

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 SEMTEK INTERNATIONAL :
4 INCORPORATED, :
5 Petitioner :
6 v. : No. 99-1551
7 LOCKHEED MARTIN CORPORATION :
8 - - - - -X
9 Washington, D.C.
10 Tuesday, December 5, 2000
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.
14 APPEARANCES:
15 MICHAEL GOTTESMAN, ESQ., Washington, D.C.; on behalf of
16 The Petitioner.
17 WALTER E. DELLINGER, III, ESQ., Washington, D.C.; on
18 Behalf of the Respondent.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	MICHAEL GOTTESMAN, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	WALTER E. DELLINGER, III, ESQ.	
7	On behalf of the Respondent	25
8	REBUTTAL ARGUMENT OF	
9	MICHAEL GOTTESMAN, ESQ.	
10	On behalf of the Petitioner	50
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in Number 99-1551, Semtek International Incorporated
v. Lockheed Martin Corporation.

Mr. Gottesman.

ORAL ARGUMENT OF MICHAEL GOTTESMAN
ON BEHALF OF THE PETITIONER

MR. GOTTESMAN: Mr. Chief Justice, and may it
please the Court:

This is a business tort action based entirely on
State law, filed in the Maryland State court. The suit
was filed within Maryland's time limits, but the Maryland
courts believed that they could not entertain the suit
because it was barred by operation of Rule 41(b) of the
Federal Rules of Civil Procedure. It was barred, they
believed, because a Federal district court in California
had dismissed an earlier assertion of the claim on the
ground that it was untimely under the California statute
of limitations and it declared that dismissal to be on the
merits.

Now, that earlier California case had been filed
by the plaintiffs in State court and, of course, we now
know it was untimely. If the case had remained in State
court and had been dismissed as untimely by the State

1 court, it is absolutely clear that under California law it
2 would not have precluded the suit in Maryland, and that's
3 because the California supreme court has stated repeatedly
4 that dismissals based on the statute of limitations do not
5 extinguish the substantive right. So far as California is
6 concerned --

7 QUESTION: Would it have been -- would the
8 California judgment have been binding on Maryland if the
9 same issues were involved, i.e., the statute of
10 limitations are about the same, and the question was when
11 the tolling period -- whether there was a tolling period
12 or something like that, and the California court had ruled
13 on the merits in the sense of -- on the issue, on the
14 issue of whether or not there was tolling?

15 MR. GOTTESMAN: Well --

16 QUESTION: Then I take it Maryland, a) would
17 have and b) perhaps must give credit to the earlier
18 judgment?

19 MR. GOTTESMAN: Well, certainly if it -- if
20 Maryland was borrowing the California statute of
21 limitations it would certainly have to give credit, but
22 even if it was relying --

23 QUESTION: No, suppose the statutes were exactly
24 parallel, and the issues were exactly parallel, but a
25 disputed issue of fact as to whether or not there had been

1 tolling?

2 MR. GOTTESMAN: Well, I think if it was a
3 disputed issue of fact it would probably be collaterally
4 estopped. There would be issue preclusion. But of course
5 Maryland might have a different definition of what
6 constitutes fraud, in which case the finding of fact in
7 California would not necessarily dispose of the comparable
8 question under the Maryland statute of limitations. There
9 was a close question here about exactly how much knowledge
10 do you have to have to be compelled to file.

11 QUESTION: So there is some instance in which
12 California's judgment has extraterritorial effect. That's
13 all I was trying to say.

14 MR. GOTTESMAN: Yes. It might have
15 issue-preclusive effect, but what the California supreme
16 court has been very clear about is that so far as your
17 right to assert the underlying -- you still possess your
18 underlying tort rights, this being a tort suit, even
19 though we have dismissed this suit on the basis of the
20 statute of limitations.

21 QUESTION: If it's an ordinary statute of
22 limitations; but suppose it was what was once called a
23 built-in statute of limitations, a proscription period
24 that bars not merely the remedy, but the very right.

25 MR. GOTTESMAN: Well, surely, if California had

1 a statute and it was construed to mean that it bars the
2 right, then yes, that would preclude you going to another
3 State. We would agree with that, Your Honor. But here,
4 California is clear that its general statutes of
5 limitations do not have that effect.

6 Now, as a result, when the defendant removed the
7 California case to the Federal court and immediately moved
8 to dismiss, so it's clear that it understood at the time
9 it was removing, we're going to move to dismiss this case
10 based on the statute of limitations, but by moving it from
11 the State court to the Federal court and getting the exact
12 same ruling, a ruling on California law, because, of
13 course, the Federal court was obliged to apply the State's
14 statute of limitations, by getting that ruling in a
15 Federal court, it is now claimed, and the Maryland courts
16 accepted the claim, that the rights which California's
17 statute of limitations preserve had been extinguished
18 because the statute of limitations was applied by the
19 Federal court.

20 QUESTION: Well, isn't the position of your
21 opponents here, Mr. Gottesman, that there is a Federal
22 rule as to res judicata issue preclusion? Do you disagree
23 with the idea that there is a Federal rule, or just
24 disagree with their version of the Federal rule?

25 MR. GOTTESMAN: Well, that's -- as this Court

1 has said in the O'Melveny & Myers case, it's -- you know,
2 it -- there's a little riddle attached to that. We -- I
3 mean, if Erie, for example, is a Federal rule, if
4 Dupasseur is a Federal rule, then yes, we would agree that
5 it is a Federal rule, but the Federal rule is that the
6 State's determination controls, so in some sense, clearly
7 it is a Federal rule, because this Court decides what law
8 applies.

9 QUESTION: Your opponents also argue, I think
10 with some merit, that Dupasseur has been superseded by the
11 Rules of Civil Procedure. What's your position on that?

12 MR. GOTTESMAN: Well, absolutely, that we regard
13 as the critical -- for us, the critical threshold question
14 is, we must persuade you that Rule 41(b) is not a rule of
15 preclusion, or that if it is, it violates the Rules
16 Enabling Act, because it is substantive, and so let me
17 turn to that. Rule 41(b) we submit for five reasons
18 should be not understood to be a rule of preclusion.

19 QUESTION: May I ask you, before you --

20 QUESTION: Before you say that, do you mean
21 issue preclusion or claims preclusion, or does that make a
22 difference?

23 MR. GOTTESMAN: Well, it doesn't --

24 QUESTION: I mean, can we say that it is a rule
25 of issue preclusion and you still prevail?

1 MR. GOTTESMAN: Well, I mean yes, we would
2 prevail if you said that in this case, but I don't think
3 that that's -- analytically it's not our position that it
4 is a rule of preclusion, but only issue preclusion. We --

5 QUESTION: It isn't termed as a rule of issue
6 preclusion, because Rule 41(b) says that unless it's a
7 jurisdictional thing it counts as a dismissal on the
8 merits, even though nothing may have been adjudicated, so
9 it may be that 41(b) would be applicable despite the
10 absence of any specific issue of adjudication.

