited with approval the high court's prior decisions granting "claim-preclusive effect" to dismissals in federal question cases that constituted adjudications on the merits under federal law even though they did not pass on the substantive merits of the claims. (*Ibid.*, citing *Plaut v. Spendthrift Farm, Inc.* (1995) 514 U.S. 211, 228 [115 S.Ct. 1447, 131 L.Ed.2d 328] (*Plaut*) and *Federated Dept. Stores*, *supra*, 452 U.S. at p. 399, fn. 3.)

In *Plaut*, *supra*, 514 U.S. at page 228, the United States Supreme Court held in a federal question case that federal common law gave preclusive effect to a dismissal under rule 41 even though the dismissal did not pass on the substantive merits of the claims. *Plaut* held the dismissal was on the merits under the "*rules of finality, both statutory and judge made*" and cited rule 41 to support that holding. (*Ibid.*, emphasis added.) For purposes of determining preclusive effect under federal common law, it was "irrelevant" that the dismissal "rested on the bar of a

statute of limitations" and thus did not pass on the substantive merits of the claims. (*Ibid.*)

Federated Dept. Stores, *supra*, 452 U.S. at page 399, footnote 3, also recognized that, in a federal question case, a dismissal had preclusive effect despite not passing on the substantive merits of the claims. The Court held that, under federal common law, a dismissal for failure to state a claim was a " 'judgment on the merits.' " (*Ibid.*) And the Court held that the Ninth Circuit erred by denying preclusive effect to such a dismissal. (*Id.* at pp. 399, 402.)

In addressing these points, *Semtek* also cited Wright and Miller and the Restatement Second of Judgments. (*Semtek*, *supra*, 531 U.S. at pp. 502–503.) Both authorities confirm that federal common law gives preclusive effect to the dismissal here. The Wright & Miller treatise states that rule "41(a) provides a *framework* that controls most preclusion questions arising from voluntary dismissals." (Wright & Miller, Federal Practice and Procedure (3d ed. 2024) Res Judicata, § 4435, emphasis added.) And the Restatement Second of Judgments confirms that increasingly "judgments not passing directly on the substance of the claim have come to operate as a bar." (Rest.2d Judgments, § 19, com. a, p. 161.)

In *Cooter & Gell*, *supra*, 496 U.S. at pages 394, 396–397, the United States Supreme Court applied these same principles to the two-dismissal rule. The Court first addressed a plaintiff's absolute right to dismiss an action without prejudice under rule 41(a)(1). The Court explained that such a dismissal lacks

preclusive effect. A dismissal without prejudice under rule 41(a)(1) does not operate as " 'an adjudication upon the merits' " "and thus does *not have a res judicata effect*." (*Cooter & Gell*, at p. 396, quoting rule 41(a)(1), emphasis added.) The Court contrasted such a dismissal with a second dismissal that has preclusive effect: "If the plaintiff invokes Rule 41(a)(1) a second time for an 'action based on or including the same claim,' the action must be dismissed *with prejudice*." (*Id.* at p. 394, emphasis added.)

Cooter & Gell is not alone in recognizing that, under federal common law and rule 41(a)(1)(B), a second dismissal is an adjudication on the merits that, in a federal question case, triggers claim preclusion. (See, e.g., *Jian Yang Lin v. Shanghai City Corp* (2d Cir. 2020) 950 F.3d 46, 50 (*Jian Yang Lin*) [treating rule 41(a)(1)(B) dismissal as claim preclusive]; *Sealey v. Branch Banking and Trust Company* (11th Cir. 2017) 693 F.Appx. 830, 833 [applying preclusive effect to rule 41(a)(1)(B) dismissal]; *Commercial Space Management Co., Inc. v. Boeing Co., Inc.* (9th Cir. 1999) 193 F.3d 1074, 1080 (*Commercial Space*) [analogizing a rule 41(a)(1) determination to claim preclusion]; *Manning v. South Carolina Dept. of Highway and Public Transp.* (4th Cir. 1990) 914 F.2d 44, 47 (*Manning*) [treating rule 41(a)(1) dismissal as claim preclusive]; see also *In re PersonalWeb Technologies LLC* (Fed.Cir. 2020) 961 F.3d 1365, 1379 [same for rule 41(a)(1) stipulated dismissal with prejudice]; *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.* (Fed.Cir. 2013) 719 F.3d 1367, 1372 [same for voluntary dismissal with prejudice].)

Because all three elements of claim preclusion apply, the Does' dismissal of their federal question action in federal court bars any claims that were or could have been litigated in that action. (*Nevada*, *supra*, 463 U.S. at pp. 128–129; *Federated Dept. Stores*, *supra*, 452 U.S. at p. 398.) Uniform federal common law governing claim preclusion thus bars this action.

