No. 15-458

IN THE

Supreme Court of the United States

ROCKY DIETZ,

Petitioner,

v.

HILLARY BOULDIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The question as presented in the petition for a writ of certiorari is:

Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case.

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CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATEMENT

1. On August 9, 2009, respondent Hillary Bouldin ran a red light at an intersection in Bozeman, Montana, and struck the passenger side of a car driven by petitioner Rocky Dietz. Pet. App. 2a; 04/16/13 Tr. 34-38, Dist. Ct. ECF No. 103. In 2011, Dietz sued Bouldin in Montana state court for negligence, seeking damages for "injuries including to his low back." Pet. App. 2a; J.A. 11. Based on the parties'

diverse citizenship, Bouldin removed the case to federal district court. J.A. 11.[1]

Before trial, Bouldin admitted that he was at fault, and that Dietz was injured in the collision. Pet. App. 2a; 04/17/13 Tr. 151, Dist. Ct. ECF No. 102. The parties also agreed that Dietz had incurred $10,136.75 in medical expenses because of the accident. Pet. App. 2a; 04/17/13 Tr. 227, 242, 257. The only issue in dispute at trial was how much Bouldin owed in additional damages, such as for pain and suffering and future medical expenses. 04/17/13 Tr. 244.

For two days in April 2013 in a small courthouse in Butte, Montana, the parties presented their evidence and arguments to a seven-member jury. J.A. 7-8. The evidence established that Dietz had various pre-existing conditions caused by numerous other incidents—including one just ten months before the accident in Bozeman, when he was dropped seventeen stories in an elevator. 04/16/13 Tr. 10, 56-57. Bouldin contested the extent to which Dietz's ongoing pain was the result of the car accident, as opposed to those previous incidents. Pet. App. 2a.

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[1]Dietz was a citizen of North Dakota and Bouldin was a citizen of Montana. Notice of Removal 2, Dist. Ct. ECF No. 1 (July 13, 2011). Because Bouldin was a citizen of the State in which Dietz brought the action, removal of the action to federal court was improper under 28 U.S.C. § 1441(b)(2). Dietz, however, waived this non-jurisdictional defect by failing to raise it within 30 days of removal. *See* 28 U.S.C. § 1447(c); *Lively* v. *Wild Oats Mkts., Inc.*, 456 F.3d 933, 942 (9th Cir. 2006). The defect did not affect the District Court's subject-matter jurisdiction over this case. *See* 28 U.S.C. § 1332(a)(1); *Grubbs* v. *Gen. Elec. Credit Corp.*, 405 U.S. 699, 702 (1972).

Bouldin also disputed how much medical treatment Dietz would actually require going forward. *Id.*

After the close of evidence, the District Court instructed the jury that the parties were bound by their admissions. 04/17/13 Tr. 222. During closing arguments, Bouldin's counsel reminded the jury of Bouldin's admission that Dietz was injured in the accident, *id.* at 227, and even went so far as to underscore that the $10,136 in past medical expenses were not in dispute: "Award those to Mr. Dietz. You should. That's your obligation under the law." *Id.* at 242. After acknowledging that Bouldin was "also responsible for other damages like pain and suffering, future treatment if you feel some is needed, and lost course of life," *id.* at 227-228, Bouldin's counsel suggested a total award "somewhere between ten and $20,000, depending on what you feel his relief is, what level of pain he has, and how his condition has been affected by this automobile accident." *Id.* at 244.

After the jury retired to deliberate, it sent a question to the court: "Has the $10,136 medical expenses been paid; and if so, by whom?" J.A. 36. Discussing the note with counsel, the court speculated: "If we end up with a verdict in less than that amount, and I can't believe that would happen, but if this is what we're heading toward, that would be grounds for a mistrial and I don't want a mistrial." *Id.* The court wondered whether the jurors "underst[ood] clearly, after the argument and the instructions, that their verdict may not be less than that amount." *Id.* Bouldin's counsel said he thought he had made that "crystal clear." J.A. 37. The court agreed, and Dietz's counsel did not voice any contrary view. *Id.* With the explicit consent of both sides' counsel, the

court responded to the jury: "The Court cannot provide this information. And it is not germane to the jury's verdict, in any event." J.A. 36-38.

The jury returned a verdict finding for Dietz but awarding him $0 in damages. Pet. App. 24a. Dietz's counsel declined to have the jury polled, and made no objection whatsoever to the verdict. *Id.* at 25a. The court then thanked the jurors and declared: "You're free to go. The jury's discharged." *Id.*

The jury left the courtroom. *Id.* Only then did Dietz's counsel ask to make a post-trial motion. *Id.* The court responded that there would be "plenty of time for post-trial motions" later. *Id.* The court then stood in recess. *Id.*

After a "fairly quick second thought," the court recalled the jurors. *Id.* at 26a. A "few minutes" had passed since the jurors had been told they were discharged. *Id.* at 31a. Speaking with counsel outside the jury's presence, the court explained that it had "just stopped the jury from leaving the building," after realizing that the $0 verdict was not "legally possible in view of stipulated damages exceeding $10,000." *Id.* at 26a. The court suggested "sending the jury back for continuing deliberations" "in the hopes" of avoiding the need for a new trial. *Id.*

Dietz's counsel only then objected. While acknowledging that the verdict was "obviously" "contrary to the undisputed evidence and the law," he argued that the jury was not capable of returning "a fair and impartial verdict at this point." *Id.* Dietz's counsel also said he thought he had seen jurors speaking with the clerk of the court following their dismissal, though he was "not at all" suggesting that they had

discussed the case. *Id.* at 26a-27a. The court reiterated that "none of [the jurors] had left the building," and asked the clerk whether any had "even left the [second] floor," where the courtroom was located. *Id.* at 28a. The clerk responded: "There was one that left the building to go get his hotel receipt * * * and to come bring it back." *Id.*

The court decided to "send the jury back into deliberations" with instructions that its verdict had to include "the medical bills plus a reasonable amount * * * for general damages." *Id.* The court did not wish "to just throw away the money and time that's been expended in this trial," *id.*, and so it rejected Dietz's request for a new trial and "a second bite at the apple." *Id.* at 29a.

After the jurors retook their seats, the court explained that their verdict was "not possible * * * under the law and the facts of this case." *Id.* at 30a. Given Bouldin's admissions that the accident had caused Dietz to incur $10,136.75 in medical expenses and to suffer "some injury," the court instructed the jury that its "verdict had to be $10,136.75 plus some other and additional reasonable amount as compensation for the injury." *Id.*

The court proceeded to *voir dire* the jurors. It asked the jurors whether they had spoken to anyone outside their "immediate numbers" about the case, and they answered "[n]o." *Id.* at 31a. One of the jurors explained that "[m]ost" of them had gone only "just outside the door" of the courtroom. *Id.* The court then expressed its understanding that "one juror had gone to the first floor," "maybe to get a hotel receipt." *Id.* A juror responded that he "did that," but "didn't talk to anybody." *Id.* When the

court addressed that particular juror individually, the juror again confirmed that he had not been "contaminated by any outside information." *Id.*[2]

Upon completing the *voir dire*, the court ordered the jury to re-deliberate and reach a verdict consistent with its clarifying instructions. *Id.* at 31a-33a. Because the court was "not equipped for a night session," it told the jurors that they would have to come back the following morning. *Id.* at 33a.

The next day, outside the jury's presence, Dietz moved for a mistrial. *Id.* at 35a-36a. The court denied the motion. *Id.* at 37a. The jury then completed its deliberations and returned a new verdict, awarding Dietz a total of $15,000 in damages. *Id.* at 38a, 40a. In accepting the verdict, the court, which had listened to all of the evidence during the preceding days, remarked that it was "satisfied we have had a fair and impartial jury, as well as an intelligent jury." *Id.* at 39a.

2. Dietz appealed, arguing that recalling the jury "impair[ed] [his] fundamental right to an unbiased jury trial." Dietz C.A. Opening Br. 21. The Court of Appeals for the Ninth Circuit held that "a court may recall a jury shortly after it has been dismissed to correct an error in the verdict, but only after making an appropriate inquiry to determine that the jurors were not exposed to any outside influences that would compromise their ability to fairly reconsider the verdict." Pet. App. 12a. "The court—and, if permitted by the court, counsel—can specifically

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[2]Unfortunately, Dietz's brief obscures this fact. *See* Dietz Br. 6 (asserting that the court "did not question each juror individually").

question the jurors" and, "through its evaluation of their responses and observations of the courtroom, determine whether recall is appropriate." *Id.* at 11a. This case-specific approach, the Court of Appeals concluded, "strikes a sensible balance between considerations of fairness and economy and allows for a cost-effective alternative to an expensive new trial." *Id.*

Turning to the facts of this case, the Court of Appeals upheld the District Court's finding that the jurors were not "in fact exposed to prejudicial outside influences during the brief period of the dismissal." *Id.* at 13a. The Court of Appeals pointed specifically to the District Court's colloquy with the jurors during *voir dire*, which "support[ed] the conclusion [that] the jury had not dispersed and interacted with any outside individuals, ideas, or coverage of the proceedings." *Id.* at 15a (internal quotation marks and brackets omitted). Accordingly, the Court of Appeals affirmed. *Id.* at 17a.

Judge Bea concurred in the judgment. Although he agreed with the majority's legal standard, he would not require a court to undertake a *sua sponte* inquiry into whether the jurors were exposed to outside influences. *Id.* at 18a-20a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

In his merits brief in this Court, Dietz has abandoned any claim that recalling the jury in this case violated his constitutional right to an unbiased jury. Taking an entirely different tack from his briefing below and certiorari petition, he now asserts that the District Court lacked authority for its actions under the Federal Rules of Civil Procedure, and that even if

the District Court had authority, this Court should exercise its supervisory powers to impose a new rule, reversing the judgment below. Dietz has forfeited these claims, and they are meritless in any event.

I. To begin, Dietz's new claims are not properly before this Court. In the courts below, Dietz argued that the jury, after being recalled, could not render a fair and impartial verdict under the Constitution. In his petition for certiorari, filed with the help of new counsel, Dietz continued to represent that the case presented a federal constitutional question, which had divided federal as well as state courts.

