IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - -X

SEMTEK INTERNATIONAL :

INCORPORATED, :

Petitioner :

v. : No. 99-1551

LOCKHEED MARTIN CORPORATION :

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Washington, D.C.

Tuesday, December 5, 2000

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

MICHAEL GOTTESMAN, ESQ., Washington, D.C.; on behalf of The Petitioner.

WALTER E. DELLINGER, III, ESQ., Washington, D.C.; on Behalf of the Respondent.

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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

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

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

MR. GOTTESMAN: Well --

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

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

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

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tolling?

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

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

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

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

MR. GOTTESMAN: Well, surely, if California had

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

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

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

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

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

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

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

QUESTION: May I ask you, before you --

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

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

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

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

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

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

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

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

Secondly, that's not inadvertent. As the

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Federal law renvoi, so to speak.

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

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

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

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

MR. GOTTESMAN: Right.

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

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

QUESTION: No, no, no, there are all kinds of -- you know, peripheral matters --

MR. GOTTESMAN: Right.

QUESTION: -- and my law clerk told me that it's split on that, that there's a split in the circuits.

MR. GOTTESMAN: In the circuits, just as there is a split on this.

QUESTION: Well, then we're really deciding that when we decide this, I guess.

MR. GOTTESMAN: Well, the first step is to decide whether Rule 41(b) is the controlling answer. If it's not, you then have to decide, well, if it's not, what is, and I -- that's the second part of our argument, and our argument for what is, is that Dupasseur or Erie, we think they are both actually grounded in exactly the same principles.

QUESTION: Mr. Gottesman, at least 41(b) would govern if you tried to bring the very same case back in the district court in California, would you agree that far, that this would operate as an adjudication on the merits, it would be preclusive of any further claim? If the very same tort claim were reinstituted it would at least be preclusive of bringing it back to the very same court.

MR. GOTTESMAN: We would agree that it would be

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

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

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

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

QUESTION: Can this question be answered en

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

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

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

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

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

QUESTION: Yes.

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

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

MR. GOTTESMAN: It gets harder, Your Honor.

(Laughter.)

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

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

QUESTION: But it wouldn't be --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

California do that?

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

(Laughter.)

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

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

MR. GOTTESMAN: Right.

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

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

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

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

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

argument I'd prefer to leave to the briefs.

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

QUESTION: What about Justice --

MR. GOTTESMAN: I'm sorry.

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

MR. GOTTESMAN: Well --

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

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

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

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

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

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

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

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

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

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

MR. GOTTESMAN: Yes.

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

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

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

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

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

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

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

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

MR. GOTTESMAN: Right.

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

MR. GOTTESMAN: Claim preclusion.

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

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

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

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

I would like to reserve the remainder of my time.

QUESTION: Very well, Mr. Gottesman.

Mr. Dellinger, we'll hear from you.

ORAL ARGUMENT OF WALTER E. DELLINGER, III

ON BEHALF OF THE RESPONDENT

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

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

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

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point, a complete rule of preclusion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DELLINGER: In only Federal causes of action.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

QUESTION: Well, why? Why?

MR. DELLINGER: Because --

QUESTION: Yes.

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

MR. DELLINGER: Yes, right.

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

MR. DELLINGER: Yes.

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

MR. DELLINGER: It could well --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DELLINGER: Yes.

QUESTION: It does?

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

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

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

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

MR. DELLINGER: Let me go --

QUESTION: Now, is that right, or --

MR. DELLINGER: Yes.

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

MR. DELLINGER: Let me go directly to that point. Almost all of their arguments are in fact arguments that Judge Collins, the Federal district judge, got it wrong. To the extent that they believe that she got it wrong -- and there are a number of different arguments you could make.

You could make the argument that Justice Scalia is making that Judge Collins should have thought, and counsel for Semtek should have argued to her, don't make this dismissal a dismissal on the merits. Specify otherwise, for any one of a number of reasons, either because we think that it -- since this is a State law matter, State law doesn't make it preclusive. They didn't do that. They did not, after the dismissal comes down, and not only under Rule 41 -- they didn't file under Rule 59(e) --

QUESTION: And you're saying because they didn't, what would not have been preclusive under State law has now been made preclusive by this Federal judgment, and that brings you right up against the proposition that Rule 41(b) cannot make any substantive change.

I think that's a massive substantive change, to

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

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

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

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

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

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

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

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

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

merits or not.

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

MR. DELLINGER: No, it is not --

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

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

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

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

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

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

QUESTION: The point --

QUESTION: But the plaintiff didn't resort --

QUESTION: Exactly.

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

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

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

QUESTION: Well --

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

QUESTION: Mr. Dellinger, to what extent should

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

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

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

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

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

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

MR. DELLINGER: Yes.

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

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

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

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

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

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

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

(Laughter.)

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

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

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

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

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

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

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

don't see how you can --

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

QUESTION: It seems to me your --

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

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

MR. DELLINGER: If they mean any --

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

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

MR. DELLINGER: That's exactly right.

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

(Laughter.)

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

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

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

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

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

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

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

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

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

MR. DELLINGER: I'm sorry.

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

QUESTION: Thank you, Mr. Dellinger.

MR. DELLINGER: Thank you.

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

REBUTTAL ARGUMENT OF MICHAEL GOTTESMAN

ON BEHALF OF THE RESPONDENT

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

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

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effect of my decision will be.

Secondly, it would be --

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

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

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

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

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

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

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

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gottesman.

The case is submitted.

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

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