No. 99-1551

IN THE
Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS
OF MARYLAND

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

REPLY BRIEF FOR THE PETITIONER

In the courts of California, a judgment of dismissal founded on a state statute of limitations entails the limited right not to be sued on the same legal theory in another action *in that state.* According to the Maryland court below, however, by reason of Federal Rule of Civil Procedure 41(b), a federal diversity judgment of dismissal predicated on the same state limitations statute affords a right not to be sued on the same transaction or occurrence *anywhere in the country.* This holding is in error.

Rule 41(b) by its terms does not, and under the Rules Enabling Act could not, control the decision in this case. To be sure, Rule 41(b) supplies a procedure for identifying which federal judgments have the *potential* to be accorded preclusive effect under the relevant governing law. But Rule 41(b) does not create an entire federal law of res judicata.[1]

Instead, this Court should hold that this diversity judgment, involving a state-law limitations dismissal, should have the same preclusive effect as if it had been rendered by a state court in the first forum, under *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). If the matter is treated as one of federal common law, the pertinent state-law res judicata rule should be borrowed because there is no federal interest requiring the use of a nationally uniform rule governing the effect of a limitations dismissal.[2] Where the first forum, like California, follows the traditional rule that limitations dismissals do not have claim preclusive effect, the second forum is free to apply its own statute of limitations. Indeed, under this Court's full faith and credit decisions, the

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[1] To resolve this case, the Court need not address any issue other than the question presented: the preclusive effect of a limitations dismissal. Thus, this Court need not decide whether uniform federal law controls such issues as the finality or validity of diversity judgments.

[2] Alternatively, this Court could adopt, as a uniform federal rule governing the res judicata effect of a limitations dismissal, the traditional rule that such a dismissal does not preclude suit in another forum with a longer limitations period.

second forum would be free to do so even if the first forum treated the limitations dismissal as barring the plaintiff "from thereafter maintaining an action to enforce the claim in that State." Restatement of Judgments § 49, cmt. a (1942). *See Brent v. Bank of Washington*, 35 U.S. (10 Pet.) 596, 617 (1836); *Bank of the United States v. Donnally*, 33 U.S. (8 Pet.) 361, 370 (1834); Restatement (Second) of Judgments § 19, cmt. f (1982).

I. RULE 41(b) DOES NOT CONTROL THIS CASE

It is common ground that Rule 41(b) *does not* supply the answer to many questions regarding the preclusive effect of a diversity judgment, "such as privity or mutuality of the parties or identity of the claims or issues." Lockheed Br. 6; *see also id.* at 36 (allowing that state law could control "the scope of the claims or causes of action precluded or the rules governing mutuality or privity of the parties"). *See also* PLAC Br. 19 n.8 (acknowledging that state law controls "some" of the preclusive effects of a diversity judgment). But, according to Lockheed, Rule 41(b) *does* control this case involving the preclusive effect of a limitations dismissal. The distinction drawn by Lockheed cannot be maintained. There is no difference in principle between the question presented here (the proper legal and territorial scope of preclusion to be given to a limitations dismissal) and the question of privity, or mutuality, or the scope of a legal "claim." In diversity cases, all of these questions require an analysis of the state law governing the proper scope of preclusion and the impact of a dismissal on a subsequent action. If a judgment is conceived as a repository of rights that it is the province of preclusion law to protect, *see, e.g.*, *Deposit Bank v. Frankfort*, 191 U.S. 499, 520 (1903), the question is the scope of those rights under the relevant state law.

To argue that the "claims in this action are identical to those in the suit dismissed by the California federal court," Lockheed Br. 5-6, begs the question of the legal and territorial scope of the preclusion to be accorded to the California federal diversity judgment. This question should be answered by reference to the preclusion law of the forum state in which the diversity court sat

and to the full faith and credit obligations that would be owed to that forum state courts' judgments.[3]

A. By Its Terms, Rule 41(b) Does Not Create a Federal Law of Res Judicata

As Lockheed maintains, the question is "what [Rule 41(b)] in fact says." Lockheed Br. 15. The Rule says nothing about creating a federal law of res judicata. The phrase "upon the merits" has no fixed meaning and certainly no fixed meaning over time. It was abandoned by the Restatement (Second) of Judgments (1982) "because of its possibly misleading connotations." § 19, cmt. a. Even Lockheed admits that the phrase "has become somewhat mislabeled." Lockheed Br. 6 n.1. Although Lockheed attempts to equate a judgment "upon the merits" with one "entitled to res judicata effect" (*id.* at 1), this is sleight of hand, not legal argument. And it begs the real question: what is the source – federal law or state law – of the res judicata effect for which the judgment is eligible?