Having persuaded this Court to grant review, Dietz now changes course, arguing for the first time that the District Court lacked authority to recall the jury under the Federal Rules—rules that were never addressed below, and that of course do not even apply in the state courts Dietz asserted were part of the split in authority. Dietz may have come to realize that the constitutional claim he raised below was meritless, but that does not excuse this bait-and-switch. The writ should be dismissed as improvidently granted.

II. Dietz's new claims lack merit anyway. What a court can do, it has the inherent power to undo—particularly when necessary to ensure a just result and save time and resources. That is the power the District Court exercised here. After pronouncing the jury discharged, the court realized that the jury's verdict was invalid as a matter of law. So the court took the modest step of undoing its pronouncement of discharge, recalling the jury to render a new verdict and avoid a costly new trial.

Federal courts have exercised the inherent power to recall a jury for well over a century, and there is no indication whatsoever that the Federal Rules were intended to abrogate that long line of decisions. Those rules are simply silent on whether a court may undo a discharge. And so they do not divest a court of its inherent power to recall a jury—just as they do not disturb a court's inherent power to reopen the evidence after it has been closed, or recall the mandate after it has been issued.

Dietz disputes the historical support for the inherent power the District Court exercised here. But most of the decisions he cites reversing jury recalls rest on concerns about juror impartiality, not on any purported lack of judicial authority. Moreover, this Court's precedent makes clear that the guarantee of juror impartiality is derived from the Federal Constitution, which demands only that a jury be free of actual prejudice—a standard undisputedly met here.

Dietz's remaining counterarguments are equally unavailing. He contends that the District Court's actions were not absolutely necessary, but this Court has required only that a court's exercise of its inherent powers "be a reasonable response to the problems and needs that provoke [their use]." *Degen* v. *United States*, 517 U.S. 820, 823-824 (1996). Dietz also contends that the jurors ceased being jurors when they were declared discharged, but his only explanation for why—that the court no longer had authority over them—merely begs the question.

In any event, even if the District Court erred in dismissing and then recalling the jury, the error was harmless. Everyone agrees that if the court had excused the jurors after calling a recess, it could have

called the jurors back, re-instructed them, and ordered them to re-deliberate. The fact that the court instead declared the jurors discharged did not prejudice Dietz in any way. That is because, as the District Court found and the Court of Appeals affirmed, the jurors were not exposed to any outside influences during the brief time they were dismissed. Thus, even if there were a defect in the proceedings, it did not affect Dietz's substantial rights.

III. Finally, Dietz contends that even if the District Court had authority to recall the jury, this Court should reverse—not based on anything in the Constitution or any federal statute or rule, but rather by fashioning a new rule under its supervisory powers.

This Court should decline this invitation. For one thing, both the Constitution and the Federal Rules require a showing of actual prejudice to justify reversal in this context, and this Court has no warrant to override that requirement. For another, Dietz's proposed rule would undermine interests in fairness, finality, and economy by encouraging parties who want a second bite at the apple to wait until after the jury is discharged to object to the verdict; by delaying the resolution of a case until after it is retried; and by requiring all involved—the court, the parties, the lawyers, the witnesses, and society—to endure a burdensome new trial.

The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. DIETZ'S NEW CLAIMS ARE NOT PROPERLY BEFORE THIS COURT

Dietz makes two claims in his merits brief. First, he claims that "a federal court lacks the authority to recall discharged jurors for further service in a case." Dietz Br. 13 (boldface and capitalization removed). Second, he claims that even if "there is a valid basis for a federal court's exercise of authority to recall discharged jurors," this Court should exercise its supervisory powers to establish, "as a matter of 'sound judicial practice,' that recall is not permitted in these circumstances." *Id.* at 33.

If these two claims sound unfamiliar to the Court, that is because they are. Dietz never made either of them before. Not in the District Court. Not in the Court of Appeals. And not in his petition for certiorari, when his counsel changed. With no acknowledgment that these claims are new, Dietz raises them for the first time in his merits brief. Because these new claims have been forfeited and are not properly before this Court, the writ should be dismissed as improvidently granted.

A. Dietz's New Claims Were Not Pressed Or Passed Upon Below

When an "argument" is "not raise[d]" or "address[ed]" below, it is "forfeited." *United States* v. *Jones*, 132 S. Ct. 945, 954 (2012); *see also OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 398 (2015). The reason for this rule is straightforward. Parties are "responsible for advancing the facts and arguments entitling them to relief." *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008) (internal quotation marks omitted). And when they fail to do

so, this Court is deprived of "the benefit of thorough lower court opinions to guide [its] analysis." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012).

1. In the courts below, Dietz had every opportunity to make the claims that now appear in his merits brief; he simply failed to do so.

In the District Court, when Dietz eventually got around to objecting (after the jury had been dismissed), he did not cite the Federal Rules, or dispute the court's inherent power. Instead, he argued that recalling the jury violated his right to a "fair and impartial verdict." Pet. App. 26a; *see also id.* at 35a (arguing that the "discharge of the jury" had an "effect" on "sequestration" that "can't be cured"). That claim is altogether different from the ones he raises now. Just as a claim that Congress exceeded its enumerated powers is entirely distinct from a claim that it violated the Bill of Rights, so too a claim that a federal court lacked the authority to recall the jury is entirely distinct from a claim that it violated a party's right to a fair trial.

In the Court of Appeals, Dietz continued to insist that recalling the jury "impair[ed] [his] fundamental right to an unbiased jury trial." Dietz C.A. Opening Br. 21; *see also id.* at 23 (claiming a "deprivation of the right to a jury trial" (internal quotation marks omitted)); *id.* at 24 (arguing that the District Court violated "the notion of a free and unbiased jury"). According to Dietz, the District Court "violated [his] right to due process of law by denying him an impartial jury." Dietz C.A. Reply Br. 9; *see also id.* at 7 ("[T]he district court acted in a manner inconsistent with due process of law."). Dietz did make a few scattered, passing references to the "authority" of the

District Court and the "federal rules of procedure." Dietz C.A. Opening Br. 12-14; *see also* Dietz C.A. Reply Br. 11. But nowhere did Dietz discuss any sources of judicial authority, invoke the Court of Appeals' supervisory powers, or cite any particular federal rule—let alone argue that any rule had been violated. *See Halicki Films, LLC* v. *Sanderson Sales & Mktg.*, 547 F.3d 1213, 1229 (9th Cir. 2008) ("passing references" in a brief are "insufficient to preserve" a claim).

2. Given Dietz's litigation choices, it is no surprise that neither court below addressed the claims that now appear in his merits brief. When Dietz argued that the recall deprived him of a "fair and impartial verdict," Pet. App. 26a, the District Court rejected that claim, concluding: "I'm satisfied we have had a fair and impartial jury." *Id.* at 39a; *see also id.* at 29a, 37a. The court said nothing about its authority under the Federal Rules or any other source.

The Court of Appeals likewise decided only whether recalling the jurors "compromise[d] their ability to fairly reconsider the verdict." *Id.* at 12a; *see also id.* at 1a (same); *id.* at 15a (discussing "the right to an impartial, untainted jury"). If there is any doubt on this score, one need only look at what Dietz himself says. His merits brief expressly criticizes the court for not "considering the question in terms of whether a federal court has the authority to recall discharged jurors." Dietz Br. 33. Thus, even Dietz concedes that the court did not "consider[]" the central issue in his merits brief. *Id.*; *see also id.* at 11 ("The court of appeals ignored the absence of authority to recall discharged jurors * * * ."). The irony, of course, is that Dietz has only himself to

blame: The reason why the court never considered that claim is because he never raised it.

This Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Dietz did not raise his claims below, and the lower courts did not address them. Because Dietz forfeited those claims, the writ should be dismissed as improvidently granted.

B. Dietz's New Claims Were Not Included In His Petition For Certiorari

The writ should be dismissed for an additional reason: Even Dietz's petition for certiorari did not include any of the claims his merits brief now raises.

Under this Court's Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Rule 24.1(a) similarly admonishes that a petitioner's brief "may not raise additional questions or change the substance of the questions already presented in [the petition]." Together, these rules "help to maintain the integrity of the process of certiorari. The Court decides which questions to consider through well-established procedures; allowing the able counsel who argue before [the Court] to alter these questions or to devise additional questions at the last minute would thwart this system." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citation omitted).

The Court granted certiorari on a single question: "Whether, after a judge has discharged a jury from service in a case and the jurors have left the judge's presence, the judge may recall the jurors for further service in the same case." Pet. for Cert. I. "Put another way," Dietz explained in his petition, "the question presented by this case is what level of

protection is necessary to preserve" the "fundamental guaranty of a fair trial, as embodied in the *constitutional* right to a jury trial as well as the broader right to due process." *Id.* at 16 (emphasis added) (internal quotation marks omitted).

Throughout the certiorari stage, Dietz characterized the question presented as one of federal constitutional law. When Bouldin insisted that there was actually no "[c]onstitutional issue" in the case, Br. in Opp. 18, Dietz reiterated that "the fundamental *constitutional* guarantee of a fair trial" was at stake. Reply to Br. in Opp. 9 (emphasis added); *see also id.* (arguing that "a fair trial in a fair tribunal is a basic requirement of due process protected by the Fourteenth Amendment" (internal quotation marks omitted)). According to Dietz's petition, the question presented had divided not only the federal courts of appeals, but also dozens of state courts of last resort, in civil as well as criminal cases—which could be true only if the question were indeed a *federal constitutional* one. Pet. for Cert. 8, 14-15, 16-17; *see also* Reply to Br. in Opp. 9. Completely absent from Dietz's certiorari-stage filings was any citation of a federal rule of procedure, discussion of a court's inherent authority, or invocation of this Court's supervisory powers.

