No. 16-1040

In The Supreme Court of the United States

CITY OF ANAHEIM, a California municipal entity, and OFFICER NICHOLAS BENNALLACK, an individual,

Petitioners,

vs.

ESTATE OF MANUEL DIAZ, and GENEVIEVE HUIZAR, an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF PETITIONERS

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QUESTIONS OF CONCERN TO THE *AMICI* RAISED BY THE DECISION OF THE NINTH CIRCUIT[1]

1. Did the Ninth Circuit err in adopting – in apparent conflict with every other circuit – a rule that the question of whether a district court abused its discretion in denying a motion to bifurcate can be decided based solely on what happened at trial following the denial of the motion to bifurcate, rather than basing that decision on the information available to the district court at the time it made its order and on which the district court in fact based its order?

2. Did the Ninth Circuit err in adopting – in conflict with other circuits – a rule that the giving of limiting instructions to a jury will generally ***not*** be an adequate means of curing potential prejudice associated with the admission (for a limited purpose) of certain evidence, and that instead the preferred means of

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[1] No counsel for a party authored the following *amici curiae* brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No persons other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

The *amici curiae*, through their counsel, ensured that the counsel of record for the petitioners herein received notice of their intention to file an *amici curiae* brief at least 10 days prior to the due date for the *amici curiae* brief. Counsel of record for the respondents herein received notice of intention of the *amici curiae* to file an *amici curiae* brief eight days prior to the due date for the *amici curiae* brief. All parties, through their counsel, consented to the filing of this brief, and copies of their respective consent letters will be submitted to the Court with this *amici curiae* brief.

dealing with that potential prejudice is to bifurcate the trial?

STATEMENT OF IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The International Municipal Lawyers Association ("IMLA") is a non-profit, nonpartisan professional organization consisting of more than 2,500 members. The membership is comprised of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The League of California Cities ("the League") is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians.

The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

IMLA and the League have an interest in ensuring that district courts remain free to fully exercise their discretion when it comes to deciding whether or not to bifurcate trials. IMLA and the League are concerned that the holding on this issue as set out in the published opinion in this case will lead to district judges feeling compelled to grant motions to bifurcate in almost all circumstances, thereby prejudicing the ability of all parties to get full and fair trials based on the jury's consideration of all of the relevant evidence. IMLA and the League submit this *amicus* brief to more fully address this concern, so that such undesirable results can be avoided.

SUMMARY OF ARGUMENT

The International Municipal Lawyers Association and League of California Cities submit this amicus brief to address their concern that the Ninth Circuit has radically changed the manner in which decisions denying motions to bifurcate trial are to be evaluated

on appellate review, and has severely limited the discretion afforded district courts in ruling on such motions.

Until this decision, it was generally understood that a court of appeals, in evaluating whether a district court abused its discretion by denying a motion to bifurcate a trial, would look at the evidence and arguments presented to the lower court in relation to that motion and determine whether the district court's ruling was, at the time it was made and in light of the evidence and arguments presented to the lower court, "beyond the pale of reasonable justification under the circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

But that isn't what the Ninth Circuit did in the present case. Instead, the appellate court's analysis of whether the district court abused its discretion in denying the motion to bifurcate focused exclusively on what happened during the trial ***after*** that ruling was made, not on the factors that led the district court to make that ruling in the first place. The court's decision essentially creates a new and unique standard of review for the denial of motions to bifurcate.

The Ninth Circuit claims that it is not "announcing a rule that requires district courts always, usually, or frequently to bifurcate damages from liability", *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 603 (9th Cir. 2016), but that is exactly what it has done by establishing a rule that evaluates the district court's exercise of discretion by what happens at trial after that

decision is made, without regard to whether the decision, at the time it was made, reasonably appeared to the district court to be "among its 'permissible' options". *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009).

There is no precedent for such a standard of review, and no justification for creating it as the means for reviewing decisions to deny motions to bifurcate. Allowing such a new standard of review will likely result – and in fact has already resulted – in district judges feeling compelled to grant such motions in almost all circumstances, thereby prejudicing the ability of parties to get full and fair trials based on the jury's consideration of all of the relevant evidence, and in fact this is occurring in district courts in the Ninth Circuit.