The most that can be said is that Rule 41(b) provides a procedure for identifying a federal judgment with the potential to bar another action as a matter of claim preclusion. Whether the judgment will so bar another action depends on the answers to other questions (including what law of preclusion will govern, the scope of that which is precluded, and the territorial scope to be given that rule of preclusion), as to all of which Rule 41(b) is silent. The "upon the merits" label is a mere datum, for whatever significance state law chooses to accord it.

To be sure, in federal question cases, the federal courts may treat that datum as dictating res judicata effect. But that is because there is a federal common law rule of res judicata, independent of Rule 41(b), which so provides. (Contrary to

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[3] Semtek is not "seeking to alter the preclusive effect of a judgment." Lockheed Br. 12 n.4. Nor is the question whether Semtek should have filed a Rule 59(e) motion to amend the California federal diversity judgment. The issue is what preclusive effect the judgment has.

Lockheed's suggestion (Lockheed Br. 20-21), the source of preclusion law in federal question cases is federal common law, not the Federal Rules. *See Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994).) In state-law cases, however, it is state law that determines whether the label triggers res judicata effect.

Interpreting Rule 41(b) as a procedural rule rather than as a font of substantive law does not "read Rule 41(b) out of the Rules of Civil Procedure altogether," as Lockheed wrongly argues. Lockheed Br. 17. We fully acknowledge that Rule 41(b) performs an important procedural function.[4] But this does not justify creating uniform federal law for all preclusion questions arising from federal diversity judgments. Far from representing an aberrant view (as Lockheed tries to suggest), our interpretation of Rule 41(b) is in fact shared by Wright & Miller and other esteemed commentators.[5]

B. The Rules Enabling Act Precludes Interpreting Rule 41(b) as Creating a Federal Law of Res Judicata

To rest an entire body of federal preclusion law upon the thin reed of the terse phrase, "upon the merits," would stretch Rule 41(b) to the breaking point. The law of preclusion is heavily substantive in nature and reflects important public policy choices. The "doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than

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[4] Contrary to PLAC's argument, the applicable source of preclusion law does not vary according to whether the recognizing court is federal or state. A recognizing federal court is not "forc[ed] ... to ignore Rule 41(b)" (PLAC Br. 20 n.10); rather, it refers to Rule 41(b) to determine whether the diversity judgment is "upon the merits" and then refers to state law to determine the preclusive effect of such a judgment. A recognizing state court does the same.

[5] *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE & PROCEDURE § 4441, at 372-73 (1981 & 2000 Supp.) [hereinafter "Wright & Miller"]; Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733, 782-83 (1986); Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 320-21 & n.113 (1993).

ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace' . . . ." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917); *see also Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (same).

The traditional rule is that "dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations." 18 Wright & Miller, *supra*, § 4441, at 369; *see also* Restatement (Second) of Judgments § 19 (1982), Reporter's Note to cmt. f ("[T]he prevailing rule" is that "[t]he dismissal operates as a bar in the jurisdiction in which it is rendered, . . . [b]ut the dismissal does not preclude an action in another jurisdiction if that jurisdiction would apply a statute of limitations that has not yet run."); Restatement (Second) of Conflict of Laws § 142(2) & cmt. g, § 143 (1971); Restatement (Second) of Conflict of Laws § 110, cmt. a (1988 rev.). Under full faith and credit principles, where the first forum (like California) does not accord preclusive effect to a limitations dismissal, neither may the second. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 384 (1985); *Union & Planters' Bank v. Memphis*, 189 U.S. 71, 75 (1903). This is true whether the preclusion in question is deemed to be issue or claim preclusion. The quest to serve "full faith and credit principles" (PLAC Br. 17-19) therefore favors Semtek's argument, not Lockheed's.