Imagine Bouldin's surprise, then, when Dietz filed his merits brief, arguing that "considering the question in terms of * * * 'strik[ing] a sensible balance between considerations of fairness and economy'" constituted "the wrong mode of analysis." Dietz Br. 33 (quoting Pet. App. 11a). Dietz now urges this Court to "h[o]ld that a federal court lacks the authority to recall discharged jurors, and stop[] there"—without reaching "considerations of fairness." *Id.* So

much for deciding "what level of protection is necessary to preserve" the "fundamental guaranty of a fair trial." Dietz's merits brief asks this Court to decide an entirely different question—not about a constitutional right, but about judicial authority; and not affecting federal *and* state courts, but affecting federal courts *only*.[3]

This Court should not countenance this bait-and-switch. Because Dietz has blatantly "change[d] the substance" of the question presented, S. Ct. R. 24.1(a), the writ of certiorari should be dismissed as improvidently granted. *See City of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1772-1774 (2015); *Taylor*, 503 U.S. at 645-646.

* * *

If Dietz had wanted this Court to address issues involving the Federal Rules and inherent powers, he should have done what petitioners do all the time: litigate the issues below, obtain a lower-court judgment addressing them, and include the issues in a petition for certiorari. *See* Pet. for Cert. i, 5-6, *Carlisle* v. *United States*, 517 U.S. 416 (1996) (No. 94-9247) (presenting issues involving Federal Rules and inherent authority, after they had been addressed below). But Dietz did none of that. His new claims should not be considered.

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[3]There is no split on whether the Federal Rules of Procedure prohibit recalling a jury. The only federal court of appeals to have reversed a jury recall did not even address that issue. *See Wagner* v. *Jones*, 758 F.3d 1030 (8th Cir. 2014). Had Dietz relied on the Federal Rules in his petition, the lack of any conflict would have been evident at the certiorari stage.

II. THE DISTRICT COURT HAD AUTHORITY TO RECALL THE JURORS

Were this Court to reach Dietz's claim that a federal court lacks authority to recall a jury, it should affirm the judgment of the Court of Appeals.

In this case, the District Court pronounced the jury discharged, and then undid that pronouncement, recalling the jury. Pet. App. 25a-26a. The District Court had the inherent authority to undo its pronouncement of discharge, and even if it did not, any defect in the proceedings was harmless.

A. A District Court Has The Inherent Authority To Undo A Pronouncement Of Discharge To Correct A Verdict And Avoid A Costly New Trial

1. Federal courts must follow the procedures mandated by the Federal Constitution, statutes, and rules. *See Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). But those laws do not spell out every possible action that a federal court may take. Where those laws are silent, federal courts retain inherent powers to manage the proceedings before them. *See* Fed. R. Civ. P. 83(b); *Thomas* v. *Arn*, 474 U.S. 140, 146 (1985); *Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936); *Fernandez* v. *United States*, 81 S. Ct. 642, 644 (1961) (Harlan, J., in chambers). Those powers are incidental to the "judicial Power" itself. U.S. Const. art. III, § 1. They are powers that "necessarily result to our courts of justice from the nature of their institution." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

When a federal court exercises its inherent power, it acts on "its own authority." *Degen*, 517 U.S. at 823. Its actions are the product of its own judgment,

not the judgment of democratic bodies. *See id.* For that reason, a court's inherent power "must be exercised with restraint and discretion." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 764 (1980). And to ensure that it is, this Court "require[s] its use to be a reasonable response to the problems and needs that provoke it." *Degen*, 517 U.S. at 823-824; *see also Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 244 (1993); *Joseph* v. *United States*, 135 S. Ct. 705, 705 (2014) (Kagan, J., respecting the denial of certiorari) ("That is not a high bar, but it is an important one.").

2. "Prior cases have outlined the scope of the inherent power of the federal courts." *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 43 (1991). From those cases emerge three settled principles.

First, a federal court has the inherent authority to "'correct that which has been wrongfully done by virtue of its process.'" *United States* v. *Morgan*, 307 U.S. 183, 197 (1939) (quoting *Arkadelphia Milling Co.* v. *St. Louis Sw. Ry.*, 249 U.S. 134, 146 (1919)); *see also Arizona* v. *Manypenny*, 672 F.2d 761, 765 (9th Cir. 1982) (Kennedy, J.) (explaining that the exercise of inherent power "to correct the legal process or avert its misfunction has been approved in varied circumstances"); *Cogan* v. *Ebden*, 1 Burr. 383, 384-385 (1757) (permitting the correction of a mistake in the verdict identified by juror affidavits). When, for instance, a judgment has been procured by fraud, a federal court has the inherent power to vacate that judgment. *See Chambers*, 501 U.S. at 44; *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 245 (1944). And when payment has been made on a judgment that is later overturned, a federal court has the inherent power to order restitution. *Nw. Fuel Co.* v. *Brock*, 139 U.S. 216, 219

(1891). The lesson of these cases is clear: When the judicial process results in error, a federal court has the inherent authority to fix it.

Second, there is a "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. Thus, a federal court has the inherent power to dismiss a suit *sua sponte* for failure to prosecute, so as to "prevent undue delays in the disposition of pending cases." *Link* v. *Wabash R.R.*, 370 U.S. 626, 629 (1962). It has the inherent power to assess attorney's fees against counsel, so as to punish counsel "who unreasonably extend court proceedings." *Roadway Express*, 447 U.S. at 757. And it has the inherent power to require the timely filing of objections to a magistrate judge's report, so as to promote "judicial economy" and prevent the "inefficient use of judicial resources." *Thomas*, 474 U.S. at 147-148. As these cases establish, federal courts have the inherent authority "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-631.

Third, a federal court has the inherent authority to modify, and even rescind, any order before final judgment. *See Marconi Wireless Tel. Co.* v. *United States*, 320 U.S. 1, 47-48 (1943); *John Simmons Co.* v. *Grier Bros. Co.*, 258 U.S. 82, 88 (1922); *City of Los Angeles* v. *Santa Monica Baykeeper*, 254 F.3d 882, 885-887 (9th Cir. 2001). For instance, after declaring the evidence closed, a federal court has the inherent power to reopen the evidence and let the parties present additional proof. *See Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971). After submitting a case to the jury, a federal court

has the inherent power to repossess the case and let the jury hear more evidence. *See United States* v. *Crawford*, 533 F.3d 133, 137-138 (2d Cir. 2008) (adopting the Fourth Circuit's view that "a district court does have discretion to reopen a case even after the jury has begun deliberations"); *United States* v. *Nunez*, 432 F.3d 573, 579 (4th Cir. 2005); *cf. United States* v. *Bayer*, 331 U.S. 532, 537-539 (1947). And after issuing its mandate, a federal court of appeals has the inherent power to recall the mandate and enter a new judgment. *See Calderon* v. *Thompson*, 523 U.S. 538, 549 (1998). These cases stand for a simple proposition: What a court can do, it has the inherent power to undo. *Cf. Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2415 (2015) ("What we can decide, we can undecide.").

3. Together, these principles establish that after a jury returns an invalid verdict and the district court pronounces the jury discharged, the court may recall the jury as a "reasonable response to the problems and needs" confronting the court. *Degen*, 517 U.S. at 823-824.

Take the facts of this case. The District Court did not recall the jury for just any reason; it did not, for instance, recall the jury merely because it disagreed with the jury's verdict, or because it thought the jury's deliberations too brief. Rather, the "problem * * * that provoke[d]" the recall was a verdict that was invalid as a matter of law. *Id.* at 824; *see* Pet. App. 26a (court explaining that its "reason" for recalling the jury was that "the verdict at zero dollars" was not "legally possible in view of stipulated damages exceeding $10,000"). The judicial process had produced a legally impermissible result. And by recalling the jury, the court sought to "correct that

which ha[d] been wrongfully done"—a textbook exercise of its inherent power. *Morgan*, 307 U.S. at 197.

Recalling the jury, moreover, met an essential "need[]," *Degen*, 517 U.S. at 824—the need for the court to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. Everyone agreed that the $0 verdict could not stand. Dietz's counsel, however, did not raise any objection until after the jury had been pronounced discharged. Absent a recall, then, the court would have had "no choice but to grant a new trial." Pet. App. 31a. And that would have imposed significant costs on all involved—the judge who must make room on his docket, the citizens who must serve as new jurors, the lawyers who must try the case a second time, and the witnesses who must appear to testify yet again. *See McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984) ("Trials are costly, not only for the parties, but also for the jurors performing their civic duty and for society which pays the judges and support personnel who manage the trials.").[4] By contrast, recalling the jury preserved "all the work" that had already gone into the trial, Pet. App. 29a, and allowed the case to proceed to a speedy and efficient resolution. *Id.* at 38a-39a. Recalling a jury thus falls squarely within a court's inherent authority to manage the proceedings "so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 630-631.

[4]Although the costs borne by witnesses in this trial may not have been exorbitant, in many other trials they very well could be. *See United States* v. *Mechanik*, 475 U.S. 66, 72 (1986).

Finally, recalling the jury was a "reasonable response"—a response "limited by," and tailored to, the "necessit[ies]" of correcting the verdict and avoiding the cost of a new trial. *Degen*, 517 U.S. at 824, 829. The court did not impose any new obligations on the parties or their counsel, or deprive them of any rights. *Cf., e.g.*, *Roadway Express*, 447 U.S. at 765 (upholding inherent power to impose sanctions); *Link*, 370 U.S. at 630-631 (upholding inherent power to dismiss suit). Instead, the court merely undid what it had done, rescinding its pronouncement, made only moments before, that the jury was discharged. The power to undo is inherent in every court. And in exercising it here, the court simply returned the parties to the status quo ante, prior to its pronouncement of discharge. *See Nw. Fuel*, 139 U.S. at 219 (upholding inherent power to "restore, as far as possible, the parties to their former position"). By (un)doing no more than was necessary, the court responded "reasonabl[y]" "to the problems and needs that provoke[d] it." *Degen*, 517 U.S. at 823-824.

In short, a district court has the inherent authority to undo a pronouncement of discharge to correct a verdict and avoid a costly new trial.