11 MR. GOTTESMAN: Well, that's correct, Your
12 Honor, surely, but I understand the question to be, what
13 if an issue was adjudicated, would the party be barred
14 from relitigating that issue. I think the answer is, they
15 may well be barred, but it's not 41(b) that causes the
16 bar. They'll be barred because whether you apply Federal
17 or State law, issue preclusion rules generally are --

18 QUESTION: Well, you had five reasons and I
19 sidetracked you. I'm sorry.

20 MR. GOTTESMAN: Yes, five reasons. The first is
21 the text, and I'll come to that. Let me just rattle off
22 the five, and then I'll go back and talk about each of
23 them if time permits. The first is the text. It is not
24 by its terms a rule-preclusion provision.

25 Secondly, that's not inadvertent. As the

1 advisory committee notes, and states repeatedly, the
2 Federal rules do not state rules of preclusion and it
3 would be improper if they attempted to do so, because such
4 rules are substantive.

5 The third is this Court's decisions since the
6 Federal rules were enacted. Now, this Court has not had a
7 preclusion case involving a State law diversity action
8 since the rules were enacted, but it's had a number of
9 Federal question cases, and so it's had an opportunity to
10 discuss what are the sources of the preclusion rule that
11 the Court applies in Federal question cases and it has
12 never suggested that the source is Rule 41(b).

13 Quite the contrary, the Court has repeatedly
14 said these rules of preclusion are judge-made and the
15 decisions of this Court that we have the power to
16 determine when exceptions to the general rule are
17 appropriate, et cetera, so that it's clear that this court
18 does not understand Rule 41(b) to be directing the answer
19 to rule preclusion questions.

20 The fourth, and I hope I have time to explain
21 this, is that the rule would be incongruous and in some
22 respects implausible in operation if it were a rule
23 preclusion law, and the fifth is that it would violate the
24 Rules Enabling Act and would undermine important questions
25 of sensitivity to State interests, these being things that

1 would cause the Court, when in doubt, to interpret it as
2 not being a rule of preclusion.

3 Let me start with the text, because the argument
4 on the other side is principally that the words of 41(b)
5 are a rule of preclusion. The words of 41(b) are that a
6 dismissal, unless it's in one of the exceptions, quote,
7 operates as a judgment on the merits, end quote.

8 Now, it doesn't say how a judgment on the merits
9 operates. Often, judgments on the merits do operate to be
10 rule -- to be claim-preclusive.

11 QUESTION: So what happens if we have a
12 litigated case, a litigated diversity case in the Federal
13 court and a judgment is entered, and then a question
14 arises as to the preclusive effect of that judgment, any
15 of the many different issues surrounding res judicata? Is
16 it established, or is -- are those matters adjudicated --
17 are they determined as a matter of State law or Federal
18 law?

19 MR. GOTTESMAN: Well, if they were State matters
20 that were adjudicated we would suggest it would be State
21 law. There is --

22 QUESTION: I'm asking -- it must arise fairly
23 often. A judgment's entered. It's a diversity case and
24 plaintiff wins, and now, later on, there is a question in
25 any -- in another Federal court to make it simple, as to

1 what the meaning of that litigated judgment is in terms of
2 res judicata. Does that second Federal judge look to the
3 State law, or is there some kind of Federal law on this?

4 MR. GOTTESMAN: Well, we believe that the judge
5 looks to State law. It may be a Federal rule that is
6 using the State law, but we believe that the question of
7 its --

8 QUESTION: Federal law renvoi, so to speak.

9 MR. GOTTESMAN: I'm sorry, Your Honor.

10 QUESTION: Federal law renvoi, so to speak.
11 Federal law looks to the sea --

12 MR. GOTTESMAN: Yes, Your Honor, good phrase for
13 it. Federal law renvoi is what Justice Scalia said, and I
14 think --

15 QUESTION: Yes, and if there is a precedent, I
16 mean, the obvious thing is they should be treated
17 similarly. That's your argument.

18 MR. GOTTESMAN: Right.

19 QUESTION: So I was just looking for a precedent
20 on that and I didn't find it.

21 MR. GOTTESMAN: I don't know of a case like
22 that, and part of -- one of the reasons is that in all 50
23 States if you had a case litigated on the true merits to a
24 judgment, everybody would regard that as claim-preclusive,
25 so the issue would never arise.

1 QUESTION: No, no, no, there are all kinds of --
2 you know, peripheral matters --
3 MR. GOTTESMAN: Right.
4 QUESTION: -- and my law clerk told me that
5 it's split on that, that there's a split in the circuits.
6 MR. GOTTESMAN: In the circuits, just as there
7 is a split on this.
8 QUESTION: Well, then we're really deciding that
9 when we decide this, I guess.
10 MR. GOTTESMAN: Well, the first step is to
11 decide whether Rule 41(b) is the controlling answer. If
12 it's not, you then have to decide, well, if it's not, what
13 is, and I -- that's the second part of our argument, and
14 our argument for what is, is that Dupasseur or Erie, we
15 think they are both actually grounded in exactly the same
16 principles.
17 QUESTION: Mr. Gottesman, at least 41(b) would
18 govern if you tried to bring the very same case back in
19 the district court in California, would you agree that
20 far, that this would operate as an adjudication on the
21 merits, it would be preclusive of any further claim? If
22 the very same tort claim were reinstituted it would at
23 least be preclusive of bringing it back to the very same
24 court.
25 MR. GOTTESMAN: We would agree that it would be

1 preclusive, but not because 41(b) says so. 41(b) says
2 it's on the merits, and California would regard that as --

3 QUESTION: All right. Then let's switch to the
4 district court in Maryland now, the Federal district court
5 in Maryland, not, as we have here, the State court. Two
6 Federal courts. Would the district court in Maryland be
7 in the same situation as the State court in Maryland, or
8 would it look to the district court in California and copy
9 what that court would do?

10 MR. GOTTESMAN: We think it doesn't matter
11 whether the second suit is filed in the State court or a
12 Federal court, that either way preclusion is determined by
13 the law of the place where the original judgment was
14 rendered, because it's there that a ruling or judgment
15 gets its preclusive effect, and whatever court is
16 receiving that, or is considering that in a second case,
17 must refer back to the first case to determine that.

18 So as we understand what the right answer should
19 be, it would not matter whether the second case is in a
20 State court or a Federal court. The question is, is what
21 happened in that first court preclusive of the suit that's
22 being filed in the second court, and we have to answer
23 that by looking to the law that appropriately applies to
24 the first ruling.

25 QUESTION: Can this question be answered en

1 masse, or doesn't it depend upon what the dismissal was
2 for? Suppose, for example, the Federal case was dismissed
3 not on statute of limitations grounds, this removed case,
4 this diversity case, but because the plaintiff was
5 recalcitrant and wouldn't comply with discovery requests,
6 and the district judge gives lots of warnings and he said
7 finally, plaintiff, I'm dismissing your case as a sanction
8 under Rule 37 for your recalcitrance.

9 MR. GOTTESMAN: Well, we think in that case the
10 dismissal is not for a reason of State law. In the case
11 that Your Honor is describing, the dismissal is for
12 behavior in front of a Federal court, a matter which the
13 Federal court polices as a matter of Federal law. If
14 that's what causes the dismissal, then we would agree that
15 there is certainly at least a strong argument and maybe a
16 compelling argument that a Federal rule of preclusion
17 would apply to that, but the Federal rule of preclusion
18 still would not be 41(b). The Federal rule of preclusion
19 would be something independent of that.