The traditional rule finds justification in the limits of the choice-of-law process: from the perspective of claim preclusion, a party like Semtek did not have the opportunity to rely on Maryland limitations law in the California action; from the perspective of issue preclusion, the timeliness of Semtek's action under Maryland law was neither litigated nor decided in the California action. Lockheed contends that the traditional rule regarding the interjurisdictional effect of limitations dismissals is "outdated," Lockheed Br. 32 n.20, but the rule is a matter of substantive policy, to be re-examined and reconsidered by the

states as they see fit. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988). It is not a matter to be decreed by a Federal Rule of Civil Procedure.

Preclusion law reflects important public policy choices and legal conceptions, such as the understanding of the nature of a "claim." *E.g.*, *Commissioner v. Sunnen*, 333 U.S. 591, 597-98 (1948); *Townsend v. Jemison*, 50 U.S. (9 How.) 407, 413 (1850); *Bank of the United States v. Donnally*, 33 U.S. (8 Pet.) 361, 370 (1834). The ability of states to adopt different rules regarding the res judicata effects of limitations dismissals serves important principles of federalism. By way of illustration, if Semtek's limitations dismissal in California had occurred in state court (where the complaint was originally filed) rather than in federal court (where it was removed by Lockheed), Semtek's action in Maryland would now be permitted to proceed. Hence, this very case underscores the sweeping effect on state law and principles of federalism entailed by the creation of a federal law of preclusion in diversity cases. That is why *Dupasseur* is instructive regarding the proper construction of Rule 41(b), and why Lockheed errs in relegating its discussion of *Dupasseur* to the last few pages of its brief. *Hanna v. Plumer*, 380 U.S. 460 (1965), itself opined that "in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, [a court] need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in state courts." *Id.* at 473.[6]

The Rules Enabling Act was never intended to provide rulemaking authority with respect to intrinsically substantive matters involving important public policy choices. *See* 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."). For example, a 1926 Senate Judiciary

[6] *Hanna*, of course, did not involve the preclusive effect of a diversity judgment, but only whether service of process should be made in the manner prescribed by state law or that set forth in Rule 4(d)(1) – an issue that "would be of scant, if any, relevance to the choice of a forum." 380 U.S. at 469.

Committee report addressing a direct antecedent of the Rules Enabling Act – whose text remained essentially unchanged from its initial proposal in 1924 until its enactment in 1934 – explained that, "[i]n view of the express provision inhibiting the court from affecting 'the substantive rights of any litigant,' any court would be astute to avoid an interpretation which would attribute to the words 'practice and procedure' an intention on the part of Congress to delegate a power to deal with . . . substantive rights or remedies." S. Rep. No. 1174, 69th Cong., 1st Sess. 11 (1926). The rulemaking power would not extend to "matters involving substantive and remedial rights affected by considerations of public policy," *id.* at 9:

> Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function. And it is inconceivable that any court will hold that rules which . . . put an end to a good cause of action, as in the case of a limitation or abatement of an action . . . are merely filling "up the details," even though they relate to remedial rights.

Id. at 11. A 1928 Senate Report repeated that "[i]t cannot be emphasized too strongly that the general rules of court contemplated under this bill will deal only with the details of the operation of the judicial machine." S. Rep. No. 440, 70th Cong., 1st Sess. 16 (1928).

Preclusion law has always been deemed to be too substantive to be incorporated in the federal rules of civil procedure. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1128 (1982) (quoting Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 59 (1977)). Thus, the original Advisory Committee rejected as exceeding its authority a strongly urged suggestion that the class action rule should include a provision as to the preclusive effects of a judgment on persons not parties to the action. *See* Burbank,

130 U. PA. L. REV. at 1164 n.637. The Advisory Committee's decision was "due to the feeling that such a matter was one of substance and not one of procedure." James W. Moore & Marcus Cohn, *Federal Class Actions – Jurisdiction and Effect of Judgment*, 32 ILL. L. REV. 555, 556 (1938).

Moreover, although Rule 14 originally included a provision on preclusive effects, the Committee deleted the provision in 1946 as beyond the rulemaking power. The 1946 amendment deleted the following sentence: "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff, or to the third-party plaintiff." The 1946 Advisory Committee Notes to Rule 14 explain that the sentence was "stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. *It is not the purpose of the rules to state the effect of a judgment.*" (emphasis added).