4. Indeed, federal courts have exercised this authority since at least 1885—a tradition that long predates the Federal Rules of Procedure. *See Burlingame* v. *Cent. R. of Minn.*, 23 F. 706, 706-707 (C.C.E.D.N.Y. 1885). Quoting from a treatise first published in 1889, the Fourth Circuit held nearly a century ago that "the mere announcement of [the jurors'] discharge does not, before they have dispersed and mingled with the bystanders, preclude recalling them." *Summers* v. *United States*, 11 F.2d 583, 586 (4th Cir. 1926) (quoting Austin Abbott, *A*

Brief for the Trial of Criminal Cases 730 (2d ed. 1902)); *see also* Austin Abbott, *A Brief for the Trial of Criminal Cases* 513 (1st ed. 1889) (same); 5 Ronald A. Anderson, *Wharton's Criminal Law and Procedure* § 2149, at 341 (1957) (same); *United States* v. *Lowery*, 64 F. App'x 879, 882 (4th Cir. 2003) (per curiam) (upholding jury recall).

Since *Summers*, five other circuits have held that a district court may recall a jury after the court has declared the jury discharged. *See* Pet. App. 13a; *Ira Green, Inc.* v. *Military Sales & Serv. Co.*, 775 F.3d 12, 24-26 (1st Cir. 2014); *United States* v. *Figueroa*, 683 F.3d 69, 73 (3d Cir. 2012); *United States* v. *Rojas*, 617 F.3d 669, 677-678 (2d Cir. 2010); *United States* v. *Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994). Even the Eighth Circuit's decision in *Wagner* v. *Jones*, 758 F.3d 1030 (8th Cir. 2014)—which ultimately reversed a recall because of concerns about juror prejudice—did not question the district court's inherent authority to undo a pronouncement of discharge. *See id.* at 1035 (implying that undoing a pronouncement of discharge would be permissible if the jurors were still in the courtroom).

Though the practice in federal courts is most relevant here, state courts have similarly upheld the authority of trial courts to recall a jury after the jury has been dismissed. *See Brister* v. *State*, 26 Ala. 107, 132 (1855); *Levells* v. *State*, 32 Ark. 585, 591 (1877); *Masters* v. *State*, 34 So. 2d 616, 620-621 (Fla. Dist. Ct. App. 1977); *Mitchell* v. *State*, 22 Ga. 211, 235 (1857); *Young* v. *State*, 136 S.E. 459, 459-460 (Ga. Ct. App. 1927); *Lahaina Fashions, Inc.* v. *Bank of Hawaii*, 319 P.3d 356, 367-368 (Haw. 2014); *People* v. *McNeeley*, 575 N.E.2d 926, 928-929 (Ill. App. Ct. 1991); *Taggart* v. *Commonwealth*, 46 S.W. 674, 675

(Ky. 1898); *State* v. *Fornea*, 140 So. 2d 381, 383 (La. 1962); *Nails* v. *S & R, Inc.*, 639 A.2d 660, 665 (Md. 1994); *Lapham* v. *E. Mass. St. Ry.*, 179 N.E.2d 589, 591 (Mass. 1962); *Anderson* v. *State*, 95 So. 2d 465, 467-468 (Miss. 1957); *Vancil* v. *Carpenter*, 935 S.W.2d 42, 46-48 (Mo. Ct. App. 1996); *Sierra Foods* v. *Williams*, 816 P.2d 466, 467 (Nev. 1991) (per curiam); *Drop Anchor Realty Tr.* v. *Hartford Fire Ins. Co.*, 496 A.2d 339, 345 (N.H. 1985); *Dearborn* v. *Newhall*, 63 N.H. 301, 302-303 (1885); *State* v. *Rodriguez*, 134 P.3d 737, 739-741 (N.M. 2006); *Rippley* v. *Frazer*, 149 A.D. 399, 403 (N.Y. App. Div. 1912); *Cole* v. *Laws*, 10 S.E. 172, 174 (N.C. 1889); *Newport Fisherman's Supply Co.* v. *Derecktor*, 569 A.2d 1051, 1053 (R.I. 1990); *State* v. *Myers*, 459 S.E.2d 304, 305 (S.C. 1995); *Webber* v. *State*, 652 S.W.2d 781, 782 (Tex. Crim. App. 1983); *Gardner* v. *Commonwealth*, 350 S.E.2d 229, 232-233 (Va. Ct. App. 1986); *State* v. *Roberge*, 582 A.2d 142, 144-145 (Vt. 1990).

5. None of this is to say that a court *must* exercise its authority to recall a jury. The law leaves the decision whether to recall the jury, or to instead hold a new trial, to the court's discretion, to be made on a case-by-case basis.

At the same time, that discretion is not unlimited. As noted, a federal court cannot exercise its authority in violation of the Federal Constitution. And it would violate the Due Process Clause, for example, to recall jurors who had lost their impartiality after being told they were discharged, or whose memories of the evidence had faded because of the passage of time. *See, e.g.*, *Skilling* v. *United States*, 561 U.S. 358, 385 (2010); *infra* pp. 45, 52. In his merits brief, however, Dietz does not argue that the District Court violated the Constitution in any way. The District

Court had the authority to recall the jury, and it did not abuse its discretion in doing so.

B. The Federal Rules Do Not Divest A Court Of Its Inherent Authority To Undo A Pronouncement Of Discharge

In arguing to the contrary, Dietz first relies on the Federal Rules of Procedure. According to Dietz, "[n]othing in the federal rules * * * *gives* a district court the authority to recall jurors after discharge for further service in a case." Dietz Br. 14 (emphasis added). But that is irrelevant. Because a federal court has the *inherent* authority to recall the jurors, it need not point to any *express* authority in the Federal Rules. Thus, the question is not whether the rules *authorize* a court to recall the jurors. Because a court inherently has the authority to do so, the question is whether the rules *divest* a court of that authority. *See Chambers*, 501 U.S. at 46 (asking whether the federal rules "displace[d]" a court's inherent power to sanction bad-faith conduct); *United States* v. *Nobles*, 422 U.S. 225, 234 (1975) (asking whether a federal rule "deprived" a court of its inherent power to order disclosure of evidence).

They do not. The federal rules say nothing about whether a federal court may undo a pronouncement of discharge by recalling the jurors. The rules are simply silent on the subject—just as they are silent on whether a court may reopen the evidence after it has been closed, repossess the case after it has been submitted to the jury, or recall the mandate after it has been issued on appeal. *See* Fed. R. Civ. P. 50(a)(2), 50(b), 51(a); Fed. R. App. P. 41; *supra* pp. 19-20. Accordingly, the rules leave undisturbed a court's inherent authority to recall the jury—just as

they leave undisturbed all of those other inherent powers of a court. *See* Fed. R. Civ. P. 83(b) (allowing a court to "regulate practice in any manner consistent with" federal and local rules); *Link*, 370 U.S. at 633 n.8 (citing Rule 83 for the proposition that a court may act even in the absence of a rule governing the situation); *Nobles*, 422 U.S. at 234-236 (holding that a federal rule that was silent on "trial practice" should not be read as displacing a court's powers "once trial has begun").

Dietz does not dispute the lack of any express prohibition on recalling the jury in the rules. Instead, he contends that the rules "necessarily *imply*" such a prohibition. Dietz Br. 14 (emphasis added). Dietz relies primarily on Civil Rules 48(c) and 51(b)(3), which govern the polling and instructing of the jury. *Id.* at 14-15, 17. Rule 48(c) provides that "[a]fter a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually." Rule 51(b)(3) provides that "[t]he court * * * may instruct the jury at any time before the jury is discharged."[5]

No court—not one—has ever adopted Dietz's reading of the rules. For good reason: Although Rules 48(c) and 51(b)(3) say what a court may do *before* a discharge, they say nothing about a court's power to *undo* a discharge. *See Fernandez*, 81 S. Ct. at 644 & n.7 (Harlan, J., in chambers) (recognizing that a federal rule providing that a defendant "shall be *admitted* to bail" did not withdraw a district court's

[5]Because citations to these rules did not appear in this case until Dietz's merits brief, we have reproduced the text of the rules in an addendum to this brief.

inherent authority to *revoke* bail (emphasis added)). Indeed, even assuming that those rules could be read as prohibiting a court from polling or instructing the jury *after* discharge, they would not stand in the way of what the District Court did here. That is because, by undoing the pronouncement of discharge, the court returned the case to the status quo ante, *before* the discharge had been announced. At that point, any polling or instructing of the jury was (once again) authorized by Rules 48(c) and 51(b)(3).

To read those rules as prohibiting recall would be particularly inappropriate in light of their affirmative language. Rules 48(c) and 51(b)(3) are phrased in terms of what a court "may" (or, in the case of a party's request for a poll, "must") do. The language of each rule affirmatively "authorizes" a court to do something. *Link*, 370 U.S. at 630. When confronted with similar language in *Link*—*i.e.*, "a defendant *may* move for dismissal of an action"—the Court declined to construe the rule as abrogating the inherent power of a court to dismiss an action on its own. *Id.* (emphasis added). The Court should decline to make the same leap here. It would make little sense to construe Rules 48(c) and 51(b)(3) as *restricting* a court's inherent authority to do one thing (*i.e.*, undo a pronouncement of discharge), just because they *grant* a court the authority to do something else (*i.e.*, poll and instruct the jury).

Indeed, the Federal Rules themselves warn against construing Rules 48(c) and 51(b)(3) in such a restrictive way. Civil Rule 1 provides that the rules "should be construed" to "secure the just, speedy, and inexpensive determination of every action and proceeding." Thus, any ambiguity in the rules should be construed in favor of preserving a court's inherent

power to undo a pronouncement of discharge and thereby allow a verdict to be corrected without the delay and expense of a new trial. Civil Rule 83(b), moreover, provides that "[a] judge may regulate practice in *any manner* consistent with" federal and local rules. (Emphasis added.) Rule 83(b) underscores that where, as here, the rules do not specifically prohibit a practice, a court may retain the inherent power to engage in it.