F. The Does' arguments about a second dismissal in a diversity action have no bearing on their second dismissal of the federal question action.

The Does cite *Semtek* to argue that an adjudication on the merits under rule 41(a)(1)(B) is "undoubtedly a necessary condition, *but it is not a sufficient one*, for claim-preclusive effect in other courts." (*Semtek*, *supra*, 531 U.S. at p. 506, emphasis added; OBOM 23, 34.) But the adjudication on the merits in *Semtek* was insufficient only because that Court adopted the state rule of preclusion for diversity cases. (*Semtek*, at p. 508.) This is not a diversity case. As *Semtek* recognized, a different rule applies in federal question cases. (See *ante*, §§ I.B, I.D; *Semtek*, at p. 507; see also *Taylor*, *supra*, 553 U.S. at p. 891; *Blonder-Tongue*, *supra*, 402 U.S. at p. 324, fn. 12; *In re Bailleaux*, *supra*, 47 Cal.2d at p. 262.) Under the rule that applies in federal question cases, the Does' second dismissal was an adjudication on the merits that has preclusive effect. (See *ante*, § I.E; e.g., *Plaut*, *supra*, 514 U.S. at p. 228; *Cooter & Gell*, *supra*, 496 U.S. at pp. 394, 396–397.)

The Does cite *Semtek* to argue that rule 41 has nothing to do with the preclusive effect of a federal court judgment. (OBOM

22, 30, 33–34.) But the Does misread that decision. *Semtek* concluded only that rule 41 does not, *by itself*, establish the preclusive effect of such a judgment. (See *Semtek*, *supra*, 531 U.S. at pp. 503 [rule 41 does not "announce a federally prescribed rule on the complex question of claim preclusion"], 504 [the high court has not relied on rule 41 as "recognizing the claim-preclusive effect of federal judgments"].)

Contrary to the Does' arguments, *Semtek* confirms that rule 41 properly informs federal common law and supports the application of claim preclusion here. *Semtek* addressed a dismissal based on the statute of limitations. (*Semtek*, *supra*, 531 U.S. at p. 499.) The high court cited its prior decisions, including *Plaut*, as establishing federal common law governing the preclusive effect of such dismissals. (*Id.* at p. 502.) In *Plaut*, the high court held that such dismissals have claim preclusive effect and cited rule 41 as informing its decision. (*Plaut*, *supra*, 514 U.S. at p. 228.) As *Semtek* and *Plaut* establish, rule 41 informs the preclusive effect of judgments in federal question cases. So informed, federal common law dictates that second dismissals of federal question actions in federal court are entitled to claim preclusive effect in both state and federal court.

In response, the Does cite even more California state decisions applying California's different rule of preclusion. (OBOM 19, citing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 77; *Mid-Century Ins. Co. v. Superior Court* (2006) 138 Cal.App.4th 769, 776.) But *Semtek* recognized that California

state law is different. (*Semtek*, *supra*, 531 U.S. at p. 502.) The Does' citations merely reinforce this point.

The Does cite California authority to argue that a second dismissal in federal court lacks any claim preclusive effect. (OBOM 39.) But the United States Supreme Court's decision in *Cooter & Gell* shows that the policies informing the two-dismissal rule support claim preclusion. (*Cooter & Gell*, *supra*, 496 U.S. at pp. 394, 396–397.) The two-dismissal rule was intended to "eliminate 'the annoying of a defendant by being summoned into court in successive actions' " by limiting the plaintiff's ability to dismiss an action. (*Id.* at p. 397.) *Cooter & Gell* thus recognized that an initial dismissal is without prejudice and lacks claim preclusive effect, but that a second dismissal is deemed with prejudice to prevent abuse of the judicial process. (*Id.* at pp. 394, 396–397; *Exxon Corp. v. Maryland Cas. Co.* (5th Cir. 1979) 599 F.2d 659, 661 [the policy underlying the rule is that "after the defendant has become actively engaged in the defense of a suit, he is entitled to have the case adjudicated and it cannot, therefore, be terminated without either his consent, permission of the court, or a *dismissal with prejudice* that assures him against the renewal of hostilities" (emphasis added)].)

Federal decisions according preclusive effect to a dismissal for failure to prosecute likewise confirm the preclusive effect of a second dismissal. *Plaut* recognized that federal common law treats a dismissal for failure to prosecute as a judgment on the merits with preclusive effect. (*Plaut*, *supra*, 514 U.S. at p. 228; see *Bragg v. Flint Bd. of Educ.* (6th Cir. 2009) 570 F.3d 775, 776

[dismissal of claims under rule 41(b) "for lack of progress" was " 'an adjudication on the merits' " and "should be given preclusive effect"]; *Owens v. Kaiser Foundation Health Plan, Inc.* (9th Cir. 2001) 244 F.3d 708, 714 [dismissal for failure to prosecute is an adjudication on the merits for purposes of claim preclusion].)