In addition, this decision reverses the long-established understanding "that bifurcation is the exception, not the rule", *Daniels v. City of Sioux City*, 294 F.R.D. 509, 511 (N.D. Iowa 2013) (citations and internal quotation marks omitted) and instead appears to impose a rule that, in general, bifurcation should be used to avoid prejudice rather than limiting instructions. This is at odds with the rule generally applied in the federal courts.

For all these reasons, the *amici* urge this Court to grant the pending petition for writ of certiorari.

LEGAL ARGUMENT

1. Until This Decision, The Ninth Circuit Followed A Well-Established Standard Of Review For Evaluating Rulings On Motions To Bifurcate, One Consistent With The Standards Followed In Other Circuits

Until this decision, the standard of review followed in the Ninth Circuit for evaluating rulings on motions to bifurcate was well-established, as the opinion itself alludes to:

> We review for abuse of discretion the district court's rulings on whether to bifurcate a trial. *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 575 (9th Cir. 1995). Under this standard, we reverse only when we are "convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

Estate of Diaz v. City of Anaheim, *supra*, 840 F.3d 592, 601 (9th Cir. 2016).

Obviously, whether the district court's ruling constituted an abuse of discretion has to be evaluated in the light of the purpose of bifurcation, which is "[f]or convenience, to avoid prejudice, or to expedite and economize". Federal Rules of Civil Procedure rule 42(b). However, as the Ninth Circuit had explained in *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004), "Rule 42(b) merely allows, but does not require, a trial court to bifurcate

cases 'in furtherance of convenience or to avoid prejudice.'"

In addition, whether a district court abused its discretion had to be evaluated in light of the evidence before it at the time it exercised that discretion. The district courts in the Ninth Circuit, like the district courts in every other circuit, followed the rule that the party seeking bifurcation had the burden of proving that bifurcation was required. See, e.g.:

FIRST CIRCUIT:

> *Chapman v. Bernard's, Inc.*, 167 F. Supp. 2d 406, 417 (D. Mass. 2001)

SECOND CIRCUIT:

> *Ake v. GMC*, 942 F. Supp. 869, 877 (W.D.N.Y. 1996)

THIRD CIRCUIT:

> *Griffith v. Allstate Ins. Co.*, 90 F. Supp. 3d 344, 346 (M.D. Pa. 2014)

FOURTH CIRCUIT:

> *F & G Scrolling Mouse L.L.C. v. IBM Corp.*, 190 F.R.D. 385, 387 (M.D.N.C. 1999)

FIFTH CIRCUIT:

> *Crompton Greaves, Ltd. v. Shippers Stevedoring Co.*, 776 F. Supp. 2d 375, 402 (S.D. Tex. 2011)

SIXTH CIRCUIT:

Schlegel v. Li Chen Song (N.D. Ohio, Aug. 28, 2008, No. 3:06 CV 1770), 2008 WL 4113959, at *2; 2008 U.S. Dist. LEXIS 85377, *4

SEVENTH CIRCUIT:

Real v. Bunn-O-Matic Corp., 195 F.R.D. 618, 620 (N.D. Ill. 2000)

EIGHTH CIRCUIT:

Daniels v. City of Sioux City, 294 F.R.D. 509, 511 (N.D. Iowa 2013)

NINTH CIRCUIT:

Burton v. Mt. W. Farm Bureau Mut. Ins. Co., 214 F.R.D. 598, 612 (D. Mont. 2003)

TENTH CIRCUIT:

Belisle v. BNSF Ry. Co., 697 F. Supp. 2d 1233, 1250 (D. Kan. 2010)

ELEVENTH CIRCUIT:

Brown v. Toscano, 630 F. Supp. 2d 1342, 1345 (S.D. Fla. 2008)

DISTRICT OF COLUMBIA CIRCUIT:

United States v. Duran, 884 F. Supp. 529, 530 (D.D.C. 1995)

It goes without saying that it is not an abuse of a court's discretion to deny a motion where the moving party fails to meet his or her burden of proof on that motion. See, e.g., *Guzman v. Mukasey*, 278 Fed. Appx.

789, 790 (9th Cir. 2008). As the Ninth Circuit explained in *Harman*, *supra*, 211 F.3d at 1175:

> Normally, the decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification ***under the circumstances***. [Citation.]