Dietz's reading of Rules 48(c) and 51(b)(3) also runs counter to the history of those rules. Those subsections were added in 2009 and 2003, respectively, against the background of a uniform body of federal court of appeals precedent permitting jury recalls. *See supra* pp. 22-23; *Carlisle*, 517 U.S. at 426 (reviewing cases "prior to the enactment" of the federal rule at issue). There is no indication whatsoever that those rules were intended to abrogate that long line of decisions. *See* Fed. R. Civ. P. 51 advisory committee's note to 2003 amendment (explaining that subsection (b)(3) was meant to "reflect[] common practice"). It should "require a much clearer expression of purpose than [the Rules] provide[] for [the Court] to assume that [they were] intended to" repudiate the outcomes in all of those cases. *Link*, 370 U.S. at 631-632; *see also Chambers*, 501 U.S. at 47 ("[W]e do not lightly assume that Congress has intended to depart from established principles such as the scope of a court's inherent power." (internal quotation marks omitted)). For all of these reasons, Rules 48(c) and 51(b)(3) do not displace a court's inherent authority to undo the pronouncement of a discharge.

Dietz's remaining rule-based arguments require little response. He contends that Civil Rules 50(b)

and 59 do not authorize a court to recall jurors. Dietz Br. 15-16. But there is no reason they would. Rules 50(b) and 59 govern motions for post-trial relief in the form of judgment as a matter of law and a new trial. Recalling a jury is altogether different from those two forms of relief, so no negative implication should be drawn from the fact that those rules do not mention recalling a jury.

Dietz also points to various Federal Rules of Criminal Procedure. Dietz Br. 16-18. But "this is a civil case," so those rules do not apply. *Id.* at 15 n.2. In any event, they are also silent on whether a court may undo a discharge, and for the reasons above, do not implicitly displace a court's inherent authority to do so. *See* Fed. R. Crim. P. 2, 57(b).

Finally, this case is far different from *Carlisle*. The question in *Carlisle* was whether a district court could grant a motion for judgment of acquittal filed one day beyond the time limit prescribed by Criminal Rule 29(c). 517 U.S. at 417-418. The Court answered no, because the rules were "plain and unambiguous": Criminal Rule 29(c) required that a motion be made within 7 days "after the jury is discharged," and Criminal Rule 45(b) provided that "the court may not extend the time limit for taking any action under Rul[e] 29." *Id.* at 420-421. Here, by contrast, there is no equivalent "may not" prohibition; rather, the rules are silent on whether a court may undo a pronouncement of discharge. And by undoing such a pronouncement, the court brings itself back within the "specified time period," Dietz Br. 24, for instructing and polling the jury under the Civil Rules. *See supra* p. 27.

Dietz contends, however, that if a court could undo a discharge, it would lead to a "[b]izarre[]" result: A court could reset the clock for filing a motion for acquittal under Rule 29(c) "through the simple artifice of recalling jurors and then once again discharging them." Dietz Br. 18. But there is no reason for concern. If recalling the jurors is just an artifice, it would not be a "reasonable" exercise of inherent authority under this Court's precedent. *Degen*, 517 U.S. at 823-824. In any event, Rules 29(c) and 45(b) have since been amended to allow courts to "render timely an otherwise untimely motion," Dietz Br. 18, simply by granting a request to file out of time. *See* Fed. R. Crim. P. 29 advisory committee's note to 2005 amendment; *id.* R. 45 advisory committee's note to 2005 amendment. The notion that a court would resort to recalling a jury merely to reset the clock is simply absurd.

C. Dietz's Remaining Counterarguments Lack Merit

Dietz makes other arguments against the District Court's authority in this case. Those arguments, too, lack merit.

1. Dietz's historical claim fails

Dietz contends that there is insufficient "historical support" for what the District Court did in this case. Dietz Br. 31. According to Dietz, no inherent power exists unless "the exercise of that power has a 'long unquestioned' history." *Id.* at 23 (quoting *Carlisle*, 517 U.S. at 426). In his view, that "requirement[]" was not satisfied here. *Id.*

a. Dietz's argument fails for a simple reason: This Court has never imposed such a "requirement[]." In the two cases on which Dietz relies—*Link* and *Car-*

lisle—the Court considered whether a claimed power had "long gone unquestioned" for only a narrow purpose: construing a federal rule of procedure. *Link*, 370 U.S. at 631-632; *see also Carlisle*, 517 U.S. at 426. When a claimed power has "long gone unquestioned," *Link*, 370 U.S. at 631, the Court will "not assume, in the absence of a clear expression," that the federal rule was intended to abrogate that power. *Carlisle*, 517 U.S. at 426; *see also supra* p. 28.

There is no basis for transforming this "cautionary principle" for construing a federal rule into a requirement for recognizing an inherent power. *Carlisle*, 517 U.S. at 426. This Court has recognized inherent powers in the past without considering whether they had long gone unquestioned. *See, e.g.*, *Thomas*, 474 U.S. at 146-148; *Roadway Express*, 447 U.S. at 764-767.

b. In any event, Dietz's historical argument fails on its own terms. As explained above, a federal court's authority to recall a jury following a pronouncement of discharge has long gone unquestioned. *See supra* pp. 22-23. Even among the States, there is a long history, dating to at least 1855, of courts recalling a jury after the jury has been dismissed. *See supra* pp. 23-24.

With only two exceptions, all of the cases Dietz's cites are inapt.[6] To begin, many of the decisions he cites actually *upheld* a court's order recalling a jury.

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[6]The two exceptions are *West* v. *State*, 92 N.E.2d 852 (Ind. 1950), and *Yonker* v. *Grimm*, 133 S.E. 695 (W. Va. 1926). Contrary to the vast weight of authority, those decisions appear to hold that a court lacks the authority to recall a jury once the court has pronounced the jury discharged.

See Summers, 11 F.2d at 586; *Brister*, 26 Ala. at 132; *Lahaina Fashions*, 319 P.3d at 367-368; *Fornea*, 140 So. 2d at 383; *Nails*, 639 A.2d at 665; *Myers*, 459 S.E.2d at 305; *Webber*, 652 S.W.2d at 782. Dietz falsely describes six of these cases as "hav[ing] *rejected* a rule permitting jury recall," Dietz Br. 30 (emphasis added), but they do just the opposite. Dietz's representations are simply wrong.

Like the decision below, most of the remaining decisions Dietz cites do not rest on "whether a * * * court has the authority to recall discharged jurors." Dietz Br. 33. Some lack any reasoning, so it is unclear what ground they rest on. *See Loveday's Case*, 77 Eng. Rep. 573 (1608); *Mills* v. *Commonwealth*, 34 Va. 751, 752 (1836). Others contain only dicta about recalling juries. *See Pumphrey* v. *Empire Lath & Plaster*, 135 P.3d 797, 805 (Mont. 2006); *Harrell* v. *State*, 278 P. 404, 406 (Okla. 1929). And still others rest on something other than a court's lack of authority—namely, concerns about juror impartiality. *See Ex parte T.D.M.*, 117 So. 3d 933, 940 (Ala. 2011) (per curiam) (purpose of rule is to prevent "appearance of impropriety"); *Spears* v. *Mills*, 69 S.W.3d 407, 413 (Ark. 2002) (purpose of rule is to "avoid even the appearance of any possible taint to the jury's verdict"); *People* v. *Hendricks*, 737 P.2d 1350, 1358 (Cal. 1987) (purpose of rule is "to guarantee a fair trial, * * * shielded from outside influences"); *Montanez* v. *People*, 966 P.2d 1035, 1037 (Colo. 1998) (purpose of rule is to "ensure that jury verdicts will not be tainted by any outside influence"); *Sargent* v. *State*, 11 Ohio 472, 474 (1842) (purpose of rule is "to insure the impartial administration of justice and the purity of jurors"); *State* v. *Nash*, 294 S.W.3d 541, 553 (Tenn. 2009) (purpose of

rule is to ensure that "jurors remain shielded from outside influences"); *Melton* v. *Commonwealth*, 111 S.E. 291, 294 (Va. 1922) (purpose of rule is to protect the "sanctity of jury trials" from "the hazard of suspicion").

To be sure, some of the decisions Dietz cites suggest limits on when a jury can be recalled—for example, holding that a jury cannot be recalled once it has "left the presence and control of the trial court." *Nash*, 294 S.W.3d at 550. But those limits rest not on any purported lack of authority to undo a pronouncement of discharge, but rather on those courts' views of when undoing such a pronouncement would raise concerns about juror impartiality. *Id.* at 553. The limits expressed in those cases thus have no bearing on the District Court's authority here.

Nor do these decisions carry weight even with respect to concerns about juror impartiality. For one thing, this Court's cases make clear that the guarantee of juror impartiality is derived from the Federal Constitution, which demands only that a jury be free of actual prejudice. *See, e.g.*, *Skilling*, 561 U.S. at 385; *infra* p. 45. Most of the decisions Dietz cites do not even reference the Federal Constitution. *See, e.g.*, *Spears*, 69 S.W.3d at 413; *Hendricks*, 737 P.2d at 1358-1360; *Sargent*, 11 Ohio at 474; *Melton*, 111 S.E. at 294. Instead, the limits that those decisions impose appear to be derived from free-floating notions of a fair trial, which have no basis in this Court's precedent. When viewed against the constitutional standard of actual prejudice, those limits are simply arbitrary. For example, the fact that a jury left the court's "presence or control" would not necessarily mean that it *was* exposed to prejudicial influences; nor would the fact that the jury remained

within the court's "presence or control" guarantee that it was *not* so exposed. *See* Pet. App. 11a ("[T]here is nothing talismanic about the courtroom door.").