When a case is dismissed under rule 41(b), including for failure to prosecute, "the defendant has been put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits." (*Costello v. U.S.* (1961) 365 U.S. 265, 286–287 [81 S.Ct. 534, 5 L.Ed.2d 551] (*Costello*).) For that reason, the United States Supreme Court has found it "logical that a dismissal on one of these grounds should, unless the Court otherwise specifies, *bar a subsequent action*." (*Id.* at p. 286, emphasis added; see *DeNardo v. Barrans* (Alaska 2002) 59 P.3d 266, 269 & fn. 14 [citing *Costello* in giving claim preclusive effect to dismissal].)

Under the reasoning of *Costello*, claim preclusion applies equally to second dismissals as to dismissals for failure to prosecute. In both situations, there is no initial bar to the district court reaching the merits in the action, and the defendant is thus put to the trouble of preparing its defense. (See *Costello*, *supra*, 365 U.S. at pp. 286–287.) Dismissals for failure to prosecute have preclusive effect " 'as a matter of sound judicial administration.' " (*Tuitama v. Bank of America, NA* (11th Cir. 2014) 552 F.Appx. 881, 883–884, quoting *Nasser v. Isthmian Lines* (2d Cir. 1964) 331 F.2d 124, 128.) Second dismissals have

preclusive effect for the same reasons. (See *Cooter & Gell*, *supra*, 496 U.S. at pp. 394, 396–397.)

In fact, *Semtek* confirms that sound judicial management informs the claim preclusive effect of a second dismissal. (*Semtek*, *supra*, 531 U.S. at p. 509.) The Court cited Restatement Second of Judgments, section 19, comment a, pages 161–162, which explains that fairness to the defendant and "sound judicial administration" support granting preclusive effect to a dismissal "especially if the plaintiff has failed to avail himself of opportunities to pursue his remedies in the first proceeding." (See *Semtek*, at pp. 502–503.) Consistent with these principles, rule 41 treats both a second dismissal and a dismissal for failure to prosecute as an "adjudication on the merits." (Rule 41(a)(1)(B), (b).)

Many appellate courts have reached the same conclusion. For example, the Second Circuit explained that federal circuit courts have "analogized the two-dismissal rule to the doctrine of res judicata." (*Jian Yang Lin*, *supra*, 950 F.3d at p. 50, citing *Commercial Space*, *supra*, 193 F.3d at p. 1080 and *Manning*, *supra*, 914 F.2d at p. 47; accord, *In re Sonus Networks, Inc, Shareholder Derivative Litigation* (1st Cir. 2007) 499 F.3d 47, 60, fn. 6 ["Rule 41 and claim preclusion doctrine are often applied interchangeably"]; *In re Schimmels* (9th Cir. 1997) 127 F.3d 875, 884 ["Rule 41(b) and the doctrine of *res judicata* do not, as the government submits, operate independently of each other"].)

The Does cite *Semtek*'s comment that the dismissal in that case barred only the "refiling of the same claim in the United

States District Court for the Central District of California." (*Semtek*, *supra*, 531 U.S. at p. 506; see OBOM 8, 23, 34.) But that is true only of federal court dismissals in diversity cases. In federal question cases, the uniform federal rules of claim preclusion apply and prevent such repetitive litigation.

Moreover, if this Court were to accept the Does' arguments, rule 41 would do little to accomplish its purpose of preventing abuse of the unilateral right of dismissal. (See *Cooter & Gell*, *supra*, 496 U.S. at p. 397; *ASX*, *supra*, 183 F.3d at p. 1268.) Under the Does' view of federal common law, the federal courts would be powerless to prevent abuse of the unilateral right of dismissal so long as plaintiffs refiled their actions in state court.

In short, the Does ask this Court to shortchange—in fact, gut—the uniform rule of claim preclusion that applies in federal question cases. (See OBOM 24.) But the "doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." (*Federated Dept. Stores*, *supra*, 452 U.S. at p. 401.) The Does voluntarily brought a federal question action in federal court and are bound by the uniform federal common law that prevents their continued litigation of this action.

G. Incorporating the state rule of preclusion for supplemental claims in federal question cases would undermine federal interests.