20 But -- in other words, to us it's not just that
21 it's a diversity case that's important here. It's a
22 diversity case that was dismissed for a reason of State
23 law. That being so, we need to know whether that reason
24 of State law precludes, and California says no, it does
25 not.

1 QUESTION: Well, what if a case is dismissed on
2 the grounds of frivolousness, and that's an application of
3 State law. It's a diversity case, but the Federal rules
4 provide for dismissal of something on the grounds it's
5 frivolous. Which one is that?

6 MR. GOTTESMAN: If the frivolous -- if it is a
7 penalty sanction, if adjudication is simply, you have
8 obviously not stated a claim --

9 QUESTION: Yes.

10 MR. GOTTESMAN: -- under State law, then because
11 it is under State law it is the State preclusion rule that
12 would apply. If what the court is saying is, you are
13 being vexatious and we want to punish you by the dismissal
14 of your lawsuit, that might be Federal, because then the
15 animus for the ruling is not state law but something about
16 the Federal court and the Federal court's --

17 QUESTION: No, where that's likely to come up, I
18 think would be, you could imagine a Federal court
19 dismissing on the ground that this is no legal issue, that
20 the State has a rule that if it was a pro se litigant you
21 get two or three chances. Then what happens?

22 MR. GOTTESMAN: It gets harder, Your Honor.

23 (Laughter.)

24 MR. GOTTESMAN: I grant that it's harder, but I
25 can identify what the principle is. It's just the

1 application of it to all these cases. Each one of them is
2 an interesting question. The principle is that if this is
3 a decision that -- if the dismissal by the Federal court
4 is rooted in State law, then State law controls the
5 preclusive effect of that dismissal.

6 QUESTION: But it wouldn't be --

7 MR. GOTTESMAN: Once you move -- and that's our
8 case. Once you move me away from that and start
9 introducing Federal elements that induce the dismissal,
10 the case becomes more complicated.

11 MR. GOTTESMAN: Well, isn't that example that
12 Justice Breyer just gave, it's a Federal procedural policy
13 that isn't going to go very -- won't be very effective if
14 the recalcitrant litigant or the frivolous litigant can
15 bring the very same case somewhere else, Federal or State,
16 so don't you have to look at the particular reason for the
17 dismissal, and you can't say it's always State law, it's
18 always Federal law, but at least -- well, let me give you
19 another concrete example.

20 Suppose there's a whole claim, and it gets
21 adjudicated, there is a counterclaim that defendant failed
22 to bring. Federal courts have a compulsory counterclaim
23 rule. Defendant then goes in as plaintiff to a State
24 court, brings what would have been a compulsory
25 counterclaim in the Federal court, in the State court

1 where it's not a compulsory counterclaim. Would the State
2 court then be obliged to defer to the Federal dismissal,
3 what a Federal court would have done, that's --

4 MR. GOTTESMAN: That is, I think, a difficult
5 middle ground case, and it was actually addressed by the
6 advisory committee to the rules, not in the case of Rule
7 13, which is what Your Honor is referring to. The same
8 issue arises under Rule 23(b)(3), the class action
9 provision. What if people don't opt out of a (b)(3) class?
10 Are they then precluded -- if they lose, if the class
11 loses, are they precluded from bringing their own lawsuit
12 in another court?

13 When Rule 23(b)(3) and (c) were drafted the
14 advisory committee said, we cannot state in the rules that
15 your failure to opt out means you are bound because we are
16 not allowed, by the Rules Enabling Act, to declare what
17 the res judicata effect of that is, so all we say in the
18 rules is, if you don't opt out of the class you will be,
19 quote, included in the judgment, and it will be then for
20 those who determine what the preclusion rules are to
21 determine what that means, and we think they're likely to
22 say that that means that they are preclusive, but that's
23 not for us to say.

24 QUESTION: Mr. Gottesman, I hope you can spend
25 some time on what happens if we agree with you that Rule

1 41(b) does not answer the question. What does answer the
2 question, then?

3 MR. GOTTESMAN: Yes. We think, Your Honor, that
4 the question is then answered by either Dupasseur and that
5 line of cases which, if Rule 41(b) did not overturn that,
6 which is what our first position is, then that is still
7 the law of this Court.

8 Now, of course, one more thing has intervened
9 since Dupasseur, and that is this Court's decision in
10 Erie, and this Court's decision in Erie would
11 independently suggest that if this is, quote, substantive
12 in the sense that Erie makes the distinction, that State
13 law would control, and it would be difficult to find
14 anything that was more substantive than this in the two
15 senses, the twin aims of Erie.

16 First of all, California law says that the fact
17 that you filed untimely here does not extinguish your
18 substantive right. You still have it, if you can find
19 somebody who will hear it. The right is still alive, but
20 the Federal court is -- if it invokes a rule that would
21 say, ah, but your right is not alive if it was issued by a
22 Federal court you're getting exactly the opposite outcome
23 on whether there exists a tort right, depending on --

24 QUESTION: Has the California court ever given
25 any explanation of this doctrine, that it's a State law

1 question, you're barred under State law by the statute of
2 limitations, but the right isn't extinguished? I mean,
3 have they ever applied that to allow a plaintiff to
4 prevail?

5 MR. GOTTESMAN: Yes, they have, Your Honor.
6 There are three different ways that rule plays out in
7 California. Two of them are within California. You can
8 -- if you -- for example, if you are dismissed because
9 your complaint did not state a claim, because you failed,
10 for example, to allege one of the elements, even on that
11 very claim you can file it again in a California court if
12 you can, you know, write a complaint that does state a
13 claim.

14 Secondly, even if you are foreclosed from
15 pursuing that claim in California, you can take the same
16 set of facts and say, well, we first alleged it as a tort.
17 That was untimely, but those same facts actually add up to
18 a breach of contract, and California will allow you to
19 refile and pursue the claim as a contract claim.

20 But thirdly, the California court has expressly
21 said, and this is the Western Coal case, which is cited in
22 our brief at page 48, that even if you are precluded from
23 coming back to the courts in California you are free to go
24 to a sister State if they are willing to hear the claim.

25 Now, Your Honor's question is why? Why does

1 California do that?

2 QUESTION: No, I wouldn't ask any question like
3 that.

4 (Laughter.)

5 MR. GOTTESMAN: Okay. Well, then I will --

6 QUESTION: Mr. Gottesman, I would have thought
7 that the rule, Rule 41, does appear expressly to cover
8 this situation. You say no, it doesn't. If it doesn't,
9 then it seems that we would have to look to Erie and to
10 Hannah.

11 MR. GOTTESMAN: Right.

12 QUESTION: And Hannah seems to say that a
13 Federal diversity court should apply a Federal rule of
14 civil procedure to the case before it whenever the rule
15 covers the point in dispute and isn't unlawful under the
16 Rules Enabling Act or the Constitution.

17 So you would then have to persuade us that the
18 Rules Enabling Act makes this rule unlawful, as applied in
19 this situation.

20 MR. GOTTESMAN: If this rule is a rule of
21 preclusion, then --

22 QUESTION: So you have to persuade us, 1) the
23 rule doesn't cover it, if it does, it's unlawful.

24 MR. GOTTESMAN: Correct, or that, 3) that we are
25 in fact covered under the exception in the rule, but that

1 argument I'd prefer to leave to the briefs.