(Emphasis added.)

The Tenth Circuit addressed this point in its decision in *United States v. Hill*, 786 F.3d 1254, 1273 (10th Cir. 2015). In that case, as here, the appellant had made "a motion in limine to exclude evidence of gang affiliation, arguing that the evidence was both irrelevant to his charges and unfairly prejudicial to him", which motion was denied. *Id.* at 1257. On appeal, the appellate court, while "acknowledg[ing] two points that support Dejuan's contention here", nonetheless affirmed the defendant's conviction. *Id.* at 1273.

> Having acknowledged these issues, how do we still reach the conclusion that the introduction of this evidence was not an abuse of discretion? Simply stated, both of the points we noted in favor of Dejuan are subject to hindsight bias. At the time of the district court's decision regarding Dejuan's motion in limine, the alleged co-conspirators had been indicted as members of the same global conspiracy. As noted above, this made the probative value of the evidence regarding Dejuan's alleged gang affiliation considerable.

Id. at 1273-1274. See also *United States v. Bennett*, 460 F.2d 872, 880-881 (D.C. Cir. 1972):

> Of course, the trial court could not have predicted at the outset of Bennett's first trial that permitting Dr. Kunev to testify on the issue of insanity before the merits had been determined would prejudice the defense on the merits. We emphasize, therefore, that the failure to order a bifurcated trial was not reversible error.

So, prior to this decision, there did not seem to be any dispute in the Ninth Circuit, or in any other circuit, that the proper method to evaluate whether a district court abused its discretion by denying a motion to bifurcate a trial required the reviewing court to look at the evidence and arguments presented to the lower court in relation to that motion and to determine whether the district court's ruling was, ***at the time it was made and in light of the evidence and arguments presented to the lower court***, "beyond the pale of reasonable justification under the circumstances." *Harman*, *supra*, 211 F.3d at 1175. (See also *United States v. Hinkson*, *supra*, 585 F.3d 1247, 1262 (9th Cir. 2009): "[T]he second step of our abuse of discretion test is to determine whether the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.' ")

But the Ninth Circuit rejected all of this in its decision in the present case.

2. The Ninth Circuit's Analysis Of Whether The District Court Abused Its Discretion In Denying The Motion To Bifurcate Focused Exclusively On What Happened During The Trial After That Decision Was Made, Not On The Factors That Led The District Court To Make That Decision In The First Place

In its published opinion in this case, the Ninth Circuit noted that the district court denied the plaintiff's motion to bifurcate liability and damages except as to the issue of punitive damages. "The district court briefly explained that neither prejudice nor the complexity of the issues warranted bifurcating liability from compensatory damages, and that limiting instructions would cure any potential prejudice." *Diaz*, *supra*, 840 F.3d at 597.

But at no point thereafter in the opinion did the appellate court even suggest that at the time the district court made its ruling, those findings "were beyond the pale of reasonable justification under the circumstances", or illogical, implausible, or without "support in inferences that may be drawn from the facts in the record", much less offer an explanation and justification for such a conclusion. Rather, the court focused its discussion on what happened during the trial, after the decision on the motion to bifurcate had been made.

It is worth pausing for a moment to remember that the Ninth Circuit panel hearing this case chose, for whatever reason, to base its decision to reverse solely on its conclusion that the district court abused its discretion in denying the motion to bifurcate. That

panel could, at least in theory, have found that evidentiary rulings made during the trial, or the conduct of the parties and witnesses during the trial, were such as to constitute reversible error. But that is not the ruling the panel chose to make.

Since the panel decided to publish its decision, and since the Ninth Circuit refused to rehear this matter *en banc*, the court's choice to base its ruling solely on a finding that the district court abused its discretion in denying the motion to bifurcate cannot be viewed simply as a matter of semantics, or of inelegance in the drafting of the opinion. The Ninth Circuit has created a standard to which all the other courts in the circuit, trial and appellate, and a fifth of the U.S. population, must now adhere.

The Ninth Circuit's focus in its opinion was summarized as follows: "[D]uring trial – and over Plaintiffs' repeated objections – the district court's evidentiary rulings strayed from its pretrial rulings. As a result, the jury was exposed to a copious amount of inflammatory and prejudicial evidence with little (if any) relevance." *Diaz*, *supra*, 840 F.3d at 598. In other words, the problem was not that the district court refused to bifurcate the trial, but rather that it failed to enforce the pre-trial rulings it had made that led it to conclude that it would be unnecessary to bifurcate the trial. This analysis is repeated throughout the remainder of the opinion.