Semtek, *supra*, 531 U.S. at page 509, cautioned that federal common law should not incorporate the state rule of decision if state law is "incompatible with federal interests." As an example

of such incompatibility, the high court pointed to state law not giving preclusive effect to dismissals for willful violations of federal discovery orders. (*Ibid.*; see *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation* (7th Cir. 2003) 333 F.3d 763, 767 [*Semtek*'s "proviso" is that state rules that "undermine the finality of federal judgments are not incorporated"], abrogated on another ground in *Smith v. Bayer Corp.* (2011) 564 U.S. 299 [131 S.Ct. 2368, 180 L.Ed.2d 341].) Yet this Court would undermine federal interests were it to apply a state rule of preclusion here.

Under rule 41(a), plaintiffs wishing to voluntarily dismiss their lawsuits in federal court have a choice. They can exercise a dismissal as of right under rule 41(a)(1). Or they can seek a court-ordered dismissal under rule 41(a)(2). But unlike a dismissal as of right, a court-ordered dismissal is subject to review by the district court and " 'may be conditioned on whatever terms the district court deems necessary.' " (*Wellfount, Corporation v. Hennis Care Centre of Bolivar, Inc.* (6th Cir. 2020) 951 F.3d 769, 774 (*Wellfount*), quoting *Bridgeport Music, Inc. v. Universal-MCA Music Pub., Inc.* (6th Cir. 2009) 583 F.3d 948, 954.) Those conditions can include an award of costs and fees. (See *Beard v. Sheet Metal Workers Union, Local 150* (9th Cir. 1990) 908 F.2d 474, 476; *Taragan v. Eli Lilly and Co., Inc.* (D.C. Cir. 1988) 838 F.2d 1337, 1340.)

Some plaintiffs may "value the possibility of securing an additional dismissal without prejudice and forgo Rule 41(a)(1) in favor of Rule 41(a)(2)." (*Wellfount*, *supra*, 951 F.3d at p. 774.)

But other plaintiffs will value "the certainty and efficiency of a Rule 41(a)(1) dismissal over the risks and potential costs of a motion under Rule 41(a)(2)." (*Ibid.*)

Because the district court exercises discretion over the terms of a voluntary dismissal under rule 41(a)(2), such a dismissal does not create the same danger of abuse as a voluntary dismissal of right under rule 41(a)(1). (*ASX*, *supra*, 183 F.3d at p. 1268 [a dismissal by court order "is not unilateral and does not pose the same danger of abuse or harassment"]; see *Wellfount*, *supra*, 951 F.3d at p. 774 [same].)

Yet the Does ask this Court to rewrite rule 41 to allow plaintiffs to obtain the certainty and efficiency of a unilateral dismissal of right without any of the costs. They avoided the risk that a district court would exercise its discretion to impose conditions on a voluntary dismissal under rule 41(a)(2), but they nonetheless seek to avoid the consequence of a second dismissal constituting an adjudication on the merits under rule 41(a)(1)(B).

This Court cannot rewrite rule 41 without impairing federal interests. Rule 41(a)(1)(B)'s limitation on repeated voluntary dismissals prevents abuse of the unilateral right of dismissal. (*Cooter & Gell*, *supra*, 496 U.S. at p. 397; *ASX*, *supra*, 183 F.3d at p. 1268; *American Cyanamid*, *supra*, 317 F.2d at p. 297; *Engelhardt*, *supra*, 299 F.2d at p. 482.) As the United States Supreme Court has explained, rule 41(a)(1) is "aimed at curbing abuses of the judicial system." (*Cooter & Gell*, at p. 397.)

The Does had the option of seeking a court-ordered voluntary dismissal of their federal action under rule 41(a)(2).

But they opted instead for the certainty and efficiency of a unilateral dismissal under rule 41(a)(1)(B). By their action, they avoided the risk that the district court would exercise its discretion to consider their voluntary dismissal on conditions favoring the School District. (See, e.g., *Wellfount*, *supra*, 951 F.3d at p. 774.) Their second dismissal thus operates as an adjudication on the merits that bars their claim.

II. The School District's assertion of sovereign immunity as to some claims did not deprive the district court of jurisdiction.

A. The Does' voluntary dismissal as of right prevented the district court from considering the School District's sovereign immunity argument.

When rule 41(a)(1) applies, it grants plaintiffs an "absolute right" to voluntarily dismiss an action without leave of court. (*Pedrina*, *supra*, 987 F.2d at p. 610.) That unilateral right of dismissal is " 'self-executing' " (*Commercial Space*, *supra*, 193 F.3d at p. 1077, fn. 4) and " 'may *not* be extinguished or circumscribed by adversary or court' " (*Pedrina*, at p. 610, emphasis added, quoting *American Cyanamid*, *supra*, 317 F.2d at p. 297). The filing of the notice of dismissal itself " 'closes the file.' " (*Ibid.*) The court has no discretion to deny the dismissal. (*Wellfount*, *supra*, 951 F.3d at p. 774.) Indeed, the court "has no role to play" at all. (*American Cyanamid*, at p. 297.)