2 Yes, that is why Rule 41(b) has to be the
3 threshold point. Now, the reason -- in explaining why it
4 does -- it is not itself a rule of preclusion, even the
5 respondent's brief at page 5 recognizes that it's not.
6 What their brief says there is that Rule 41(b) addresses
7 one of the elements of claim preclusion, and when --

8 QUESTION: What about Justice --

9 MR. GOTTESMAN: I'm sorry.

10 QUESTION: I just don't want you to lose, before
11 you sit down, Justice O'Connor's argument that she just
12 asked about, why would it be a violation of Erie? That
13 is, another way of looking at this is, what you've all
14 described, you've described what California does that
15 isn't a judgment on the merits, so the district court here
16 used the wrong word. It made a mistake. It wasn't
17 dismissing it on the merits, or it shouldn't have, but it
18 did, so your remedy was to appeal from that.

19 MR. GOTTESMAN: Well --

20 QUESTION: If it says on the merits, it means on
21 the merits, and what you all want is something that wasn't
22 on the merits.

23 MR. GOTTESMAN: Well, but that's not the --
24 again, the -- California has law in this, too. It is not
25 what the judgment says that --

1 QUESTION: Yes, but if -- I'm just trying to get
2 you to respond to the question of, assuming you lost on
3 the point about what it means, then would this in fact
4 violate Erie, et cetera?

5 MR. GOTTESMAN: Well, it would -- I mean, I
6 think on the merits in Rule 41(b) it has a fixed meaning.
7 I don't think it's a meaning that is variable with the
8 nature of the case. It would make Rule 41(b) quite
9 unusual, because the consistent rulings of this Court have
10 been that the Federal rules --

11 QUESTION: Mr. Gottesman, let me pursue one more
12 thing that I think bears on what I'm interested in and
13 perhaps what Justice Breyer's asking about.

14 After the Federal district court in California
15 proposed to enter the order it did, did your client then
16 ask for an amendment of that judgment or explain the
17 problem, or ask the court, look, here's the problem, we
18 want to go to Maryland, would you clarify this and make
19 sure that we're not bound or prevented from going to
20 Maryland?

21 It seemed to me that your client had the first
22 opportunity to do that and perhaps just bypassed it, and
23 so there's no inequity here if you're bound.

24 MR. GOTTESMAN: Well, surely they had the
25 opportunity. We don't know whether they would have

1 prevailed or not on that, and if they -- if Rule 41(b) is
2 a rule of preclusion their failure to avail themselves of
3 that opportunity obviously will be fatal, but if we're
4 right that it is not a rule of preclusion, then their
5 failure is irrelevant. The --

6 QUESTION: Didn't you go back to the district
7 court at some point --

8 MR. GOTTESMAN: Yes.

9 QUESTION: -- after the litigation in Maryland
10 and the district court refused to say --

11 MR. GOTTESMAN: Yes. It was too late. The
12 Federal district court said, sorry, you're too late. It
13 said a lot of things that suggested that she certainly had
14 not intended to --

15 QUESTION: I don't want to use up your rebuttal
16 time, but Mr. Dellinger's brief says, and he's going to
17 get up here and say they're running away from Rule 41.
18 They're running away. Why don't you just say, Rule 41 is
19 claim preclusion and this claim is different, end of
20 story?

21 MR. GOTTESMAN: Well, that actually turns on the
22 question --

23 QUESTION: I missed it. It is issue preclusion.
24 It is issue preclusion, and this issue is different.

25 MR. GOTTESMAN: Well, certainly this -- if all

1 41(b) is is issue preclusion, then yes, this issue is
2 different, because the issue here is, is it timely under
3 Maryland's statute of limitations.

4 QUESTION: Yes, but that -- isn't that a pretty
5 tough argument, because the text of the rule says,
6 operates as an adjudication on the merits --

7 MR. GOTTESMAN: Right.

8 QUESTION: -- which sounds like issue-preclusion
9 language, and I guess that -- which leads to my question.

10 MR. GOTTESMAN: Claim preclusion.

11 QUESTION: Is -- yeah. Assuming that we accept
12 your position, what function does the phrase, operates as
13 adjudication on the merits, perform in a case like this?

14 MR. GOTTESMAN: Well, first of all it is there
15 because it informs whatever the rule preclusion rule is.
16 When 41(b) was adopted there were two preclusion rules
17 announced by this Court, one for Federal question cases,
18 one for State cases. The Federal question rule was that
19 if it was, quote, on the merits it is precluded unless we
20 find an exception.

21 The State rule was, we look to the State law to
22 determine what the rule preclusion is, so obviously 41(b)
23 plays an important role. Wherever the operative
24 preclusion rule says that on the merits dictates claim
25 preclusion, then it will have that effect, but it's having

1 that effect not because of Rule 41(b) but because of
2 whatever the operative preclusion rule is.

3 I would like to reserve the remainder of my
4 time.

5 QUESTION: Very well, Mr. Gottesman.

6 Mr. Dellinger, we'll hear from you.

7 ORAL ARGUMENT OF WALTER E. DELLINGER, III

8 ON BEHALF OF THE RESPONDENT

9 MR. DELLINGER: Thank you, Mr. Chief Justice,
10 and may it please the Court:

11 Mr. Gottesman has described what seems to be an
12 utterly unworkable system in which we have a State court
13 that is in the process of recognizing an earlier Federal
14 judgment begin the process of deciding what the Federal
15 district court should have done.

16 Rule 41 serves an extremely important function
17 in the structure of the Federal Rules of Civil Procedure.
18 It reflects an understanding by the Advisory Committee on
19 the Federal Rules that it is very important to determine
20 at the time a Federal civil action is dismissed whether
21 that judgment of dismissal brings an end to litigation
22 arising between those parties and their privities on the
23 same set of facts. It gives you that answer so that
24 everyone knows whether this is an adjudication on the
25 merits. It is not, as Mr. Gottesman suggests at some

1 point, a complete rule of preclusion.

2 QUESTION: But the question is, on the merits of
3 what? You want to say, on the merits of the suit, and the
4 rule doesn't say that. It's on the merits of what was
5 presented to the court, and this sounds to me like issue
6 preclusion.

7 Now, it may be that if you're dismissed on the
8 merits for failing to comply with the rules of the court
9 there's a strong Federal policy there, but here there's no
10 Federal policy.

11 MR. DELLINGER: With all due respect, Justice
12 Kennedy, two responses. One, I do not think that Rule 41
13 can be read to be merely issue-preclusive rather than
14 precluding the claim and, secondly, even if it were so
15 read, it would lead to very unpalatable consequences on
16 the first question.

17 This Court, I think, has passed this point in
18 Plout, where you specifically held that Congress violated
19 Article III of the Constitution when it tried to reopen
20 and revive Federal cases that had been adjudicated and
21 determined to be found outside the statute of limitations
22 and Congress tried to retroactively extend the statute of
23 limitations, and the parties seeking to defend the act of
24 Congress said, well, that's just statute of limitations,
25 and this Court says in Plout that --

1 QUESTION: But that was because they were trying
2 to reopen the judgment on the same grounds that the
3 judgment was granted.