The court wrote that "[t]he most troubling evidence admitted at trial related to Diaz's gang membership." *Ibid.* The court noted that:

> In ruling on the motions in limine, the district court held that evidence of Diaz's gang affiliation was relevant only to damages, because Officer Bennallack did not know he was a gang member. The court also specifically excluded evidence of Diaz's gang tattoos themselves, such as photographs, because such evidence was unnecessary to establish the fact that he was a gang member.

Ibid.

But then, according to the appellate court, the district court, during trial, modified those rulings, allowing in evidence that had previously been excluded. The court indicated that the testimony of the defendants' gang expert (Gonzalez) was "beyond the scope permitted by the [district] court – as were some of the questions defense counsel posed." *Id.* at 599.

> In summary, Gonzalez's testimony did not hew to the district court's direction to be "narrow" and "focused on his gang membership, not the activities of the gang at large." Instead, Gonzalez took every opportunity to opine on matters squarely forbidden by the court's previous rulings. As a result, the jury was exposed to inflammatory testimony that was wholly irrelevant to liability, and of limited relevance even as to damages.

Id. at 600.

But none of this discussion has anything to do with whether the pre-trial decision of the district court to deny the motion to bifurcate amounted to an abuse of discretion. In fact, the appellate court's discussion in many ways validates the district court's decision on that issue, since what the Ninth Circuit found to be troubling was the lower court's failure to adhere to its earlier rulings, not those rulings themselves.

In regard to the admission of evidence regarding the decedent's drug use, the panel wrote that "despite its original hesitation, the district court ultimately ruled that the toxicology evidence was relevant to damages, and Defendants proceeded to similarly stretch this ruling." *Ibid.*; footnote omitted.

> But beyond any marginal relevance of Diaz's drug use to damages – again, because it supposedly undermined his mother's claim that she loved her son – the evidence at trial fixated on his drug use on the day of the incident and how it may have affected his behavior, which had *no* relevance to his mother's loss. Indeed, the singular focus of the drug-use testimony was Diaz's toxicological status on the day he was shot, a risk which the district court recognized when it first ruled on the issue pretrial. At the time, the court "reject[ed] the contention that drug intoxication on the date of the incident goes to damages. At most, it establishes his condition on just one day. Any further inference would be unsupported and unduly prejudicial."

Ibid.; italics in original.

Again, there is no criticism of the district court's pre-trial ruling on this issue; the Ninth Circuit's criticism is with the rulings made by the lower court during trial.

The Ninth Circuit identified additional testimony that it found lacked relevance "even to damages". *Id.* at 601. The court concluded that "[t]his was simply overkill. Considering that the parties and district court had repeated trouble tracking precisely why this prejudicial evidence was admissible for any purpose, no jury could properly compartmentalize it." *Id.* at 602. "Similarly, even if evidence of Diaz's drug use were relevant to damages, the form and nature of the evidence presented regarding his drug use on the day of the incident was unduly prejudicial in light of the decision not to bifurcate." *Ibid.*

All of this discussion relates to how the trial actually unfolded, but there is nothing in the discussion to suggest that the district court should have known that these problems would occur absent bifurcation. There is literally no discussion in the opinion that the district court's denial of the motion to bifurcate, given the evidence and arguments presented to it prior to the trial, was illogical, implausible, or without "support in inferences that may be drawn from the facts in the record" and thus was "beyond the pale of reasonable justification under the circumstances".

The opinion concludes that "[b]ecause the district court abused its discretion in refusing to bifurcate the compensatory damages phase (thereby allowing in this

unduly prejudicial evidence of drugs and gangs), we reverse. Under these circumstances, the court's bifurcation ruling was 'beyond the pale of reasonable justification under the circumstances.' *Apfel*, 211 F.3d at 1175." *Id.* at 603. But the Ninth Circuit's own discussion in its opinion makes clear that the allegedly "unduly prejudicial evidence" was allowed in because of decisions made ***during*** the trial, not because the district court exercised its discretion to deny the motion to bifurcate the trial.