The Does voluntarily dismissed their federal action after the School District filed a motion to dismiss. (2 AA 172–204.) In that motion, the School District asserted Eleventh Amendment

sovereign immunity against some of the Does' causes of action. (2 AA 188–189.) The Does' dismissal was effective immediately under rule 41(a)(1), as the School District had not filed an answer or summary judgment motion. The dismissal thus closed the case and prevented a hearing on the motion. (E.g., *Pedrina*, *supra*, 987 F.2d at p. 610; *American Cyanamid*, *supra*, 317 F.2d at p. 297.)

The Does argue that federal courts cannot adjudicate a case without first establishing subject matter jurisdiction. (OBOM 41–43.) The Does cite many cases. (*Ibid.*) But the only case they cite that even mentions rule 41 is *Guerrero*, *supra*, 28 Cal.App.5th at page 1107. And *Guerrero* mentions rule 41 only once in passing while describing the facts of another case. (*Ibid.*) The Does' cases addressing subject matter jurisdiction are not relevant in construing the effect of a rule that allows the plaintiff to voluntarily dismiss an action as of right and prevents the district court from reaching the issue of its jurisdiction.

Had the Does wanted the district court to rule on the issue of Eleventh Amendment sovereign immunity, they could have opposed or joined in the motion to dismiss. Or they could have requested that the district court order the dismissal of the action without prejudice subject to appropriate conditions. (Rule 41(a)(2).) But they did neither. They instead voluntarily dismissed the action as of right. This Court should not rewrite federal law to excuse their litigation tactics.

The Does discuss *Guerrero* at some length. (OBOM 42, 44.) But that case shows only that the Does' arguments lack any

merit on the facts here. In *Guerrero*, the Court of Appeal held that a federal court judgment had no preclusive effect on state law claims when the district court *involuntarily* dismissed those claims without prejudice because of the defendant's Eleventh Amendment sovereign immunity. (*Guerrero*, *supra*, 28 Cal.App.5th at p. 1096.) But this case does not involve an involuntary dismissal order, much less one without prejudice. Instead, the Does *voluntarily* dismissed their action as of right and by doing so prevented the district court from ruling on the issue of sovereign immunity. That second dismissal is not deprived of preclusive effect by any lack of jurisdiction in the federal court, and this Court should reject the Does' arguments to the contrary.

B. Even ignoring the Does' voluntary dismissal as of right, the district court was not required to reach the issue of sovereign immunity.

The Does cite *Steel Co. v. Citizens for a Better Environment* (1998) 523 U.S. 83, 84, 94 [118 S.Ct. 1003, 140 L.Ed.2d 210] (*Steel Co.*) to argue that a federal court must first answer questions of jurisdiction before reaching merits issues. (OBOM 41.) *Steel Co.* rejected the notion of "hypothetical jurisdiction" by which a federal court would "assume" Article III jurisdiction in order to decide the merits of a case. (*Steel Co.*, at pp. 93–94.)

But *Steel Co.* is irrelevant for two reasons. First, the district court here did not assume jurisdiction to reach the

merits. The district court did not reach the merits at all. The Does' voluntary dismissal precluded any merits determination.

Second, *Steel Co.* has no relevance to the issue of Eleventh Amendment sovereign immunity. *Steel Co.* specifically said that "*Article III jurisdiction* is always an antecedent question." (*Steel Co.*, *supra*, 523 U.S. at p. 101, emphasis added.) The Eleventh Amendment has little bearing on Article III. (See *Calderon v. Ashmus* (1998) 523 U.S. 740, 745, fn. 2 [118 S.Ct. 1694, 140 L.Ed.2d 970] [Eleventh Amendment sovereign immunity "is not coextensive with the limitations on judicial power in Article III"].) For example, Article III subject matter jurisdiction can never be stipulated or waived. (*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee* (1982) 456 U.S. 694, 702 [102 S.Ct. 2099, 72 L.Ed.2d 492].) But a state may waive Eleventh Amendment immunity and, unless a state raises its sovereign immunity, the court can ignore the issue. (*Wisconsin Dept. of Corrections v. Schacht* (1998) 524 U.S. 381, 389 [118 S.Ct. 2047, 141 L.Ed.2d 364].)

The federal courts of appeals have divided on the question whether *Steel Co.* requires a federal court to resolve Eleventh Amendment immunity claims before reaching the merits. At least the D.C., First, Third, and Seventh Circuits have held that a court may address the merits without first deciding Eleventh Amendment sovereign immunity. (*Bowers v. National Collegiate Athletic Ass'n* (3d Cir. 2003) 346 F.3d 402, 415–418 (*Bowers*); *Floyd v. Thompson* (7th Cir. 2000) 227 F.3d 1029, 1034–1035; *U.S. ex rel. Long v. SCS Business & Technical Institute, Inc.* (D.C.