4 MR. DELLINGER: I understand that, and I will
5 come to that point. I just wanted to make it clear that
6 there is -- there's clear -- that what the Court does in
7 Plout is to analogize a statute-of-limitations dismissal
8 to a failure to prove substantive liability and a failure
9 to prosecute. That is a judgment on the merits.

10 The Court said, to be precise, the rules of
11 finality treat a dismissal on statute-of-limitation
12 grounds the same way they treat a dismissal for failure to
13 state a claim, for failure to prove substantive liability,
14 or for failure to prosecute, as a judgment on the merits,
15 citing for that proposition Federal Rule of Civil
16 Procedure 41(b). That wasn't dicta. That was part and
17 parcel of why it violated Article III. 41(b) stands --

18 QUESTION: Mr. Dellinger, I don't think your
19 colleague contests that. I think he agrees that 41(b),
20 when it says, on the merits, does preclude another Federal
21 court, and any State court, where the question is a
22 Federal question and, therefore, where it is up to the
23 Federal Government to say what an on-the merits -- what
24 effect an on-the-merits decision has.

25 But I think what he says is, it's up to the

1 State courts to decide what an effect an on-the-merits
2 decision has with regard to State causes of action. Now,
3 is there some reason why that can't be true?

4 MR. DELLINGER: Yes, and since there are two
5 issues on the table, 1) that they should win because this
6 should be only claim-preclusive, which is what Justice
7 Kennedy asked, and your question, they should win because
8 this is a diversity case.

9 QUESTION: I'm talking the whole hog, right.

10 MR. DELLINGER: On the whole -- and if I could
11 just make the most critical point to Justice Kennedy, and
12 then I'll return, which is that the structure of Rule
13 41(b) says that all dismissals, involuntary dismissals are
14 on the merits except those for lack of jurisdiction, lack
15 of venue, and failure to join an indispensable party.
16 Those three are claim-preclusive. I'm sorry. Those three
17 are issue-preclusive, and because we know that the three
18 exceptions are issue-preclusive, we therefore know that
19 the basic part of the rule, not the exception,
20 extinguishes the claims, and I think Plout makes no sense
21 otherwise.

22 With respect to the fact that -- the notion that
23 Rule 41(b) should only operate where the first case is a
24 Federal question case and not a diversity case --

25 QUESTION: No, I'm not saying it should not only

1 operate. It operates all the time. But what is the
2 effect of being an adjudication on the merits is only
3 determined by 41(b) in Federal cases, because that is a
4 Federal determination of what the effect of an on-the-
5 merits decision is in a Federal case, and what Mr.
6 Gottesman is saying is that it's up to the States what the
7 effect of an on-the-merits decision is in a non-Federal
8 case.

9 MR. DELLINGER: Well, let's be precise about
10 this. This is a Federal case in the sense it is in
11 Federal court. The dismissal is a judgment of the United
12 States district court. It is --

13 QUESTION: Federal cause of action is what I
14 mean by Federal --

15 MR. DELLINGER: In only Federal causes of
16 action.

17 There has never been a holding that a Federal
18 rule whose text applies to all civil actions applies only
19 in cases in which there is a Federal question rather than
20 a diversity basis for --

21 QUESTION: It would be quite contrary to Hannah
22 to say so, wouldn't it?

23 MR. DELLINGER: It would be contrary to Hannah
24 to say so, because Hannah, the plain text of the rule
25 covers both of these.

1 Also, it's important to note how difficult it
2 would be to follow the notion that Rule 41 provides the
3 preclusive effect only in Federal question matters because
4 often, increasingly these days, a lawsuit will encompass
5 both Federal and pendant or supplemental State claims, so
6 that there's simply no indication in the rule that when a
7 Federal court reaches a judgment of dismissal in a case
8 involving Federal questions, in a case involving State law
9 claims, or in a case involving mixed claims, that you
10 don't judge the preclusive effect by looking at Rule 41
11 and how it operates as a judgment of dismissal in the
12 Federal courts.

13 Whether it is a Federal question case or a
14 diversity case, the Federal courts have a strong interest
15 in establishing at the time of dismissal, whether this
16 does extinguish the claim or not, and their suggestion
17 that, you know, why would the Federal courts have an
18 interest -- you may be asking whether the Federal courts
19 have an interest when it's a State law cause of action.
20 I'm just saying that that's the -- let me explain why the
21 Federal courts do have an interest.

22 They would say, look, this is a State law cause
23 of action, and the next lawsuit is going to be filed
24 outside the Federal court system in State courts, but it's
25 important to recognize that the Federal courts do have a

1 very vital interest in not allowing people casual access
2 to try their cases in Federal court and not be bound by
3 the results.

4 QUESTION: But access to what? This is my
5 problem, Mr. Dellinger, with your position. This is a
6 case that was begun in California State court -- you're
7 relying on Erie and no forum-shopping -- begun in a
8 California State court, removed by the defendant to a
9 California Federal court, and then the case is begun again
10 in Maryland, which has a longer statute of limitations.

11 But for the removal of that diversity case to
12 the Federal court, this case, when it's reinstated in
13 Maryland, would have been heard under the 3-year statute
14 of limitations and one thing we know for sure, there is no
15 substantive policy that either California or the Federal
16 court there is putting forward.

17 They're saying, we don't want to clog our courts
18 with a stale claim, a claim we regard as stale. If
19 Maryland wants to have its courts occupied by old claims,
20 it's none of our business. We don't care what they --
21 this is a procedural policy in that sense, what cases do
22 we want our courts to be dealing with. That kind of
23 statute of limitations, as opposed to one that bars the
24 right, is one that's directed to how long we want to open
25 our court door. Why should the Federal court or

1 California court care if another State wants to make it
2 longer?

3 MR. DELLINGER: I agree with the question that
4 California doesn't have much of an interest here, and if
5 you think of this, if we get to it in Erie terms, and I
6 think because this is a Hannah case with a Federal rule
7 squarely on point we never get to Erie, but if you think
8 of it as an Erie case, you're exactly right that
9 California doesn't have an interest.

10 California has determined that the substantive
11 policy should be that there will be a cause of action for
12 business torts. California has balanced the interest
13 between keeping that alive and the interest of repose in
14 favor of settling at 2 years for how long that should be
15 tried in California.

16 Mr. Gottesman infers from California decisions
17 that California would not preclude a suit brought in
18 Maryland.

19 QUESTION: But that's nothing, I mean, at all
20 unusual conjecture. It is normally the rule that a
21 statute of limitations that's merely a procedural one you
22 don't -- when you rule out the door you're ruling for your
23 forum and not for some other State.

24 MR. DELLINGER: My point is this. California
25 has no coherent interest. It may be indifferent to

1 whether the suit is brought in Maryland, but we're not
2 frustrating any interest of California's in deciding that
3 we're going to consider the dismissal conclusive, whereas
4 the Federal courts have a real interest in having Federal
5 lawsuits that are tried there absolutely conclude an issue
6 so that parties don't think --

7 QUESTION: Well, why? Why?

8 MR. DELLINGER: Because --

9 QUESTION: Yes.

10 QUESTION: No, I mean, I'm just going to say I'm
11 surprised, I thought your answer was going to be, and tell
12 -- perhaps it isn't -- that California has no interest in
13 preventing them from suing in Maryland, Maryland has no
14 interest, and the Federal courts have no interest, and
15 what they should have done is just say, don't dismiss it
16 on the merits.