Similarly, a 1985 House Report on a bill that became 1988 legislation governing federal court rulemaking (Pub. L. 100-702, 102 Stat. 4648) stated that the House did not intend to "confer power on the Supreme Court to promulgate rules regarding matters, such as limitations and preclusion, that necessarily and obviously define or limit rights under the substantive law." H.R. Rep. No. 422, 99th Cong., 1st Sess. 21 (1985) (incorporated in section-by-section analysis of H.R. Rep. No. 889, 100th Cong., 2d Sess. 29 (1988)). A letter by the Chief Justice during consideration of the 1988 legislation recognized that "[t]he Judicial Conference and its committees on rules have participated in the rules promulgation process for over a half century. During this time they have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter." Letter from Hon. William H. Rehnquist to Hon. Peter W. Rodino, Jr. (Oct. 19, 1988), *reprinted in* 134 Cong. Rec. H10,430, H10,441 (daily ed. Oct. 19, 1988).

Accordingly, a noted scholar has concluded that the judiciary "lacks the power 'to promulgate rules regarding . . . limitations and preclusion.'" Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1033 (citation omitted). The history of federal rulemaking demonstrates that Rule 41(b) should not be construed as determining the preclusive effect of a limitations dismissal. To the extent it were read to have such a meaning, Rule 41(b) would be invalid – a point that, contrary to Lockheed's argument, is encompassed by the second question presented, as Semtek noted in its Petition for Certiorari at 28 n.22.

Rather than calling into question the legitimacy of Rule 41(b), this Court should follow the simpler path of construing the rule, in accordance with its text, as not addressing the question of preclusion law presented by this case. This Court has recognized the established practice of "interpret[ing] the Federal Rules . . . with sensitivity to important state interests and regulatory policies" and of "avoid[ing] conflict with important state regulatory policies." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 427 n.7, 438 n.22 (1996). In *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-52 (1980), for example, this Court construed Federal Rule 3 as not determining when a diversity action commences for the purposes of tolling the state statute of limitations. In *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943), this Court interpreted Federal Rule 8(c) as relating only to a matter of pleading and not to the burden of proof. Lockheed admits that neither *Walker* nor *Palmer* "gave the Federal Rule an unnecessarily expansive interpretation extending beyond its plain text and into the sphere occupied by a state rule." Lockheed Br. 26-27. Lockheed contends that this principle is inapposite here because there is no plausible alternative interpretation to Lockheed's overly ambitious reading of Rule 41(b) (Lockheed Br. at 27-28), but that contention is wrong. Rule 41(b) is better interpreted as a procedural rule affording a datum that the federal court regards its decision as "on the merits," for whatever

significance that has under the preclusion law of the applicable jurisdiction.

C. Lockheed's Interpretation of Rule 41(b) Would Produce Uncertainty

According to Lockheed, "Rule 41(b) preserves the discretion of district courts to specify that a dismissal is 'without prejudice' precisely to permit case-specific tailoring of a dismissal's preclusive effect." Lockheed Br. 24 n.11. Lockheed identifies no constraint on the rendering court's discretion to decide whether or not its dismissal will be "upon the merits." Indeed, constraints on the court's discretion would be unavailable because they would have to be located in the governing background principles of law that Lockheed contends have been swept aside by Rule 41(b). Lockheed even touts as an advantage the fact that, under its proposal, "the parties normally will not know in advance" what preclusive effect the federal judgment will have. Lockheed Br. 37. Compare PLAC Br. 21-22 (preclusion rule should provide "much-needed certainty," "a clear answer," and "predictability').

Lockheed thus interprets Rule 41(b) as a vast charter for discretionary decisionmaking in *all* cases, not just those involving limitations dismissals in diversity cases – a charter for policy choices that were never presented to Congress to review and that are shielded, according to Lockheed's view of *Hanna*, from the principles of federalism. Rule 41(b) would authorize a rendering federal court to prescribe not merely whether it regards its decision as "on the merits" but also the legal significance of that order as a matter of res judicata law. Lockheed suggests that this extraordinary result is not problematic so long as only the rendering court (and not the recognizing court) retains such freewheeling discretion. Lockheed Br 18-19. Lockheed is wrong. In describing the "uniform rule" (*United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950)), and "inflexible doctrine" of res judicata (*Wong Doo v. United States*, 265 U.S. 239, 241 (1924)), this Court has never suggested that the res judicata effect of federal judgments is to be

left to the discretion of individual district courts – whether the rendering *or* the recognizing courts.[7]