Cir. 1999) 173 F.3d 890, 892–893; *Parella v. Retirement Bd. of Rhode Island Employees' Retirement System* (1st Cir. 1999) 173 F.3d 46, 53–56.) And at least the Second, Fifth, and Tenth Circuits have reached the contrary conclusion. (*Hale v. Mann* (2d Cir. 2000) 219 F.3d 61, 67; *Martin v. Kansas* (10th Cir. 1999) 190 F.3d 1120, 1126; *U.S. v. Texas Tech University* (5th Cir. 1999) 171 F.3d 279, 287.) Although the Eleventh Circuit initially appeared to join the courts finding *Steel Co.* applicable in this situation, it more recently held that a federal court may reach merits issues before considering Eleventh Amendment sovereign immunity "when a state invites it to do so." (*McClendon v. Georgia Dept. of Community Health* (11th Cir. 2001) 261 F.3d 1252, 1258–1259 [distinguishing *Seaborn v. State of Fla., Dept. of Corrections* (11th Cir. 1998) 143 F.3d 1405, 1407].)

If this Court reaches the issue, it should side with those courts that correctly refuse to extend *Steel Co.* to waivable issues of Eleventh Amendment sovereign immunity. But this Court should not reach the issue. Courts should "not reach constitutional questions in advance of the necessity of deciding them." (*Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.* (1984) 467 U.S. 138, 157 [104 S.Ct. 2267, 81 L.Ed.2d 113].) Because the district court here had no opportunity to address either Eleventh Amendment sovereign immunity or the merits, this Court should decline to resolve the split of authority on the constitutional question of the order the district court should have applied in deciding those issues (if it had decided them).

Rather than addressing Eleventh Amendment sovereign immunity, the district court could have resolved the School District's motion to dismiss on alternative grounds. For example, the School District argued that claim preclusion barred some of the Does' claims. (2 AA 189–190.) The Does' federal complaint had realleged causes of action for negligent failure to educate, intentional infliction of emotional distress, and sexual harassment as to which the superior courts in both initial state court actions had sustained demurrers *without* leave to amend. (Compare 2 AA 408–409 with 2 AA 562, 597–598, 602.) And the federal complaint had realleged a general cause of action for negligence as to which the superior court in one of the actions had also sustained a demurrer *without* leave to amend. (Compare 2 AA 547 with 2 AA 562, 590.) The district court would properly have reached those straightforward issues before sovereign immunity. (See *Bowers*, *supra*, 346 F.3d at p. 418 [it is better to decide a case on a nonconstitutional basis "than to address the constitutional jurisdictional issues under the Eleventh Amendment"].)

C. If the district court had reached the issue of sovereign immunity, it would have found immunity lacking as to at least one claim and perhaps all.

The Does' arguments are also beside the point because the School District did not have Eleventh Amendment sovereign immunity as to all of the Does' claims.

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 it. (*Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44, 54, 68 [116 S.Ct. 1114, 134 L.Ed.2d 252], overruled on another ground in *Central Virginia Community College v. Katz* (2006) 546 U.S. 356, 363 [126 S.Ct. 990, 163 L.Ed.2d 945].) And Congress *has* abrogated the states' sovereign immunity as to Title IX claims. (42 U.S.C. § 2000d-7(a)(1); *Lane v. Pena* (1996) 518 U.S. 187, 200 [116 S.Ct. 2092, 135 L.Ed.2d 486]; *Gruver v. Louisiana Board of Supervisors for Louisiana State University Agricultural and Mechanical College* (5th Cir. 2020) 959 F.3d 178, 180.)

The Does asserted a claim under Title IX in their federal court action. (2 AA 616.) In its motion to dismiss, the School District acknowledged that the Eleventh Amendment did not provide immunity as to that claim. (2 AA 188–189.) Since the district court had jurisdiction over at least the Title IX claim, the Does' dismissal of the federal court action had claim preclusive effect for the reasons already discussed. (See *ante*, §§ I.D–E.) The Does' arguments about the other claims are thus beside the point.

