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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ABDULLAH WRIGHT, Plaintiff, v. CITY OF SAN DIEGO, SDPD Off. Brandon Lopez, Defendants.	Case No. 24-cv-02089-GPC-BLM **DEFENDANTS CITY OF SAN DIEGO AND SDPD OFFICER BRANDON LOPEZ'S REPLY IN SUPPORT OF THEIR MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL AND MOTION FOR STAY PENDING DETERMINATION** Hearing Date: August 15, 2025 Hearing Time: 1:30 p.m. Judge: Hon. Gonzalo P. Curiel Courtroom: 2D

Defendants City of San Diego and SDPD Officer Brandon Lopez respectfully submit this reply in support of their Motion for Certification of Interlocutory Appeal and Motion for Stay Pending Determination. Defendants file this reply in opposition to Plaintiff's Response in Opposition.

I. ARGUMENTS

Plaintiff's Reply makes the overarching argument that the City's Motion should not be granted because the use of statistics to make a prima facie showing of *Monell* liability at the pleading stage is proper. While Plaintiff makes several

arguments in opposition to the City's motion for certification that the City will respond to, the manner in which statistics are used as prima facie evidence of *Monell* liability is the problem that the City brings to this Court's attention and for which it seeks certification.

The City's primary argument is that courts should not engage in the task of interpreting statistics to arrive at the conclusion that plaintiffs have or have not pled sufficient "facts" to make a prima facie showing of *Monell* liability at the pleading stage. Using statistics as evidence of *Monell* liability at the pleading stage, as further argued below, creates a problem by asking courts to independently analyze what the statistics show and ultimately what they mean. Statistics are often unreliable and they are, many times, not representative of the proposition for which they are offered as evidence.

The United States Supreme Court has warned: "We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances." *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 340 (1977) (internal citations omitted). This is why statistics, if they are used at all, should be used as complementary evidence during a case in chief to support, or defend, a party's position and not as prima facie evidence of *Monell* liability. The controlling and relevant case law supports this position.

A. Statistics Are Not Prima Facie Evidence of a *Monell* Violation.

The primary problem presented using statistics as prima facie evidence of *Monell* liability at the pleading stage is that while statistics may show discriminatory impact, they do not show discriminatory intent or purpose. *Washington v. Davis*, 426 U.S. 229, 239 (1976.) Fourteenth Amendment equal protection cases, such as Plaintiff's, require a showing of discriminatory intent, which is not supported by Plaintiff's proffered statistics. This is a significant pleading deficiency because Plaintiff's *Monell* allegations rest entirely upon statistical data in both his original

complaint and his first amended complaint. (ECF No. 1 at ¶¶ 17–24; ECF No. 14 at ¶¶ 17–24.) This statistical evidence and "Plaintiff's allegations concerning his alleged illegal traffic stop" are the bases upon which this Court concluded in its order on the City's motion to dismiss that Plaintiff had made "a plausible allegation that Officer Lopez acted with discriminatory intent against Plaintiff when he was detained and arrested." (ECF No. 13 at 7–8.) This Court also accepted Plaintiff's statistics as evidence of a comparator class in Plaintiff's equal protection claim because this finding is "supported by the statistical data relied on by Plaintiff." (*Id.* at 9.)

This Court's acceptance of Plaintiff's proffered statistics is therefore the lynchpin of a significant portion of Plaintiff's federal causes of action. Absent this Court's acceptance of Plaintiff's statistical data, Plaintiff cannot make a prima facie showing of *Monell* liability in his FAC because a single incident is typically not enough to demonstrate the existence of a *Monell* custom or policy—and Plaintiff conceded he was not bringing a claim based on the single instance exception. *City of Oklahoma v. Tuttle*, 471 U.S. 808, 821 (1985). The only other evidence Plaintiff offers in support of his constitutional claims are the facts of his arrest. (ECF No. 14 at ¶¶ 25–96.) "To infer the existence of a city policy from the isolated misconduct of a single, low-level officer, and then to hold the city liable on the basis of that policy, would amount to permitting precisely the theory of strict respondeat superior liability rejected in Monell." *Id.* at 831.

The statistical evidence proffered by Plaintiff may show a disproportionate racial impact related to traffic stops, but it cannot show racially discriminatory intent or purpose. Plaintiff needs to show "[p]roof of racially discriminatory intent or purpose [which] is required to show a violation of the Equal Protection Clause." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). Without such a showing, Plaintiff's equal protection and failure to train causes of action fail at the pleading stage. Plaintiff cannot make such a showing because statistics do not support a finding of intentional discrimination. *U.S. v.*

Redondo-Lemos, 27 F.3d 439, 443 (9th Cir. 1994.) The reason statistics do not support a finding of intentional discrimination is that statistical studies, such as those proffered by Plaintiff, show the occurrence of a purportedly discriminatory actions, not the motivation behind those actions.

While statistics may be probative, appellate courts have consistently held that statistical evidence alone cannot show discriminatory purpose or intent. *McCleskey v. Kemp*, 481 U.S. 279, 296 (1987); *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972); *Redondo-Lemos*, *supra*, 27 F.3d at 443. Even the assumption that proffered statistics are valid "does not include the assumption that the [statistics] show[] that racial considerations actually enter[ed] into any" allegedly discriminatory decisions. *McCleskey*, 481 U.S. at 291 n.7. To the extent that prior appellate opinions expressed "that the substantially disproportionate racial impact of [an] official practice standing alone and without regard to discriminatory purpose, suffices to prove racial discrimination violating the Equal Protection Clause," those cases have been overruled. *Washington*, 426 U.S. at 244–45.