For another thing, many of these decisions—including *Loveday's Case*, *Mills* v. *Commonwealth*, and *Sargent*—come from a different era, when jury sequestration for the entirety of deliberations was the rule, rather than the exception. The practice of mandatory sequestration started seven centuries ago in England, and lasted there until 1870. *See United States* v. *Piancone*, 506 F.2d 748, 749 n.1 (3d Cir. 1974); 2 Edward Coke, *The First Part of the Institutes of the Laws of England* § 366, at 227b (16th ed. 1809) ("By the law of England a jury, after their evidence given upon the issue, ought to be kept together in some convenient place, without meat or drinke, fire or candle * * * ."). In the United States, the practice persisted well into the twentieth century. *See United States* v. *Richardson*, 817 F.2d 886, 889 (D.C. Cir. 1987) ("Historically courts would not allow a jury to return home for the night during deliberations, even with an admonition. This circuit approved such a jury release only in 1921, others much later." (citations omitted)); Marcy Strauss, *Sequestration*, 24 Am. J. Crim. L. 63, 71 n.30 (1996) ("In 1995, New York became the last state to eliminate mandatory sequestration during deliberations in all felony trials."). Preventing the jurors from separating was thought necessary to ensure that they were not exposed to outside influences. *See Sargent*, 11 Ohio at 473-474; *Snell* v. *Bangor Steam Navigation Co.*, 30 Me. 337, 339 (1849). And if the law did not tolerate the jurors' separating during deliberations, it certainly would not tolerate their

separating afterward and being called back. *See Sargent*, 11 Ohio at 473-474. As Dietz acknowledges, however, the days when jurors had to be "kept together in seclusion for the duration of deliberations" have long passed. Dietz Br. 28. Today, judicial tools like jury instructions and *voir dire* are considered adequate to guarantee an impartial jury. Respect for those very same tools renders the decisions Dietz cites anachronistic.

For these reasons, the limits on recall recognized by many of the decisions Dietz cites are irrelevant or outdated. This case would fall within all but the narrowest of those limits in any event. As the Court of Appeals determined, at the time the jury was recalled in this case, it "had not yet dispersed." Pet. App. 13a; *see also id.* at 15a. "Most" of the jurors were "just outside the [courtroom] door," while one had "gone to the first floor" "to get a hotel receipt." *Id.* at 31a. Dietz contends that that one juror "left the courthouse altogether." Dietz Br. 2. But that was not the District Court's understanding. *See* Pet. App. 26a, 28a, 31a. And Dietz cannot carry his burden of proving otherwise by relying on a single stray remark by the clerk of the court. *See id.* at 28a; *id.* at 14a n.8 (noting that the record is "inconsistent" on this point).

Moreover, the jury had not mingled with any bystanders. In fact, the record does not reveal the presence of any bystanders at all—no press, no family members, no visitors on other business. That is not surprising given the setting: a small courthouse in Butte, Montana. When the court asked the jurors whether they had "talked to anybody about the case outside [their] immediate numbers," the jurors responded that they had not. *Id.* at 31a. The

juror who had gone to the first floor confirmed the same, stating unequivocally: "I didn't talk to anybody." *Id.* The only person with whom any juror may have spoken was the clerk of the court. *Id.* at 26a-27a. And she was no "bystander." The clerk is an officer of the court, who is in frequent contact with the jury as part of her job. *See Myers*, 459 S.E.2d at 305 (holding that a jury, which was dismissed to the custody of the clerk and then recalled, had no opportunity to mingle with or discuss the case with others); *Rodriguez*, 134 P.3d at 740 ("[B]ecause they are officers of the court, we decline to presume that court officials have contaminated a juror or the jury * * * .").

Finally, the jurors "remained under the *de facto* control of the court." *Sierra Foods*, 816 P.2d at 467. The court staff had no trouble finding all of the jurors and asking them to return. *See Masters*, 344 So. 2d at 620 (explaining that "the fact that [the jurors] were so readily re-assembled indicates" that they had not "in fact separated"). Each juror was still within the "call of the Court." *Willoughby* v. *Threadgill*, 72 N.C. 438, 440 (1875). Thus, even when viewed in light of other courts' concerns about juror impartiality—which have nothing to do with a federal court's inherent authority, have no basis in the Federal Constitution, and have roots in a bygone era of mandatory sequestration—the judgment below should stand.

c. Dietz relies on "[o]ther rules and practices at common law," Dietz Br. 27, but they do not provide historical support for his claim either.

Dietz cites *Jackson* v. *Williamson*, 100 Eng. Rep. 153 (1788), *Little* v. *Larrabee*, 2 Me. 37 (1822), and

Walters v. *Junkins*, 16 Serg. & Rawle 414 (Pa. 1827), for the proposition that a jury typically is not permitted to amend a verdict following discharge. Dietz Br. 27-28. But in each of those cases, the jury's verdict was perfectly proper; it was not incomplete, inconsistent, or otherwise legally impermissible. The jurors claimed merely to have intended the verdict to be something different, and the courts concluded that permitting a verdict to be amended, just because the jurors later expressed disagreement with it, would lead to great abuse. *See Walters*, 16 Serg. & Rawle at 415; *Little*, 2 Me. at 39-40; *Jackson*, 100 Eng. Rep. at 153. Those decisions do not address the court's authority to recall the jury in cases like this one, where the verdict was invalid as a matter of law and would not have been allowed to stand in any event.

Dietz's reliance on *Rex* v. *Wooler*, 105 Eng. Rep. 1280 (1817), is also misplaced. In that case, it was unclear whether all of the jurors had assented to the verdict, so the court ordered a new trial. *Id.* at 1282. The only question at that point was "whether that new trial should be had by the old or by a new panel." *Id.* at 1283. And the court decided that it "ought not to direct a new trial before the same persons." *Id.* *Wooler* stands for the unremarkable proposition that "where a new trial is granted, * * * it should be by a fresh jury." *Id.* at 1284. The case does not address the antecedent question of when a court can recall a jury instead of granting a new trial.

The last couple of common-law rules Dietz identifies are equally irrelevant. He notes that in Blackstone's day, a civil case would be dismissed if the plaintiff failed to appear in court to receive the verdict. Dietz Br. 29. But in such a case, there would be no need to recall the jury, because the

plaintiff would have forfeited his right to a verdict anyway. Dietz also says that it was a crime for a juror to receive outside information about a case. *Id.* But no one thinks that jurors should be asked to re-deliberate if they were exposed to outside influences following dismissal.

2. Dietz's claim that recalling the jury was not "necessary" fails

Dietz next contends that recalling the jury in this case was not " 'necessary to the exercise' of a federal court's other powers" or "sufficiently 'limited by the necessity giving rise to its exercise.' " Dietz Br. 31. But as explained above, the District Court's decision to recall the jury was a reasonable response to the necessities of correcting a verdict and avoiding a costly new trial. *See supra* pp. 20-22.

Dietz nevertheless insists that the power to recall a jury is not "necessary" because, even without that power, a court would still be able to function as a court and enforce its decrees. Dietz Br. 31. But in this context, as in many others, the word "necessary" "imports no more than that one thing is convenient, or useful, or essential to another." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 413 (1819). This Court has never restricted a court's inherent powers to those which are *absolutely* necessary. On the contrary, this Court has recognized that inherent powers may be "necessary only in the sense of being useful." *Chambers*, 501 U.S. at 47 n.12. Accordingly, this Court has required only that the exercise of inherent powers "be a reasonable response to the problems and needs that provoke [their use]." *Degen*, 517 U.S. at 823-824.

Still, Dietz maintains that recalling the jury can never be necessary because a court could always remedy an invalid verdict by granting a new trial instead. Dietz Br. 31-32. Quoting from a dissent, he contends that "'a court need not exercise inherent power if Congress has provided a mechanism to achieve the same end.'" *Id.* at 32 (quoting *Chambers*, 501 U.S. at 64 (Kennedy, J., dissenting)). But that is not the law. As the Court's opinion explained, "the inherent power of a court can be invoked even if procedural rules exist which [address the same problem]." *Chambers*, 501 U.S. at 49; *see also id.* at 50 ("But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules."). In any event, a new trial is no "substitute[] for the inherent power." *Id.* at 46. The reason is simple: Although both would remedy the verdict, a new trial would impose significant costs on the parties, the lawyers, the witnesses, the court, and society—while recalling the jury would not.

Dietz asserts that he is "unaware of any case in which this Court has held that considerations of expediency are sufficient to give rise to inherent authority." Dietz Br. 32. But no one suggests that expediency alone can suffice. Recalling the jury in this case was not only expedient, but also just (because it allowed for the correction of a wrongful verdict) and narrowly tailored (because it merely restored the status quo ante). *See supra* pp. 20-22. And though Dietz is unable to name any, many of this Court's inherent-power cases regard expediency, efficiency, and economy as key considerations. *See, e.g.*, *Degen*, 517 U.S. at 824 (inherent authority to

dismiss appeal while the party seeking relief is a fugitive "promotes the efficient, dignified operation of the courts" (internal quotation marks omitted)); *Thomas*, 474 U.S. at 147-148 (inherent authority to require the filing of objections is "supported by sound considerations of judicial economy" and prevents "inefficient use of judicial resources"); *Roadway Express*, 447 U.S. at 757 (inherent authority to sanction counsel deters counsel from "unreasonably extend[ing] court proceedings"); *Link*, 370 U.S. at 630-631 (inherent authority to dismiss *sua sponte* a suit for lack of prosecution promotes "the orderly and expeditious disposition of cases"); *Landis*, 299 U.S. at 254 (inherent authority to stay proceedings promotes "economy of time and effort").

3. Dietz's claim that the jurors ceased being jurors merely begs the question

Dietz offers a final reason why a court does not have authority to recall the jury: "Upon discharge, a juror ceases to be a juror." Dietz Br. 18. And why does "a juror cease[] to be a juror"? "[B]ecause," he says, "after discharge, the court no longer has authority over the jury." *Id.* at 22.

If this argument sounds circular, it is because it is. According to Dietz, the court lacks authority over the jurors because they have ceased to be jurors; and they have ceased to be jurors because the court lacks authority over them. Both the premise and the conclusion to Dietz's argument are the same. And so we end up exactly where we started: When does a court lack authority over the jurors?