And it is an open question whether the School District had sovereign immunity as to any of the claims. Sovereign immunity applies only when a state or an "arm of a state" is a defendant. (*Munoz v. Superior Court of Los Angeles County* (9th Cir. 2024) 91 F.4th 977, 980.) To determine whether an entity is an arm of a state, the Ninth Circuit adopted a set of factors in *Mitchell v. Los Angeles Community College Dist.* (9th Cir. 1988) 861 F.2d 198, 201 (*Mitchell*).) But *Mitchell* is no longer good law. At the

end of last year, the Ninth Circuit overruled that decision and repudiated its factors. (*Kohn v. State Bar of California* (9th Cir. 2023) 87 F.4th 1021, 1028 ["The *Mitchell* factors are . . . inconsistent with Supreme Court arm of the state doctrine"].)

Before overruling *Mitchell*, the Ninth Circuit had applied the factors from that decision in holding that California school districts were arms of the state and had sovereign immunity under the Eleventh Amendment. (*Sato v. Orange County Department of Education* (9th Cir. 2017) 861 F.3d 923, 934; *Belanger v. Madera Unified School Dist.* (9th Cir. 1992) 963 F.2d 248, 254.)

Yet most courts have held that school districts are not arms of the state and not entitled to Eleventh Amendment immunity. (See *Eason v. Clark County School Dist.* (9th Cir. 2002) 303 F.3d 1137, 1141 & fn. 2 [collecting authorities].) And the Ninth Circuit has held that school districts in other states are not entitled to Eleventh Amendment immunity. (See, e.g., *Holz v. Nenana City Public School Dist.* (9th Cir. 2003) 347 F.3d 1176, 1181 [Alaska]; *Savage v. Glendale Union High School, Dist. No. 205, Maricopa County* (9th Cir. 2003) 343 F.3d 1036, 1041 [Arizona]; *Eason*, at p. 1144 [Nevada].)

In a concurring opinion in *Health Freedom Defense Fund, Inc. v. Carvalho* (9th Cir. 2024) 104 F.4th 715, 727, Judge Ryan Nelson concluded that the new test in "*Kohn* seems to conflict with (and likely overrule) our reasoning in *Belanger* and *Sato*," which are the cases in which the Ninth Circuit had concluded that California school districts have sovereign immunity as arms

of the state. Judge Nelson found that *Kohn* raised the question whether the ruling in that case that a California school district was entitled to sovereign immunity "should be revisited." (*Id.* at p. 726.)

The question whether California school districts have sovereign immunity is outside the scope of review in this case. The School District raises the issue not to ask this Court to predict how the Ninth Circuit would resolve the issue but to show that this Court should refrain from deciding the constitutional issues that the Does now raise. There is a large gap between a defendant asserting sovereign immunity in a motion to dismiss and the defendant actually prevailing on that issue. And without a ruling on the issue of sovereign immunity, there is no reason for this Court to consider the order the district court should have applied in making such a ruling, especially in light of the uncertainty of the law in this area.

The Does claim that they voluntarily dismissed the federal action only because the School District asserted sovereign immunity as a defense to some claims. (OBOM 8, 14.) But their notice of dismissal does not mention sovereign immunity as the reason for dismissal. (RJN 6–7.) If the Does had intended to limit the grounds for their dismissal, they could have requested that the district court dismiss the action without prejudice subject to appropriate conditions. But the Does instead voluntarily dismissed the action as of right and avoided the risk that the court would impose unfavorable conditions, such as costs and attorney fees, on their dismissal. The district court was not

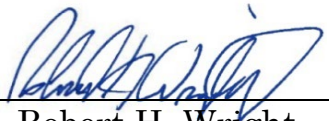
allowed, much less required, to resolve the Eleventh Amendment sovereign immunity issues.

CONCLUSION

For all these reasons, this Court should affirm the judgment of the Court of Appeal.

August 23, 2024

HORVITZ & LEVY LLP
ROBERT H. WRIGHT
JOHN F. QUERIO
MCCORMICK BARSTOW SHEPPARD WAYTE & CARRUTH LLP
LAURA A. WOLFE

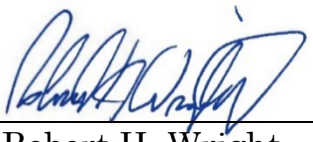
By: 
Robert H. Wright

Attorneys for Defendant and Respondent
Marysville Joint Unified School District

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.520(c)(1).)

The text of this brief consists of 10,812 words as counted by the program used to generate the brief.

Dated: August 23, 2024



Robert H. Wright

PROOF OF SERVICE

John HR Doe et al.. Marysville Unified School District
Case No. S283639

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On August 23, 2024, I served true copies of the following document(s) described as **ANSWER BRIEF ON THE MERITS** on the interested parties in this action as follows:

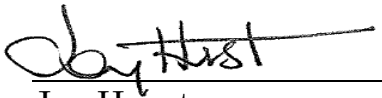
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 23, 2024, at Burbank, California.