II. THE LAW OF THE FORUM STATE CONTROLS THE PRECLUSIVE EFFECT OF A FEDERAL DIVERSITY JUDGMENT

Ultimately, this is a case about federalism, not about Federal Rule 41(b). The argument that the rule of *Dupasseur* is an artifact of the Conformity Act (Lockheed Br. at 46-49) ignores the authoritative scholarship of Professor Burbank, *supra*, 71 CORNELL L. REV at 741-62, which establishes that the preclusion rules applied by the federal courts followed the source of the substantive law applied by the rendering court.[8] The emphasis on the source of the substantive law is also unmistakable in *Deposit Bank v. Frankfort*, 191 U.S. 499, 515-16 (1903) (describing *Dupasseur* as applying to cases "wherein the court derives its jurisdiction from the citizenship of the parties and in the exercise of the jurisdiction to administer the laws of the State where the proceedings are had"), and *Bigelow v. Old Dominion*

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[7] Ironically, under Lockheed's approach the district court in this case – had it been apprised of the full context in which it was acting – likely would have exercised its discretion to make plain that its dismissal precluded only the repleading and refiling of the complaint in California, and not a subsequent action in Maryland. *See* App. 65a, 71a & n.17.

[8] Lockheed quotes selectively from *Dupasseur* (committing the same error as Professor Degnan, *see* Burbank, *supra*, 71 CORNELL L. REV. at 749) and omits *Dupasseur*'s critical language that state res judicata law governed because the rendering federal court derived "its jurisdiction solely from the citizenship of the parties [and] was in the exercise of jurisdiction to administer the laws of the State" – not merely that "its proceedings were had in accordance with the forms and course of proceeding in the State courts." 88 U.S. at 135. As Professor Burbank has noted, the concept of "administering" state law is a clear reference to the Rules of Decision Act. *See* Burbank, *supra*, 71 CORNELL L. REV. at 749-50 n.65. In addition, the drafter of the headnotes in *Dupasseur* was Justice Bradley, the author of the Court's opinion, and headnote 3 leaves little doubt that the decision rested on the Rules of Decision Act rather than on the Conformity Act. 22 L. Ed. 588 (1875).

Copper Mining & Smelting Co., 225 U.S. 111, 129-30 (1912) (noting that federal court was "administer[ing]" state law).[9]

A. State Interests

The rule of *Dupasseur* vindicates important principles of federalism and diversity jurisdiction that are reflected in the *Erie* doctrine. Without the rule of *Dupasseur*, variations in state preclusion law would be overridden whenever federal courts sat in diversity, creating opportunities for forum shopping and risking inequitable administration of the laws.[10] "[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

Lockheed tries to deny the important interests of federalism at issue by arguing that there is uncertainty regarding California preclusion law. Lockheed Br. 30-32. But the systemic values served by the rule of *Dupasseur* do not depend on the particular circumstances of this case. This Court need not delve into California preclusion law in order to reverse the judgment below

[9] The issue in *M'Cormick v. Sullivant*, 23 U.S. (10 Wheat.) 192, 199 (1825) (cited at PLAC Br. 13 & n.6), was whether a federal diversity judgment was void for lack of subject-matter jurisdiction. Whether uniform federal law may determine the validity of federal judgments (see note 1, *supra*) says nothing about whether federal law controls the preclusive effect of judgments deemed valid under federal law.

[10] PLAC cites the elimination of these variations as reason to abandon *Dupasseur*. PLAC Br. 11 (federal "uniform answer" is preferable to state-law "patchwork"). But variation in substantive law (which res judicata is) is the essence of federalism and does not justify replacing state law with a federal straitjacket. *E.g.*, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). PLAC's claim that federal res judicata law would be less "unsettled" than state law (PLAC Br. 21) is beside the point and in any event unsupported by caselaw showing that the res judicata law of each state is at least as clear as that within the federal system. *See* Semtek Opening Br. 26.