17 MR. DELLINGER: Yes, right.

18 QUESTION: That's all, and they didn't say it. I
19 thought that -- now you didn't say that, so I'm sort of
20 interested.

21 MR. DELLINGER: Yes.

22 QUESTION: I mean, I thought your point was, you
23 know, a dismissal on the merits is a dismissal on the
24 merits --

25 MR. DELLINGER: It could well --

1 QUESTION: -- and maybe they're right, therefore
2 the thing to do is say, judge -- you see, that's --

3 MR. DELLINGER: No, no, that's exactly where I'm
4 going, after noting --

5 QUESTION: Can I throw a question in, just one
6 here? Does the form of the judgment make a difference to
7 you? In other words, if -- supposing that if the judge
8 had said, if I dismiss this, this won't hurt you because
9 you can sue in Maryland, but then he entered a judgment
10 which did not get outside the rule, would the rule trump
11 his -- would the rule require that they could not proceed
12 in Maryland even though he thought they could?

13 MR. DELLINGER: Not if you have an indication
14 that the judge is otherwise specified --

15 QUESTION: He enters the same judgment he enters
16 in this case.

17 MR. DELLINGER: I would think that that is a
18 bar. The only issue would be if the judge has expressly
19 stated, outside the four corners of the page of the
20 judgment, that he intends it not to be a dismissal, you
21 know, on the merits --

22 QUESTION: So it's a matter of subjective intent
23 of the judgment, of the judge who enters the judgment?

24 MR. DELLINGER: Well, I think that's a
25 possibility, but I would go with --

1 QUESTION: How could you, if you're relying on
2 41(b) and 41(b) says, unless the court in its order for
3 dismissal otherwise specifies --

4 MR. DELLINGER: Otherwise specifies would
5 suggest that you --

6 QUESTION: It would have to be within the four
7 corners of the order.

8 MR. DELLINGER: But you ought to stay within
9 the four corners of the order, and if the judge doesn't
10 specify otherwise, it is claim-preclusive, and there is an
11 opportunity at that moment --

12 QUESTION: Oh, excuse me. Why does it have to
13 be claim -- I would like to come back to your assertion
14 that the dismissal on the merits cannot mean one thing for
15 purposes of a Federal claim and something else for
16 purposes of a State claim. We've heard that California
17 allows you to rebring the same claim that has been
18 dismissed on the merits because you've left out one of the
19 elements of the claim. You can bring back the same claim
20 involving the same transaction. You put in the missing
21 elements, and you're allowed to proceed, even though there
22 has been a dismissal on the merits.

23 Now, that's not what a dismissal on the merits
24 means in the Federal system. It means something quite
25 different. Now, what if you have a dismissal in a Federal

1 court in California on the merits? Does that mean that
2 that suit cannot be rebrought even in a California State
3 court, when you put in an additional element that should
4 have been put in in the original complaint?

5 MR. DELLINGER: Yes.

6 QUESTION: It does?

7 MR. DELLINGER: It does. It does mean that, and
8 that's --

9 QUESTION: So you're dictating the --
10 California's own res judicata effect as to what should be
11 the effect of a judgment?

12 MR. DELLINGER: That is right, because the
13 Federal court system sets its own rule for when a
14 dismissal is on the merits and precludes further
15 litigation of that claim. The Federal interest in that --

16 QUESTION: But isn't -- again, isn't your answer
17 the same as before? You say, of course the Federal court
18 here should have allowed another suit to be brought in
19 California. That's why it says, unless the court
20 otherwise specifies. The lawyer's supposed to say, judge,
21 California doesn't dismiss this on the merits. What
22 California does is just bar you under the statute of
23 limitation. That's why those words are in the rule.

24 MR. DELLINGER: Let me go --

25 QUESTION: Now, is that right, or --

1 MR. DELLINGER: Yes.

2 QUESTION: Don't say I'm right if I'm not,

3 please.

4 MR. DELLINGER: Let me go directly to that

5 point. Almost all of their arguments are in fact

6 arguments that Judge Collins, the Federal district judge,

7 got it wrong. To the extent that they believe that she

8 got it wrong -- and there are a number of different

9 arguments you could make.

10 You could make the argument that Justice Scalia

11 is making that Judge Collins should have thought, and

12 counsel for Semtek should have argued to her, don't make

13 this dismissal a dismissal on the merits. Specify

14 otherwise, for any one of a number of reasons, either

15 because we think that it -- since this is a State law

16 matter, State law doesn't make it preclusive. They didn't

17 do that. They did not, after the dismissal comes down,

18 and not only under Rule 41 -- they didn't file under Rule

19 59(e) --

20 QUESTION: And you're saying because they

21 didn't, what would not have been preclusive under State

22 law has now been made preclusive by this Federal judgment,

23 and that brings you right up against the proposition that

24 Rule 41(b) cannot make any substantive change.

25 I think that's a massive substantive change, to

1 say that a -- an adjudication that under State law would
2 not prevent further State litigation, now, because a
3 Federal judge has said this is on the merits will preclude
4 further State litigation. Why isn't that a substantive
5 alteration, which the Federal rules should not be able to
6 produce?

7 MR. DELLINGER: That's because what is at issue
8 here is not a determination of what the law of business
9 torts ought to be in California. What is at issue here is
10 not even how long one has to sue.

11 What is at issue here is the effect of a
12 judgment of a case that has been adjudicated in a Federal
13 court, where the Federal Rules of Civil Procedure set up a
14 clear system, a signalling system for saying, all
15 voluntary dismissals are not on the merits, are not claim-
16 preclusive, all involuntary dismissals are, that's a
17 default rule unless you otherwise specify.

18 Now, there may be many reasons why you would
19 think, Justice Scalia, that a Federal judge sitting in
20 diversity ought to make a decision dismissing the case on
21 statute of limitation grounds or any other grounds not
22 claim-preclusive, that the judge ought to specify
23 otherwise, and Rule 41(b) provides for that, so that
24 whatever the reasons are, a Federal court sitting in
25 diversity and a party before that court can say, you

1 should not make this claim-preclusive. One of the factors
2 you ought to take into account is the existence of a
3 contrary California law on claim preclusion.

4 And if the judge insists on not otherwise
5 specifying, or in this case making it absolutely clear, by
6 saying this dismissal is in its entirety with prejudice
7 and on the merits, you can seek relief under Rule 59 from
8 the form of that judgment and you can go to the Ninth
9 Circuit Court of Appeals, where they went to contest the
10 merits of the statute of limitations claim. They didn't
11 do that. They didn't take it to the Ninth Circuit. They
12 didn't seek certiorari.

13 If that judgment was wrong, it is wrong in a way
14 that is still clearly preclusive under res judicata. As
15 this Court said --

16 QUESTION: What is the Federal interest that in
17 effect supports your entire argument? Why are we going
18 through this? You've gotten right up to the line a couple
19 of times to explain what the Federal interest is which
20 differs from the State interest, but you've never gotten
21 across the line. What is it?

22 MR. DELLINGER: It seems to me, Justice Souter,
23 that there are two Federal interests. One is in having a
24 clear determination at the time a suit is dismissed in
25 Federal court whether that is an adjudication on the

1 merits or not.