Joy Hurst

SERVICE LIST
John HR Doe et al. v. Marysville Joint Unified School District
Case No. S283639

John C. Manly (SBN 149080) Morgan A. Stewart (SBN 209852) Saul E. Wolf (SBN 244833) Cristina J. Nolan (SBN 318495) **Manly, Stewart & Finaldi** 19100 Von Karman Ave., Ste. 800 Irvine, CA 92612 T: (949) 252-9990 F: (949) 252-9991 jmanly@manlystewart.com mstewart@manlystewart.com swolf@manlystewart.com cnolan@manlystewart.com	Attorneys for Plaintiffs and Appellants JOHN JH DOE, JOHN HR DOE, JOHN GL DOE, JOHN JO DOE, JANE CJ DOE and JOHN RD DOE ***Via Truefiling***
Holly N. Boyer (SBN 221788) Shea S. Murphy (SBN 255554) Kevin K. Nguyen (SBN 322665) **Esner, Chang, Boyer & Murphy** 234 E. Colorado Blvd., Suite 975 Pasadena, CA 91101 T: (626) 535-9860 F: (626) 535-9859 hboyer@ecbm.law smurphy@ecbm.law knguyen@ecbm.law	Attorneys for Plaintiffs and Appellants **JOHN JH DOE, JOHN HR DOE, JOHN GL DOE, JOHN JO DOE, JANE CJ DOE and JOHN RD DOE** ***Via Truefiling***
Laura A. Wolfe (SBN 266751) **McCormick Barstow Sheppard Wayte & Carruth LLP** 7647 North Fresno Street Fresno, California 93720-2578 T: (559) 433-1300 F: (559) 433-2300 laura.wolfe@mccormickbarstow.com	Attorney for Defendant and Respondent **MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT** ***Via Truefiling***

Hon. Debra L. Givens Yuba County Superior Court Department 1 215 Fifth Street, Suite 200 Marysville, CA 95901	Trial Judge Case No. CVPO21-00697 ***Via U.S. Priority Mail***
California Court of Appeal Third Appellate District 914 Capitol Mall Sacramento, CA 95814	Court of Appeal Judge Case No. C095446 ***Via Truefiling***

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 8/23/2024 by Zenate Ali, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **JOHN HR DOE v. MARYSVILLE JOINT UNIFIED SCHOOL DISTRICT**
Case Number: **S283639**
Lower Court Case Number: **C095446**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **rwright@horvitzlevy.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S283639 ABOM (EmbBr)

Service Recipients:

Person Served	Email Address	Type	Date / Time
Robert Wright Horvitz & Levy LLP 155489	rwright@horvitzlevy.com	e-Serve	8/23/2024 1:47:41 PM
Marina Maynez ESNER, CHANG, BOYER & MURPHY	mmaynez@ecbm.law	e-Serve	8/23/2024 1:47:41 PM
Lynn Garcia Spinelli, Donald & Nott 131196	lynng@sdnlaw.com	e-Serve	8/23/2024 1:47:41 PM
Laura Wolfe McCormick, Barstow, Sheppard, Wayte & Carruth LLP 266751	laura.wolfe@mccormickbarstow.com	e-Serve	8/23/2024 1:47:41 PM
Sheeny Bang ESNER, CHANG, BOYER & MURPHY	sbang@ecbm.law	e-Serve	8/23/2024 1:47:41 PM
Laura Wolfe McCormick Barstow Sheppard Wayte and Carruth LLP	laura.wolfe@mccormickbartsow.com	e-Serve	8/23/2024 1:47:41 PM
Shea Murphy Esner, Chang, Boyer & Murphy 255554	smurphy@ecbm.law	e-Serve	8/23/2024 1:47:41 PM
Kelsey Wong ESNER, CHANG, BOYER & MURPHY	kwong@ecbm.law	e-Serve	8/23/2024 1:47:41 PM
Holly Boyer Esner, Chang, Boyer & Murphy 221788	hboyer@ecbm.law	e-Serve	8/23/2024 1:47:41 PM
Kevin Nguyen	knguyen@ecbm.law	e-	8/23/2024

Esner, Chang, Boyer & Murphy 322665		Serve	1:47:41 PM
John Manly	jmanly@manlystewart.com	e-Serve	8/23/2024 1:47:41 PM
Morgan Stewart 209582	mstewart@manlystewart.com	e-Serve	8/23/2024 1:47:41 PM
Saul Wolf	swolf@manlystewart.com	e-Serve	8/23/2024 1:47:41 PM
Cristina Nolan 318495	cnolan@manlystewart.com	e-Serve	8/23/2024 1:47:41 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/23/2024

Date

/s/Robert Wright

Signature

Wright, Robert (155489)

Last Name, First Name (PNum)

Horvitz & Levy LLP

Law Firm