and allow the meaning of California law to be decided by the Maryland courts on remand. Further, as the case comes to this Court, it has been assumed that a statute-of-limitations dismissal by a California state court does not foreclose suit in another forum offering a longer statute of limitations. App. 31a. The question presented stated that California preclusion law "would not impose a res judicata bar to the Maryland action," Petition for Certiorari at i, and Lockheed never disputed this statement in its brief in opposition and in fact conceded the point in the Maryland Circuit Court.[11]

In any event, Lockheed's description of California law is inaccurate. *Koch v. Rodlin Enterprises*, 273 Cal. Rptr. 438 (Ct. App. 1990), held that "a summary judgment granted on the grounds that the action is barred by the statute of limitations does not act as res judicata to preclude a subsequent action." *Id.* at 441. Even within California, a limitations dismissal has only issue-preclusive effect.[12]

Lockheed notes that the California decision in *Koch* was *intrajurisdictional* in nature – i.e., it concerned the ability of the plaintiff to bring a subsequent lawsuit within California itself. That is entirely unremarkable. Indeed, one would not expect California to seek to dictate the extraterritorial effect of its judgments. *Cf. Baker v. General Motors Corp.*, 522 U.S. 222

[11] *See* Tr. Oral Arg. at 16 (statement by Lockheed's counsel that, if the dismissal had been rendered by a California state court, "we would be arguing that the Court should give res judicata to that," but "we would be on the short end of that stick, to be perfectly candid with you").

[12] *See also Johnson v. City of Loma Linda*, 5 P.3d 874, 878, 884 (Cal. 2000) (dismissal of state sex discrimination claim based on laches does not bar subsequent federal suit); *Lackner v. LaCroix*, 602 P.2d 393, 395 (Cal. 1979) ("dismissal on limitations grounds is in no way dependent on nor reflective of the merits"); *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1319 (9th Cir.) ("a judgment based on the statute of limitations regarding a cause of action in one suit is not necessarily res judicata in a second suit, which pleads a different cause of action based on the same core of underlying facts"), *cert. denied*, 525 U.S. 963 (1998).

(1998). Lockheed's argument, in fact, proves our point: Lockheed's position (and the decision of the Maryland courts under review) necessarily gives greater effect to a federal diversity judgment than would be given to an identical judgment rendered by the state court in California, because (according to Lockheed) the federal judgment has *interjurisdictional* preclusive effects, while the California judgment does not. The proper analysis would respect the prerogatives of both California and Maryland by recognizing that California does not accord claim-preclusive effect to its limitations dismissals, that even if it did Maryland would be free as a matter of full faith and credit to permit suit on the same claim under its longer statute of limitations, and that Maryland has decided not to adopt a borrowing statute applying the statutes of limitations of other jurisdictions.

B. Federal Interests

There are no federal interests sufficient to displace state law with respect to the question presented by this case concerning the preclusive effect of a diversity judgment. To be sure, as *Dupasseur* acknowledged, the interpretation of a federal judgment is ultimately a federal question. 88 U.S. at 134-35. But "knowing whether 'federal law governs' . . . does not much advance the ball." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994). Even if this Court were to adopt a federal common law of preclusion that would trump *Erie* – and there are sound reasons to decline to do so – that federal common law should borrow state res judicata rules. *See* 18 Wright & Miller, *supra*, § 4472, at 734 (citing 1 Restatement (Second) of Judgments § 87 (1981)); Restatement (Second) of Conflict of Laws § 95 cmt. h (1988 rev.) ("When a federal judgment adjudicates claims under State law, State law, as a matter of federal law, may determine the effects of the judgment.").

Thus, federal law determines what substantive law a diversity court applies but mandates use of state substantive law (28 U.S.C. § 1652), including state statutes of limitations, *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), and state choice of law

rules, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), despite concerns that such an approach "would yield a patchwork of conflicting rules." PLAC Br. 11. *See also University of Tennessee v. Elliott*, 478 U.S. 788, 798-99 (1986) (articulating federal common-law rule to "serve[] the value of federalism" that federal courts must give the factfinding of a state agency acting in a judicial capacity the same preclusive effect to which it would be entitled in the state's courts). *See generally* Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1552-71 (1992).