2 QUESTION: You would have a clear determination
3 if you simply followed the California rule. You don't
4 need this for a clear determination.

5 MR. DELLINGER: No, it is not --

6 QUESTION: The only time you need it is if the
7 State doesn't have a rule.

8 MR. DELLINGER: Well, it is not clear to me that
9 the State of California has a clear rule, but let me put
10 that to one side.

11 QUESTION: All right, but we're assuming it
12 does. I mean, that's the premise on which we're taking
13 this case.

14 MR. DELLINGER: If you assume for a moment that
15 it does, there's also a Federal interest in not providing
16 moot court opportunities for litigants. This is --

17 QUESTION: In other words, you say, we don't
18 want the Federal court used twice. There is a Federal
19 system, and if you've gone into a Federal court once, you
20 shouldn't be going into a Federal court twice, but why
21 does that preclude you from going into a State court?

22 MR. DELLINGER: Because it would certainly lead
23 to a too-casual resort to Federal court if the judgment
24 was not going to be preclusive. Let me give you a --

25 QUESTION: The point --

1 QUESTION: But the plaintiff didn't resort --

2 QUESTION: Exactly.

3 QUESTION: This was removed by the defendant,
4 and that's why this is -- the position you're taking,
5 frankly, is so troublesome, because it's the defendant
6 who's forum-shopping, and there is a reason for -- you
7 hesitated, why does California say, we don't care if
8 Maryland wants to entertain it longer.

9 It's kind of a sisterly or brotherly attitude
10 toward your fellow State courts. One says, we have a
11 short time. You have to come into our court, say, in 1
12 year. Another one is more laid back and says, you can
13 come any time within 3 years, so the first State says,
14 we're not going to clog our courts with this business. If
15 someone else want to entertain it longer, it doesn't -- no
16 skin off our teeth.

17 MR. DELLINGER: You raise a State interest.
18 Justice Souter raises the Federal interest. Let me
19 preface my responses by saying that I believe the Rules
20 Advisory Committee has settled this debate by the way it
21 has written the clear language of --

22 QUESTION: Well --

23 MR. DELLINGER: -- Rule 41, but I'm happy to
24 engage in it, if I --

25 QUESTION: Mr. Dellinger, to what extent should

1 we be guided by an opinion of this Court called Walker v.
2 Armco Steel?

3 Now, that case dealt with Rule 3 of the Federal
4 rules, and Rule 3 says an action is commenced by filing a
5 complaint, and this Court said, it does not determine when
6 an action is commenced for the purpose of triggering a
7 State statute of limitations in a diversity case, and the
8 Court in Walker said that the rule did not displace the
9 State's policy determinations underlying its statute of
10 limitations.

11 It seemed as clear a rule in its language as
12 Rule 41, and in -- was a diversity case, and invokes the
13 same concerns, I think, and yet we said, okay, there we're
14 not relying on Rule 3's text. Does that have a bearing on
15 this?

16 MR. DELLINGER: It does, but we still win. It
17 does in the following sense. I think that the best
18 argument that you can make for saying that a Federal court
19 ought to apply nonpreclusive, ought to reach a
20 nonpreclusive judgment when the State rule so provides.
21 The best rule, the best argument for that would be an
22 argument that follows from Walker and Justice Ginsburg's
23 opinion in Gasperini, where those cases take the position
24 that the Federal rules are to be construed, although under
25 Hannah they clearly prevail, they're to be construed with

1 sensitivity to State interest. So that you could imagine
2 that the proper thing for a Federal court to do sitting in
3 diversity is to say, well, look, it first looks like
4 there's a direct conflict between 41(b) and State law,
5 because 41(b) says these are all dismissals on the merits,
6 but State law is to the contrary, and I have this
7 otherwise-specifies clause, so I can make an exception, so
8 I could in the sense of Gasperini make an exception where
9 there's a contrary State law.

10 QUESTION: No, I don't think so, not -- because
11 Gasperini was talking about the way Federal judges
12 uniformly will operate. Rule 41(b) is set up, unless that
13 district judge otherwise so directs. That's the problem
14 with -- your out is, this district judge should have
15 otherwise specified, go up to the Ninth Circuit.

16 MR. DELLINGER: Yes.

17 QUESTION: There's a big difference between
18 leaving it in the hands of each individual district judge
19 and saying, as in the case of Rule 3, when this Court
20 interpreted that rule, not for one district judge but for
21 all them it says, your clock doesn't start ticking until
22 you actually serve the summons and complaint because we
23 want to honor State policies.

24 MR. DELLINGER: I appreciate the distinction,
25 but it's important to remember that any argument you have

1 with what Judge Collins should have done in the Federal
2 district court is an argument that should have been made
3 before her and taken up on the court of appeals, so that
4 if in the future you wanted to tell district judges that
5 they always had to defer to State statute of limitations
6 the way to do that is on direct review of a diversity
7 case.

8 There's a certain oddness here, if you think
9 about it, that we're talking about Erie and Hannah and
10 Federal diversity cases on review of a State court
11 judgment dealing with a matter of State law, because the
12 -- it's just as if Judge -- suppose Judge Collins had said
13 that she was going to decide this case, clearly
14 erroneously, as a matter of Federal common law business
15 torts, and they didn't appeal it to the Ninth Circuit,
16 they didn't seek cert from that. Even though that would
17 be clearly erroneous under Erie, they're bound by that and
18 can't second-guess it.

19 Now, I never got the question of the Federal
20 interest here. You could have a litigant that's got a
21 troublesome statute of limitations claim, because it
22 involves possible concealment, possible latent defects,
23 nondisclosure. They could say, look, we could bring this
24 in Federal court in California. We can try it for 3
25 years, and if we lose on the statute of limitations

1 grounds we'll have a very good practice opportunity,
2 because it won't preclude us at all from bringing the very
3 same case in some other State.

4 QUESTION: That's -- can you answer my other
5 question that I had before? I was not just trying to be
6 helpful to you. I was trying to build up to a question
7 that I have.

8 (Laughter.)

9 QUESTION: That the -- imagine we have a piece
10 of paper, which is called a judgment, after litigation in
11 Federal court on a diversity case and it says, defendant
12 wins. Now, a lot of questions can arise as to the res
13 judicata effect of that, peripheral questions, privity,
14 parties, et cetera.

15 Don't we normally use State law to determine the
16 meaning of that piece of paper called the judgment, which
17 came out of diversity after litigation, or do we? I'm not
18 positive. And then, of course, I'm thinking if we do,
19 shouldn't we get to the same result here?

20 MR. DELLINGER: That's a very good question, and
21 it clarifies a point that they make. Their best point
22 under the Rules Enabling Act, which has troubled Justice
23 Scalia in his questions, is that this is a -- all of a
24 sudden we're making Rule 41(b) into a whole Federal law of
25 preclusion. No, we're not. We're only saying it resolves

1 one of the issues of preclusion. It doesn't reach all
2 those other issues.