Porret v. *City of New York*, 169 N.E. 280 (N.Y. 1929), does not help Dietz answer that question. *Porret* did not even involve a jury recall. Rather, the

jury in that case had separated for the night after delivering a sealed verdict. *Id.* at 280. When the jury reassembled the next morning, the trial judge refused to accept the verdict and sent the jury back to return a new one. *Id.* The New York Court of Appeals held that the trial judge did not err in doing so. *Id.* It contrasted the case before it with one where the jury "has been discharged altogether and relieved, by the instructions of the judge, of any duty to return." *Id.* "In such circumstances," the court opined, the jury "has ceased to be a jury, and, if its members happen to come together again, they are there as individuals." *Id.* But the case before it was different, the court explained, because "[t]he record does not fairly justify the inference that this jury had reassembled in any such desultory way." *Id.*

These passages are mere dicta, unaccompanied by any citation or source of law. They address the discretion of a New York state trial judge—not a federal district court. And they do not even describe the facts of this case. The jurors here did not "reassemble[] in any such desultory way"; they did not just "happen to come together again," as an unorganized group. *Id.* Instead, they were asked to come back by the court, for a particular reason: to correct their legally impermissible verdict. *Porret* says nothing about the authority of a federal court to recall a jury to do that. *Cf. Rippley*, 149 A.D. at 403 (upholding a jury recall under New York law).

Dietz hypothesizes a scenario in which a juror refuses to return after being told to come back. But there are countless points in a trial at which a juror could refuse to return; the moments following dismissal are not unique. Jurors, after all, are no longer sequestered throughout trial or even during

deliberations. *See supra* pp. 34-35. Instead, they are allowed to go their separate ways during recesses, during lunch, and at the end of the day; the jurors in this case took seven breaks that were noted on the record. J.A. 16, 18, 20, 24, 26, 29, 30. Following any such break, a juror could refuse to return, or could return but refuse to participate or deliberate. Should that happen, there is typically good cause to excuse the juror from service. *See* Fed. R. Civ. P. 47(c) (authorizing a court to "excuse a juror for good cause" during trial or deliberations); Fed. R. Crim. P. 23(b)(3) (similar). That would typically be true in Dietz's hypothetical as well. Dealing with these sorts of problems is usually left to a district court's sound discretion. *See, e.g.*, *United States* v. *Baker*, 262 F.3d 124, 129 (2d Cir. 2001). And there is no reason not to entrust district courts with the same discretion here.

Because the District Court had the inherent authority to recall the jury, the judgment below should be affirmed.

D. In Any Event, Any Defect In The Proceedings Was Harmless

Even if the District Court erred in dismissing and then recalling the jury in this case, the error was harmless.

Civil Rule 61 provides that "[u]nless justice requires otherwise, no * * * error by the court or a party * * * is ground for granting a new trial * * * . At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61; *see also* Fed. R. Crim. P. 52(a) (similar). This rule is "as binding as any statute," and this Court may not

invoke its supervisory powers to "circumvent" it. *Bank of Nova Scotia*, 487 U.S. at 254-255.

To appreciate the nature of the asserted error here, consider what all agree would have been an error-free proceeding. After the jury returns a $0 verdict, the court orders a recess and dismisses the jury. The court concludes that the verdict is legally impermissible and then calls the jurors back, re-instructs them, and orders them to re-deliberate. Everyone agrees that there would have been no error if the court had followed this procedure. *See* Dietz Br. 14-15, 40. Re-instructing the jurors and ordering them to re-deliberate were "action[s] which could have been taken, if properly pursued." *Nguyen* v. *United States*, 539 U.S. 69, 79 (2003).

The procedure followed in this case differed from the procedure above in only one respect: Instead of calling a recess, the court declared the jurors discharged. As a consequence, the jurors were no longer under the court's instructions not to discuss the case with others. The question, then, is whether this supposed defect affected Dietz's substantial rights.

The answer is no. The only way in which discharging the jury instead of calling a recess could have prejudiced Dietz is if the jurors were exposed to outside influences during the brief period following their dismissal. After questioning the jurors, the District Court found that they had not been "contaminated by any outside information." Pet. App. 31a. The Court of Appeals affirmed that finding, *id.* at 15a, and Dietz has never disputed it. *See Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts."). Because the

jurors remained impartial, the fact that they were pronounced discharged did not affect the outcome of the case. Indeed, courts have deemed similar errors in recalling discharged jurors harmless when, as here, there was no evidence of bias. *See Rojas*, 617 F.3d at 678 & n.5; *United States* v. *Davis*, 15 F.3d 1393, 1404 & n.3, 1409-1410 (7th Cir. 1994); *United States* v. *Huntress*, 956 F.3d 1309, 1316-1317 (5th Cir. 1992); *United States* v. *Moore*, 93 F. App'x 887, 892-893 (6th Cir. 2004); *Fornea*, 140 So. 2d at 383.

Because any defect in the proceedings did not affect Dietz's substantial rights, the judgment below should be affirmed.

III. THIS COURT SHOULD NOT EXERCISE ITS SUPERVISORY POWERS TO IMPOSE A NEW RULE LIMITING THE DISCRETION OF DISTRICT COURTS

Dietz contends that even if "there is a valid basis for a federal court's exercise of authority to recall discharged jurors," this Court should establish, "as a matter of 'sound judicial practice,' that recall is not permitted in these circumstances." Dietz Br. 33 (quoting *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 265 (2004)). This Court's supervisory powers, however, should "be sparingly exercised," *Lopez* v. *United States*, 373 U.S. 427, 440 (1963), and Dietz has provided no justification for their exercise here.

A. Dietz's Proposed Rule Would Undermine Fairness

1. Dietz urges this Court to exercise its supervisory powers in light of "profound concerns about the basic fairness of jury trials." Dietz Br. 34. According to Dietz, those concerns take the form of various "*poten-*

tial" risks—namely, that jurors "*may* be exposed to outside influence," that they "*may* simply change their minds," and that they "'*may* * * * be[] confused in the[ir] understanding of the instructions.'" *Id.* at 34-35 (emphases added).

But there is already a source of law addressed to "the basic fairness of jury trials": the Constitution. And while Dietz asserts that recalling jurors "implicates" the Constitution, he studiously avoids arguing that it *violates* it. *Id.* at 35. Despite pursuing that argument below, *see* Dietz C.A. Opening Br. 21; *supra* pp. 12-13, he now abandons it. For good reason. The Constitution guarantees the right to a fair trial—a trial before a "panel of impartial, indifferent jurors." *Murphy* v. *Florida*, 421 U.S. 794, 799 (1975) (internal quotation marks omitted). That is a right to a trial before a jury free of *actual* prejudice. *See, e.g.*, *Skilling*, 561 U.S. at 385; *Rivera* v. *Illinois*, 556 U.S. 148, 159 (2009); *Smith* v. *Phillips*, 455 U.S. 209, 215 (1982); *Remmer* v. *United States*, 347 U.S. 227, 229 (1954); *Dennis* v. *United States*, 339 U.S. 162, 171-172 (1950). It is not a right to a trial free of the "mere *opportunity*" for prejudice. *United States ex rel. Darcy* v. *Handy*, 351 U.S. 454, 462 (1956) (emphasis added) (internal quotation marks omitted). As this Court has made clear, a claim of "essential unfairness" must "be sustained not as a matter of speculation but as a demonstrable reality." *Id.* (internal quotation marks omitted).

Dietz nevertheless asks this Court to prohibit recalling a jury even in the absence of actual prejudice. This Court should decline that invitation. A showing of actual prejudice is required not only by the Constitution but by the Federal Rules. *See* Fed. R. Civ. P. 61; Fed. R. Crim. P. 52(a); *supra* pp. 42-44. This

Court cannot circumvent that requirement by fashioning its own rule, necessitating a new trial whenever there is a mere potential for prejudice. *See Bank of Nova Scotia*, 487 U.S. at 254 ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry * * * ."). In making actual prejudice the touchstone of the constitutional inquiry, this Court has never suggested that a different inquiry could be possible if the Court were only to "analyze the question under the supervisory power." *Id.* at 255 (internal quotation marks omitted).

Dietz maintains that his rule would give "better guidance" to lower courts. Dietz Br. 37. But even if that were true, Dietz's proposal should be directed at the Civil Rules Advisory Committee, not this Court. That committee is charged with considering changes to the rules after hearing from all interested parties. This Court should hesitate to impose on its own any rule that has not gone through that process. *Cf. Shannon* v. *United States*, 512 U.S. 573, 587 (1994) (declining to use the Court's supervisory powers to require a jury instruction that Congress could have, but did not, include in the relevant legislation).

2. Dietz's rule does not make sense in any event. As an initial matter, Dietz does not argue that any of the risks he identifies were present in this case. He does not argue, for example, that the jurors here may have been exposed to outside influences, or that the recall may have caused confusion or coercion. Thus, Dietz's concerns would not justify reversal in this case, even if they were legitimate in the abstract.

Dietz's concerns, however, are not even that. He fears that jurors "may be exposed to outside influence" once they have been declared discharged. Dietz Br. 34. But district courts have an age-old tool for uncovering such influence: *voir dire*. *Voir dire* is a well-established way of "ascertain[ing] whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried." *Connors* v. *United States*, 158 U.S. 408, 413 (1895); *see also Skilling*, 561 U.S. at 386-387 (praising the benefits of "in-the-moment *voir dire*"). This case illustrates the point. After recalling the jurors but before allowing them to re-deliberate, the District Court asked them whether they had talked to anyone about the case. Pet. App. 31a. Their answers established that they had not been "contaminated by any outside information." *Id.*

If Dietz had thought this *voir dire* insufficient, he could have objected or requested additional questions. He did not. *Id.* Nevertheless, he now contends that *voir dire* is inadequate to reveal bias acquired after a jury is dismissed, because that is a time when the jurors are not under instructions to avoid outside influences. Dietz Br. 37-38. But *voir dire* is an effective tool for uncovering bias, whenever acquired. In *Skilling*, for example, the Court held that *voir dire* was "well suited" to uncovering bias from publicity prior to trial—when, as here, the jurors were under no instructions to avoid outside influences. 561 U.S. at 384; *see also McDonough*, 464 U.S. at 554 (explaining that *voir dire* can expose even "unknown" biases on the part of a potential juror). A juror's responses during *voir dire* are not any less trustworthy just because the juror is being

asked about a time when he was not under the court's instructions.