More recently, district courts within the Ninth Circuit and outside of the Southern District of California have affirmed the principle that statistics do not show discriminatory purpose or intent in *Monell* claims. *Greenstone v. Las Vegas Metro. Police Dep't*, No. 2:23-cv-00290-GMN-NJK, 2024 WL 385213 at *13 (D. Nev. Jan. 31, 2024) ("[D]istrict courts within the Ninth Circuit have found statistical arguments insufficient to show facts necessary for alleging an improper custom. . . . For a *Monell* claim, context is needed to connect the data to a finding that the individuals who underly the statistic suffered a constitutional violation."); *see Baca v. Anderson*, No. 22-02461, 2023, 2023 WL 11892957 at *6 (N.D. Cal. Feb. 23, 2023) ("Without more information, it is impossible for me to evaluate this statistic to determine what (if any) import it may have for a *Monell* analysis.").

District courts outside of the Ninth Circuit have also dismissed cases at the pleading stage where *Monell* claims were solely based on statistical evidence or

media reports. *Nance v. City of New York*, No. 09–CV–2786 (ENV)(VVP), 2011 WL 2837491 at *9 (E.D.N.Y. July 14, 2011) (dismissing a municipal liability claim under Rule 12(b)(6) where the plaintiff "trot[ted] out the magic words from *Monell*—'practice, policy, and custom'—without providing a shred of factual support for her claim aside from a general allusion to 'statistic[s]' " about similar occurrences); *Perez v. New York City Dep't of Corr.*, No. 10–CV–2697 (RRM)(RML), 2012 WL 3704744 at *6 (E.D.N.Y. Aug. 2012) (dismissing a *Monell* claim under Rule 12(b)(6) where the plaintiff "relie[d] on unsubstantiated and general allegations in newspaper articles and a blog post to suggest that the [complained of] conduct" had previously occurred; finding that the articles, "if true, at best cite a handful of instances the specifics of which are not clear.").

In keeping with the principle of limiting the types of cases where statistical evidence can be used to prove racially discriminatory purpose or intent, the Ninth Circuit and the Supreme Court have proscribed the use of statistics in all cases except Title VII and jury selection cases. *McCleskey*, 481 U.S. at 294–95 (declining to use a statistical study directly addressing the facts of the case as evidence of discriminatory purpose or intent in a Fourteenth Amendment Equal Protection challenge); *Redondo-Lemos*, 27 F.3d at 444.

This proscription is particularly appropriate in § 1983 cases because discriminatory intent cannot be deduced from statistical evidence because statistics cannot speak to a deliberate choice necessarily made to vindicate a specific intent or achieve a particular purpose. "[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives" by municipal policymakers. *Pembaur v. Cincinnati*, 475 U.S. 469, 483–84 (1986). Whatever deductions can be drawn from statistical evidence, a deliberate intent or purpose to discriminate is not one of them. The exception to this proscription occurs when a statistical pattern is patently obvious as found in *Yick Wo*

v. Hopkins, 118 U.S. 356 (1886) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).[1] "But such cases are rare. Absent a pattern as stark as that in *Gomillion or Yick Wo*, impact alone is not determinative, and the Court must look to other evidence." *Village of Arlington Heights*, *supra*, 429 U.S. at 266. Something more than statistics is typically necessary to make a showing on intent. *Id.* It is this "other evidence" that is missing in Plaintiff's FAC.

B. Plaintiff's Arguments Against Certification are Unavailing.

Plaintiff makes several arguments in opposition that cannot be credited. Plaintiff first argues that "[t]he City's case citations reveal fact-driven inquiries evaluating individual complaints, not pure questions of law." (Opp'n at p. 6.) The point of the City's request for certification is that the question as to whether statistics can be used to prove a prima facie case of *Monell* liability is a question of law. It is the factual inquiry that makes the use of statistics problematic because this inquiry asks courts to individually assess the meaning and impact of the proffered statistics in order to determine if they might equal intent. This question was first answered in *Washington v. Davis* then reaffirmed thrice in *McCleskey v. Kemp*, *Jefferson v. Hackney*, and *U.S. v. Redondo-Lemos*.

Plaintiff also argues that the "City can point to no substantial ground for difference of opinion." (Opp'n at p. 12.) While the City believes it has shown that there is a substantial ground for difference of opinion between the courts in the Southern District, the district court cases within and without the Ninth Circuit show this noted difference of opinion is not geographically limited.

Lastly, Plaintiff argues that the "City cannot show that an interlocutory appeal here would "materially advance the ultimate termination of the litigation." (Opp'n at

[1] As noted in *McLeskey v. Kemp*, 481 U.S. at 293 n.12, the "stark pattern[s]" of racial discriminatory impact that per se demonstrated a constitutional violation shown by the statistical evidence in *Gomillion* and *Yick Wo* were 100% and 98.75%, respectively.

p. 14–15.) If the City prevails on interlocutory appeal, Plaintiff's second and third causes of action should be dismissed, as his only non-statistical showing consists of the facts surrounding his own arrest. (ECF No. 14 at ¶¶ 17–96.) This is a proposition that is supported in Plaintiff's Opposition. (Opp'n at p. 15.)

II. CONCLUSION

Plaintiff's reliance on statistical data to make a prima facie showing for his *Monell* and equal protection claims fails under controlling precedent, which does not permit an inference of the City's purported discriminatory intent based solely on such evidence. Moreover, bare statistics cannot provide context and do not speak to motives or purpose. Statistics speak the language of the individual who compiled them and are subject to differing interpretations by others. Or as Mark Twain said: "Facts are stubborn things, but statistics are pliable." This pliability should be tested when plaintiffs and defendants are able to question the veracity of the statistics in question, not before.

Dated: June 13, 2025

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