3 For example, you have to establish a final
4 judgment on the merits between the same parties involving
5 the same claims. The only issue that 41(b) addresses is
6 whether that first judgment was, in fact, on the merits.
7 It's not a rule of mutuality. It's not a rule of all of
8 these other things. There are a lot of preclusion issues
9 where you would look to State law, and that's a possible
10 outcome, some of which this Court hasn't resolved, but
11 those are not issues with respect to which there is a
12 Federal Rule of Civil Procedure squarely on point.

13 QUESTION: Well, you're just saying that, then,
14 it's only changing a very tiny bit of substantive law. I
15 mean, it's still changing substantive law, even if it's a
16 tiny bit.

17 The fact is that if a dismissal on the basis of
18 the statute of limitations under State law would not
19 prevent the plaintiff from bringing the suit again, and if
20 a Federal court, whether by mistake or not -- whether by
21 mistake or not -- makes a dismissal on the basis of the
22 statute of limitations and says it shall preclude further
23 actions under State law, you're going to allow that to
24 govern. I think that is an alteration of substantive law.
25 Now, it maybe just a tiny bit of substantive law, but I

1 don't see how you can --

2 MR. DELLINGER: Justice Scalia, if that is
3 considered an alteration of substantive law it would raise
4 havoc with the Federal Rules of Civil Procedure. There
5 are counterclaim rules, there are interpleader rules,
6 there are all kinds of rules that relate to and have some
7 effect on whether a judgment winds up being a judgment of
8 dismissal on the merits, and it's not the kind of issue
9 about which Justice Harlan was concerned in his concurring
10 opinion in Hannah v. Plumer when he said, we have to be
11 careful, I realize that the Federal rules, if they're
12 arguably procedural, take precedence over State law --

13 QUESTION: It seems to me your --

14 MR. DELLINGER: -- but we have to worry about
15 ordering people's private lives. This is not a rule that
16 orders -- that tells people how to order their private
17 lives. It makes political choices that a State ought to
18 make for itself.

19 QUESTION: Was your answer to me, then, that the
20 words, on the merits, are not peripheral because if they
21 mean anything they mean claim preclusion --

22 MR. DELLINGER: If they mean any --

23 QUESTION: -- and therefore, if you apply it,
24 you can't just look to State law because that would make
25 the words meaningless in that Heartland issue, and if you

1 put that -- you applied it where it's not applied, that's
2 just a mistake like any other court, any other Federal
3 court. That's -- is that what your answer is?

4 MR. DELLINGER: That's exactly right.

5 QUESTION: But that's not a good answer, because
6 they wouldn't --

7 (Laughter.)

8 QUESTION: I didn't say it was a good answer.

9 QUESTION: They would not make the words
10 meaningless, you acknowledge, in those cases where you're
11 dealing with a Federal cause of action and where it is
12 within the power of the Federal courts to say what the
13 effect of a judgment on the merits is. That's enough to
14 give the words meaning.

15 QUESTION: It would also finally resolve the
16 merits of the question whether the statute -- whether the
17 claim is barred by the California statute of limitations.
18 That issue is resolved on the merits.

19 MR. DELLINGER: Well, this Court has never held
20 that a Federal rule simply doesn't apply in diversity
21 cases when the plain text of the rule says it applies to,
22 you know, all suits of a civil nature under Rule 1, and
23 there's just no way to tease that out of the rule.

24 I think that the uncertainty that would occur --
25 for many reasons, California has never passed judgment on

1 the question of whether the dismissal of a claim in
2 California for the running of statute of limitations
3 should preclude the same claim from being brought in
4 another State.

5 QUESTION: Mr. Dellinger, it is the normal rule,
6 and I think you're well aware that in the -- the Ryder
7 Miller Treatise puts this very issue. The longer period
8 of limitation in the second forum, the traditional rule
9 has been that it's free to proceed with the second action
10 if the State has a longer limitation.

11 MR. DELLINGER: Justice Ginsburg, if I may
12 interrupt, as a matter of full faith and credit, but
13 increasingly -- as a matter of full faith and credit if
14 there's not been a first lawsuit, a State -- the second --
15 the second State in a case like Sun Oil, the second case
16 can apply its own longer statute of limitations, period,
17 even though the first State has a shorter limitations
18 period and is providing the cause of action.

19 QUESTION: Well, I wish that you hadn't
20 interrupted --

21 MR. DELLINGER: I'm sorry.

22 QUESTION: -- only for this reason, because the
23 next sentence goes on to say, Civil Rule 41(b) is even
24 more clearly inapposite to these problems than to the many
25 other difficult preclusion questions it may seem to touch.

1 QUESTION: Thank you, Mr. Dellinger.

2 MR. DELLINGER: Thank you.

3 QUESTION: Mr. Gottesman, you have 3 minutes
4 left.

5 REBUTTAL ARGUMENT OF MICHAEL GOTTESMAN

6 ON BEHALF OF THE RESPONDENT

7 MR. GOTTESMAN: Thank you, Your Honor. Three
8 short points. First, I think it must be evident that if
9 respondent is right, every defendant in the 25 to 30
10 States which still adhere to the traditional preclusion
11 rules is going to remove every possible case it can to
12 Federal court if it thinks there's a time bar question
13 because, by removing it, it will get preclusion unless,
14 and this is now my second point, unless Justice Breyer's
15 solution becomes the solution.

16 Now, I want to make clear we do not believe
17 41(b) is a preclusion rule, but still I will address the
18 question of whether these problems can get solved that
19 way. For three reasons, I think they can. First, the
20 advisory committee has said it is not the function of the
21 rendering court, the first court, to worry about the res
22 judicata effect of its decisions. That's in the advisory
23 committee notes to Rule 23(c) in 1966, and that is a
24 traditional Hornbook rule. The rendering court doesn't
25 sit around and say, now, let's see what the preclusive

1 effect of my decision will be.

2 Secondly, it would be --

3 QUESTION: But the recognition court must look
4 to the rendition court to find out what the preclusive
5 effect --

6 MR. GOTTESMAN: Right. Well, to the law of the
7 rendition court. Not to the court itself, but to the law
8 of the state of the rendition court, that's correct, Your
9 Honor, but you rarely see an opinion in which the opinion
10 ends by saying, and I think this decision ought to have
11 res judicata effect. I mean, it just isn't done, and the
12 rules committee said it's not being done in the Federal
13 rules.

14 Secondly, it would be too complicated.
15 Preclusive of what, as Justice Kennedy asked. Every
16 decision precludes some things. The Court's going to have
17 to write a Hornbook.

18 If it's -- if the argument is, State law isn't
19 preclusive of certain things, Your Honor, you should
20 tailor your order appropriately, the parties are going to
21 sit there and analyze the entire jurisprudence of that
22 State in order to write in what it does preclude and what
23 it does not preclude. It would be an impossible task.

24 And thirdly, it would mean that you would have
25 constant appeals, because districts -- we now have created

1 a whole nother issue to litigate in the rendering court.
2 Parties might not ultimately decide to bring a second
3 lawsuit, but they're got to worry that in case I might I'd
4 sure better get this thing right, and we are going to have
5 endless litigation in that first court, and it will be a
6 Federal court, because we're talking about Rule 41 here.

7 Now, the third point I want to make is this.
8 There's something very asymmetric about this. 41(b) --

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
10 Gottesman.

11 The case is submitted.

12 (Whereupon, at 11:02 a.m., the case in the
13 above-entitled matter was submitted.)
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