Dietz also expresses concern that "jurors may simply change their minds after delivering the verdict" because "[d]elivering a verdict, and observing the reactions to it, are themselves psychologically significant events." Dietz Br. 34-35. He adds that giving the jury a chance to render a new verdict might lead to "confusion, unintended compulsion and, indeed, coercion." *Id.* at 35 (internal quotation marks omitted).

But if these concerns were taken seriously, a jury could *never* be told to go back and render a new verdict. After all, these same concerns would arise any time a jury delivers an invalid or inconsistent verdict, even before discharge. And yet, Dietz acknowledges that these concerns do not always stand in the way of sending the jury back to reach a different verdict. *See id.* at 14-15, 40. Indeed, the Federal Rules expressly authorize a court to "direct the jury to further consider its answers and verdict," Fed. R. Civ. P. 49(b)(3)(B), (b)(4), even after the jury has endured what Dietz calls the "psychologically significant," and perhaps "confus[ing]," event of delivering an inconsistent verdict. Dietz's argument proves too much.

Moreover, when the jury's initial verdict is legally impermissible, Dietz's concerns are entirely misplaced. A jury that renders an invalid verdict, contrary to the court's instructions, is already confused. *See* Pet. App. 28a ("Clearly, the verdict somehow is the result of misapprehension on the part of the jury as to their duties in setting damages."). The point of recalling the jury for further instruction and deliber-

ation is to clear up that confusion and allow it to change its mind. Because Dietz's concerns are inapt when, as here, the initial verdict is itself the product of confusion, there is no justification for the categorical rule he advocates.

According to Dietz, recalling a jury is also unfair because "the jurors have ceased to be a properly constituted jury." Dietz Br. 36. But that argument is circular, *see supra* p. 40, and lacks any support in the cases Dietz cites involving "improperly constituted tribunals." Dietz Br. 36. In each of those cases, the tribunal was improperly constituted because of an error affecting the composition of the jury or judicial panel itself. *See Nguyen*, 539 U.S. at 80 (Article IV judge was statutorily ineligible to sit by designation on a federal court of appeals); *Vasquez* v. *Hillery*, 474 U.S. 254, 263-264 (1986) (discrimination in the selection of a grand jury); *Davis* v. *Georgia*, 429 U.S. 122, 122-123 (1976) (per curiam) (improper criteria in the selection of a petit jury); *United States* v. *Am.-Foreign Steamship Corp.*, 363 U.S. 685, 691 (1960) (retired circuit judge was statutorily ineligible to participate in an en banc decision). Here, by contrast, there is no dispute that these seven jurors *could have* decided this case. *See Nguyen*, 539 U.S. at 79 (distinguishing between "an action which could have been taken, if properly pursued, and one which could never have been taken at all"); Dietz Br. 14-15, 40. The only defect, if any, was in the procedure the court followed. *See supra* p. 43. Because there was nothing wrong with the composition of the jury itself, the jury was not improperly constituted.

3. Far from promoting fairness, Dietz's proposed rule would actually undermine it.

For one thing, Dietz's supposed "bright-line rule" would undermine public confidence in the fairness and integrity of the judicial process by mandating new trials when they are plainly unnecessary. This case is far from the only one that fits that bill. Take the facts of *Lapham*. In delivering the jury's verdict, the foreman handed the clerk signed slips showing verdicts for the plaintiff. 179 N.E.2d at 590. The clerk read the verdicts in open court, and the jurors "nodded their heads in assent." *Id.* Only after the jury was dismissed and left the courtroom did the clerk discover that the foreman had also signed and submitted verdict slips for the defendant. *Id*. The court recalled the jurors and instructed them to decide which forms to submit. *Id.* at 590-591. The jury retired to discuss the matter and eventually returned with verdicts for the plaintiff. *Id.* at 591. Under Dietz's proposed rule, however, the court would have been unable to recall the jury for further instruction and deliberation, even to allow the jury to confirm its "intended" verdict. *Id.* The court would have been required instead to hold a costly new trial. Such an absurd consequence would make our judicial process appear less fair, not more so.

For another thing, Dietz's "bright-line rule" would encourage gamesmanship. A party unhappy with how the trial unfolded could simply remain silent while the jury was discharged. Under Dietz's rule, that would ensure that the jury could not be called back to correct even the most obvious of errors in the verdict. Far from being hypothetical, that is exactly what Dietz's counsel attempted to do here. Despite an error in the jury's verdict that he described as "obvious," Pet. App. 26a, Dietz's counsel sat on his hands while the court dismissed the jury, *id.* at 25a,

hoping to get a "second bite at the apple" in a new trial in front of a new jury. *Id.* at 29a. He objected only after the jury had been pronounced discharged. This behavior all occurred *after* he learned of the $0 verdict, which was, in effect, information that suggested the jury did not believe his client's allegations. Any rule that would encourage such gamesmanship diminishes the appearance of fairness in the judicial system.

B. Dietz's Proposed Rule Would Undermine Finality

Dietz contends that recalling jurors undermines the "finality of jury verdicts" by subjecting those verdicts to challenge. Dietz Br. 38. But when, as here, a jury returns a legally impermissible verdict, it is only a matter of time until that verdict is thrown out. If the court had not recalled the jury in this case, it would have discarded the $0 verdict soon enough—on Dietz's own motion. *See* Pet. App. 26a (Dietz's counsel arguing that "the verdict is contrary to the undisputed evidence and the law"); *id.* at 35a (Dietz's counsel moving for a mistrial). For Dietz to now express an "interest in [the] finality" of that verdict is quite extraordinary. Dietz Br. 38.

Moreover, there is no telling when this case would have been resolved if the court had granted Dietz's preferred remedy of a new trial. It might have been days, weeks, or even months until a new trial would have taken place. And yet, by recalling the jury, the court was able to enter final judgment *the very next day*. J.A. 10. Indeed, recalling a jury will *always* achieve finality sooner than a new trial.

Dietz warns that permitting recall would mean that jurors could be haled back into court long after

delivering a verdict. Dietz Br. 37-38. But no one is suggesting that a court's authority to recall a jury is unlimited. As noted, the Due Process Clause places important limits on when a jury can be recalled. That Clause prohibits recalling jurors after they can no longer be impartial, and after their memories of the evidence have faded. *See supra* p. 45; *United States* v. *Sweat*, 555 F.3d 1364, 1368 (11th Cir. 2009) (per curiam) (upholding decision not to hold an evidentiary hearing on juror prejudice, given the "likely fogging of memories" in the three months since the jury was dismissed); *United States* v. *Boone*, 951 F.2d 1526, 1532 (9th Cir. 1991) (noting that "the jurors' memories had probably begun to fade" in the three months after the verdict). Following dismissal, one would not have to wait long for either of those things to occur, preventing the jury from being recalled.

It should come as no surprise, then, that Dietz's parade of horribles has not materialized despite this country's long history of courts permitting recall. Dietz points to no actual instances of courts reopening cases "weeks[] or months later," or of jurors being "haled back into court" for a "life sentence" of service. Dietz Br. 38-39. On the contrary, courts have been judicious in their use of recall. *See, e.g.*, *Boone*, 951 F.2d at 1532 (declining to reconvene a jury over two years after trial); *United States* v. *Washington*, 819 F.2d 221, 224-225 (9th Cir. 1987) (declining to recall jury two years after trial). Absent evidence that the problems Dietz hypothesizes are real, this Court should not wield its supervisory powers to restrict the discretion of district courts across the country. *See, e.g., Intel*, 542 U.S. at 265 n.17 (noting that the problems that supposedly justified the Court's exer-

cise of supervisory powers "seem[ed] more imaginary than real" because there was "no evidence whatsoever" that those problems had materialized in 40 years).

C. Dietz's Proposed Rule Would Undermine Efficiency

Finally, Dietz asserts that "it is far from clear that recall would always be a more efficient alternative than other procedures for remedying an invalid or ambiguous verdict." Dietz Br. 40. Once the jury was dismissed in this case, however, the only alternative to recall was a new trial. And recalling a jury is *always* more efficient than holding a new trial.

Dietz points out that under Civil Rule 59, he would have had 28 days after judgment to file a motion for a new trial challenging the jury's $0 verdict. *Id.* But the fact that Dietz could have waited 28 days to file such a motion only highlights the efficiency of recalling the jury and obtaining a new verdict the next day. The Court should not deny district courts the discretion to avoid costly new trials by recalling a jury. Because Dietz's proposed rule would undermine fairness, finality, and efficiency, it should be rejected.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

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FEDERAL RULES OF CIVIL PROCEDURE

Civil Rule 1 provides:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

Civil Rule 48 provides:

> (a) Number of Jurors. A jury must begin with at least 6 and no more than 12 members, and each juror must participate in the verdict unless excused under Rule 47(c).
>
> (b) Verdict. Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.
>
> (c) Polling. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.

Civil Rule 50 provides:

> (a) Judgment as a Matter of Law.
>
> (1) *In General.* If a party has been fully heard on an issue during a jury trial and the

court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, as-

sert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

Civil Rule 51 provides:

(a) Requests.

(1) *Before or at the Close of the Evidence.* At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) *After the Close of the Evidence.* After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) *How to Make.* A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) *When to Make.* An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) *Assigning Error.* A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) *Plain Error.* A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Civil Rule 61 provides:

> Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Civil Rule 83 provides:

> (a) Local Rules.
>
> (1) *In General.* After giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with—but not duplicate—federal statutes and rules adopted under 28 U.S.C. §§ 2072 and 2075, and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. A local rule takes effect on the date specified by the district court and remains in effect unless amended by the court or abrogated by the judicial council of the circuit. Copies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.
>
> (2) *Requirement of Form.* A local rule imposing a requirement of form must not be enforced in a way that causes a party to lose

any right because of a nonwillful failure to comply.

(b) Procedure When There Is No Controlling Law. A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and the district's local rules. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.