3. The Ninth Circuit Has Created A New Standard Of Review For The Analysis Of Denials Of Motions To Bifurcate Without Any Attempt To Justify Its Action

The opinion's concluding observation on this issue is the most telling: "To avoid the runaway case – like this one, where the Defendants and their witnesses repeatedly overstepped the judge's rulings – courts should use bifurcation to corral lawyers and witnesses, so the jury hears only evidence relevant to the issues at hand." *Id.* at 606.

But how is a district court supposed to know, before the trial even begins, that parties and witnesses are going to "overstep" the court's rulings and that the trial is going to devolve into a "runaway case"? The district judge can't, and so the Ninth Circuit has established an impossible standard to meet.

It is only in hindsight that the decision by the district court to deny the motion to bifurcate became problematic, and, as the Tenth Circuit indicated in *United States v. Hill*, *supra*, such "hindsight bias" is not a legitimate basis for concluding that a pre-trial ruling amounted to an abuse of discretion. 786 F.3d at 1273-1274.

The Ninth Circuit claims that it is not "announcing a rule that requires district courts always, usually, or frequently to bifurcate damages from liability. District courts still have the broad discretion to make these decisions." *Diaz*, *supra*, 840 F.3d at 603. But that is exactly what it is doing, by establishing a rule that evaluates the district court's exercise of discretion by what happens at trial ***after*** that ruling is made, without regard to whether the ruling, ***at the time it was made***, reasonably appeared to the district court to be "among its 'permissible' options". *United States v. Hinkson*, *supra*, 585 F.3d at 1262.

There is no precedent for such a standard of review, and no justification for creating it as the means for reviewing decisions to deny motions to bifurcate. It stands in conflict with the standard of review in force in every other circuit in this country. The likely result of allowing such a new standard of review to be established is that district judges will feel compelled to grant such motions in almost all circumstances, thereby prejudicing the ability of parties to get full and fair trials based on the jury's consideration of all of the relevant evidence. That is in fact how courts in the

Ninth Circuit are interpreting this decision. See *Crawford v. City of Bakersfield* (E.D. Cal., Oct. 6, 2016, No. 1:14-CV-01735-SAB), 2016 WL 5870209, at *7; 2016 U.S. Dist. LEXIS 139398, at *20-*21[2] and *Molina v. City of Visalia* (E.D. Cal., Sept. 16, 2016, No. 1:13-cv-01991-DAD-SAB), 2016 U.S. Dist. LEXIS 128975, at *17.[3]

A well-known treatise on federal practice has interpreted this case the same way.

> The Ninth Circuit has observed that district courts should bifurcate liability from damages to avoid prejudice when graphic and prejudicial evidence about a victim or party

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[2] "Some of the parties' motions in limine address evidence that will only be relevant to the damages in this action, such as the matter at issue here. Rule 42 of the Federal Rules of Civil Procedure allows a court to order a separate trial of one or more separate issues. Fed. R. Civ. P. 42(b). Accordingly, the Court finds this action should be bifurcated into liability and damages phases for trial. See *Estate of Diaz v. City of Anaheim*, ___ F.3d ___, 2016 WL 4446114, at *7 (9th Cir. Aug. 24, 2016) (finding abuse of discretion not to bifurcate trial where prejudicial evidence was relevant only to issue of damages)."

[3] "In ruling on the various motions in limine in this order and from the bench, the court has excluded gang evidence, evidence of drug use, and evidence of criminal histories from the liability stage of the proceedings. This evidence, however, may have some relevance as to compensatory damages, which would require bifurcation of the trial and separate proceedings for compensatory damages. See *Estate of Diaz*, 834 F.3d 1048, 2016 U.S. App. LEXIS 15572, 2016 WL 4446114, at *7 (gang evidence and evidence of drug use, which may have had some relevance to damages, required bifurcation of the liability stage of the trial in an excessive force case stemming from a fatal police shooting, as this evidence had no relevance to liability and was highly prejudicial.)"

> has little or no relevance to the issue of liability.[29.01]
>
> Footnote 29.01. **Bifurcation to avoid prejudice.** See *Estate of Diaz v. City of Anaheim*, 834 F.3d 1048, 1057 (9th Cir. 2016) (district court should have bifurcated liability from damages in excessive use of force action against police because evidence of decedent's gang affiliation and drug use was highly prejudicial and irrelevant to issue of liability, even if it may have been relevant to the issue of damages).