The federal interest in the stability of federal court judgments is satisfied by the basic obligation of respect for federal judgments. It may also be the case that this interest requires uniform federal rules governing validity and finality (see note 1, *supra*) and a procedure (as provided by Rule 41(b)) for identifying those federal judgments regarded as being "upon the merits" for whatever significance governing background law may attribute to them. *See* Burbank, *supra*, 71 CORNELL L. REV. at 764-65, 780-81 n.226, 782-83, 793. Any remaining federal interest does not justify creating an entire body of federal res judicata law to govern diversity judgments.

Indeed, PLAC concedes that *Deposit Bank v. Frankfort* "can be read to suggest that the federal interests in a federal-court diversity judgment, as opposed to a judgment on a federal question, do not justify *creating* a federal-common-law rule of preclusion." PLAC Br. 16 n.7. The forum state (as supplier of the substantive law to be applied) has a stronger interest than the federal government in the outcome of most preclusion questions. In this case, for example, California has an interest in not having the effect of its statute of limitations stretched beyond what the state itself would provide. Further, any federal interest is contingent, because any subsequent litigation may occur (as here) in the courts of another state rather than in federal court.[13]

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[13] In this case, for example, both Semtek complaints were filed in state court. As the California federal court observed, "if the federal court system

PLAC's claim that federal law is needed for uniformity's sake (PLAC Br. 19-22) falls flat in light of the concession that Rule 41(b) does not supply the answer for all (or even a majority) of preclusion questions. *E.g.*, Lockheed Br. 36 (state law controls the res judicata effect of diversity judgments with respect to "the scope of the claims or causes of action precluded or the rules governing mutuality or privity of the parties"). Contrary to the suggestion at PLAC Br. 10-11, there is always power as a matter of federal common law to check or override any idiosyncratic feature of state law that is hostile to or discriminates against a particularized federal interest.[14] Not surprisingly, the authorities cited by Lockheed (Lockheed Br. 34-35) in fact express reservations about its argument.[15]

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is to be burdened by two successive federal actions in this matter, the burden will be caused by Lockheed's successive removals, not Plaintiff's successive state court complaints." App. 69a n.13.

[14] *Cf. Felder v. Casey*, 487 U.S. 131, 150-53 (1988) (federal law displaces state notice-of-claim statute); *Testa v. Katt*, 330 U.S. 386, 393-94 (1947) (state may not discriminate against federal law). *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962) (cited at Lockheed Br. 34-36), involved a dismissal for failure to prosecute a suit in federal court. The specialized federal interest implicated by penalty dismissals provides no support for the wide-ranging proposition endorsed by Lockheed that "[t]he same logic extends to all dismissals under Rule 41(b)." Lockheed Br. 36. In fact, penalty dismissals may be invoked only "in extreme circumstances," Richard H. Field *et al.*, CIVIL PROCEDURE 1144 (1997) (internal quotation omitted), and present an atypical example of a compelling federal interest.

[15] Professor Erichson states that, "[a]dmittedly, the *Erie* question is a close one. If we emphasize the federal interest in federal court litigation procedures, as I suggest is appropriate . . . federal law prevails. If we emphasize forum-shopping concerns and vertical uniformity, state law prevails." Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 1008 (1998). Professor Lilly states that the Federal Rules "[p]robably" do not "operate directly to dictate their res judicata consequences in other courts" and "under one view, could not, without running afoul of the Enabling Act." Graham C. Lilly, *The Symmetry of Preclusion*, 54 OHIO ST. L.J. 289, 320-21 & n.113 (1993).

C. Forum Shopping

In addition to serving the interests of federalism, honoring the Rules of Decision Act, and preventing the inequitable administration of state law, *Dupasseur* also prevents forum shopping. When they arise, preclusion issues often determine whether a lawsuit is dead or alive. Thus, while forum shopping will not occur in every case, it would be naive to pretend that the danger does not exist. PLAC's very appearance as an *amicus* in this case suggests that it recognizes the opportunities for forum shopping.