8-42 Moore's Federal Practice – Civil § 42.20; emphasis in original.

This radical change in the manner in which motions to bifurcate are evaluated should not be accepted by this Court, and accordingly the pending petition for writ of certiorari should be granted.

4. Additionally, The Ninth Circuit's Opinion Has Effectively Eliminated Limiting Instructions As An Alternative To Bifurcation

The court below did not simply change how decisions to deny motions to bifurcate will hereafter be reviewed in the Ninth Circuit. It also essentially precluded district courts from using limiting instructions as an alternative to bifurcation.

This Court has recognized, in the context of demands for separate trials of co-defendants in criminal matters, that:

> The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson v. Marsh*, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice. See 481 U.S. [200] at 211 [1987].

Zafiro v. United States, 506 U.S. 534, 539 (1993).

The Ninth Circuit itself, in its opinion in this case, recognized – at least until this decision – that limiting instructions were generally a sufficient means of addressing potential prejudice associated with the introduction of certain evidence, noting that "there is a strong presumption that jurors follow instructions" and that "[a] timely instruction from the judge usually cures the prejudicial impact of evidence unless it is highly prejudicial or the instruction is clearly inadequate." *Diaz*, *supra*, 840 F.3d at 603; citations and internal quotation marks omitted. (See also *Houskins v. Sheahan*, 549 F.3d 480, 495-496 (7th Cir. 2008).) But the decision below essentially reverses that approach.

The Ninth Circuit references "[t]he Advisory Committee Note to Federal Rule of Evidence 403 . . . [which] recognizes the potential inadequacies of a limiting instruction, counseling that '[i]n reaching a decision whether to exclude on grounds of unfair prejudice,

consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.'" *Diaz*, *supra*, 840 F.3d at 603. But the district court here ***did*** explicitly consider whether limiting instructions would be effective, and concluded that they would. ER 74.

The Ninth Circuit then commented that "if a limiting instruction was considered sufficient to cure all prejudice, there would be no need ever to bifurcate to avoid prejudice in other cases; yet in the civil rights context, courts often bifurcate the trials of individual officers from municipalities to avoid such prejudice." But the case law has never suggested that limiting instructions are always sufficient to prevent prejudice, and the district court in this case was not operating under such a mistaken belief.

The clear impression left by the opinion in this case is that, in general, district courts should bifurcate trials to avoid prejudice rather than utilizing limiting instructions. As noted in Section 3 above, that is exactly how this opinion is being interpreted. See *Crawford v. City of Bakersfield*, 2016 WL 5870209, at *7, 2016 U.S. Dist. LEXIS 139398, at *20-*21 and *Molina v. City of Visalia*, 2016 U.S. Dist. LEXIS 128975, at *17-*18. See also 8-42 Moore's Federal Practice – Civil § 42.20, *supra*.

This decision drastically restricts the options of district courts and undermines the well-established understanding "that bifurcation is the exception, not the rule", *Daniels v. City of Sioux City*, *supra*, 294

F.R.D. 509, 511 (N.D. Iowa 2013) (citations and internal quotation marks omitted), and that the decision whether to bifurcate "is [a] matter within [the] discretion of [the] trial judge to be decided on [a] case-by-case basis". *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 115 (3d Cir. 1992) (citing to *Idzojtic v. Pennsylvania R.R. Co.*, 456 F.2d 1228, 1230 (3d Cir. 1971)). No longer in the Ninth Circuit is "the question . . . one that seems to depend on the facts of each case, a matter to be determined by the trial judge exercising a sound discretion." *Southern R. Co. v. Tennessee Valley Authority*, 294 F.2d 491, 494 (5th Cir. 1961).

This is not an appropriate restriction on the discretion of district judges to determine the best means of ensuring a fair trial, and accordingly, for this reason as well, the pending petition for writ of certiorari should be granted.

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CONCLUSION

For all these reasons, the *amici curiae* urge this Court to grant the pending petition for writ of certiorari and to address and resolve the questions of concern identified by the *amici* in this brief.

March 30, 2017

Respectfully submitted,

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