Lockheed's own conduct illustrates the danger. Lockheed removed the California action to federal court and then lodged a proposed judgment with the federal court specifying that the dismissal was "on the merits" – language that the district court had not used in its order of May 5, 1997. App. 58a. Lockheed thereby sought to transform a non-merits limitations dismissal into a federal judgment claiming full res judicata effect.[16]

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[16] Lockheed also unsuccessfully attempted to remove the Maryland action to federal court and to have the federal court in California enjoin the Maryland state-court action. Lockheed moved to transfer the Maryland action to California, but withdrew its motion after the California federal court indicated that it was not "obvious that res judicata would apply to bar Plaintiff's Maryland state court action." App. 65a. The Maryland Circuit Court did not deny that "Lockheed was the only party shopping for the federal forum." *Id.* 45a. By contrast, Semtek filed suit in Maryland after "additional investigation by Semtek revealed that much of the alleged tortious conduct occurred in Maryland." *Id.* 37a. Semtek cited a variety of Maryland contacts, including events that occurred in Maryland, documents originating there, and five current as well as two former Lockheed executives who were resident in Maryland. *See* Affidavit of Steven C. Shuman in Opposition to Motion to Transfer in *Semtek International Incorporated v. Lockheed Martin Corp.*, No. CCB-97-2386 (D. Md.). Semtek's choice of the Maryland forum was thus dictated by the location of witnesses and evidence.

III. EVEN IF RULE 41(b) CONTROLLED, IT WOULD NOT ACCORD PRECLUSIVE EFFECT TO LIMITATIONS DISMISSALS

Petitioner's primary position is that Rule 41(b) does not control this case because it does not embody a federal law of res judicata. Even under Lockheed's interpretation of Rule 41(b), however, the judgment below should be reversed because limitations dismissals are preliminary rather than on the merits under *Costello v. United States*, 365 U.S. 265 (1961). Lockheed claims that such a result is too disruptive to contemplate because *Costello*'s construction of Rule 41(b) applies to federal question as well to diversity cases. But Lockheed ignores the fact that even preliminary dismissals are entitled to issue-preclusive effect. Restatement (Second) of Conflict of Laws § 110, cmt. b (1988 rev.). Thus, a federal question case like *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (concerning claims under § 10(b) of the Securities Exchange Act), unlike a limitations dismissal in a diversity case, does not involve the possibility of a subsequent suit in a different forum applying a different law. Hence, the preclusive effect of a limitations dismissal in the federal question context is as a practical matter more extensive (simply by virtue of the nature of the plaintiff's claims) than in the context of a diversity suit founded on state law.

Lockheed's predictions of disruption are refuted by real-world experience. The traditional rule has long permitted a subsequent action in a different forum after a limitations dismissal. *See* Part I-B, *supra*. No ill effects have been shown. Although Lockheed contends that this rule has been superseded by the Restatement (Second) of Conflict of Laws (1988 rev.) (Lockheed Br. 32 n.20), that contention is incorrect. Section 110, comment a of the 1988 revision provides that "[a] judgment for the defendant is also *not on the merits* if it is based on the ground that the plaintiff's action is barred by the forum's statute of limitations . . . ." (emphasis added). *See also* § 110, cmt. b.

Lockheed contends that *Costello* is confined to "curable

defects," Lockheed Br. 42, but the language of the decision is not so limited. *Costello* held that Rule 41(b) was intended to incorporate the "common-law principle" that "dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." 365 U.S. at 285-86. One aspect of this "common-law" principle was the traditional rule regarding the limited effect of limitations dismissals on subsequent actions in different forums. The linkage is confirmed by the reference to limitations dismissals (in Restatement of Judgments § 49, cmt. a (1942)) in the 1963 Advisory Committee notes concerning the amendment of Rule 41(b). Moreover, limitations dismissals often are "curable" in the sense that new evidence may come to light regarding, for example, fraudulent concealment (as in *Koch v. Rodlin Enterprises*, 273 Cal. Rptr. at 440), or a plaintiff may "cure" the defect by bringing a new suit in a different forum with a longer limitations period – just as a plaintiff may cure a dismissal for improper venue by filing a new suit in a new court as Rule 41(b) expressly contemplates.[17]

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[17] Lockheed's argument is less a claim that limitations dismissals should be deemed to be "upon the merits" than it is a choice-of-law objection to the traditional rule allowing each forum state to apply its own statute of limitations, so that issue preclusion does not prevent subsequent lawsuits. The solution to this "problem" – if it is one – is not to mischaracterize Rule 41(b) but rather to adopt the kinds of choice of law principles reflected in Restatement (Second) of Conflict of Laws § 142 (1988 rev.), and the Uniform Conflict of Laws Limitations Act, 12 U.L.A. 46-49 (Supp. 1983). *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 778 n.10 (1984).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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