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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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| ABDULLAH WRIGHT,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF SAN DIEGO, SDPD Off. Brandon Lopez,<br><br>Defendants. | Case No.: 24cv2089-GPC-BLM<br><br>Hon. Gonzalo P. Curiel<br>Courtroom: 2D<br>Date: June 27, 2025<br>Time: 1:30 p.m.<br><br>PLAINTIFF'S RESPONSE IN OPPOSITION TO "DEFENDANTS CITY OF SAN DIEGO AND SDPD OFFICER BRANDON LOPEZ'S NOTICE OF MOTION AND MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL AND MOTION FOR STAY PENDING DETERMINATION" (ECF 18). |



PLAINTIFF'S RESPONSE IN OPPOSITION TO "DEFENDANTS CITY OF SAN DIEGO AND SDPD OFFICER BRANDON LOPEZ'S NOTICE OF MOTION AND MOTION FOR CERTIFICATION OF INTERLOCUTORY APPEAL AND MOTION FOR STAY PENDING DETERMINATION" (ECF 18).

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## I. Introduction.

Plaintiff Abdullah Wright respectfully submits this response in opposition to "Defendants City of San Diego and SDPD Officer Brandon Lopez's Notice of Motion and Motion for Certification of Interlocutory Appeal and Motion for Stay Pending Determination."[1] [ECF 18.] Because (1) the question Defendant City is seeking to certify does not involve a "controlling question of law," (2) it is neither "novel" nor "exceptional," (3) the City can point to no "substantial ground for difference of opinion," and (4) a resolution of the question would not

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[1] Both Defendants appear to be bringing this motion under 28 U.S.C. § 1292(b). *See generally* ECF 18. But the *Monell* cause of action discussed in Defendants' motion is against the City only, not the individual officer. *See* ECF 1 at ¶¶ 130-140; *see also Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) (holding that municipalities "can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers"). Accordingly, Plaintiff Wright responds here as if the City is moving this Court to certify a question under § 1292(b) and both Defendants are moving to stay these proceedings.

"materially advance" the termination of the litigation, the Defendants' motions should be denied.

## II. Interlocutory appeals are permitted under 28 U.S.C. § 1292(b) only in "exceptional" circumstances.

### A. Section 1292(b) is to be "applied sparingly," "construed narrowly," and is limited to "exceptional situations."

Interlocutory appeals under 28 U.S.C. § 1292(b) are permitted only in "exceptional situations" where allowing such an appeal "would avoid protracted and expensive litigation." *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1981) (discussing interlocutory appeals under Section 1292(b) as being appropriate in "exceptional circumstances," "exceptional situations," and "exceptional cases") (citations omitted). The Ninth Circuit has recognized that Section 1292(b) should be "applied sparingly." *Id.* at 1027; *see also James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) ("Section 1292(b) is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly.").

As the party seeking a departure from the final-judgment rule, the Defendant City bears the "burden of establishing the existence of such exceptional circumstances." *IBLC Abogados, S.C. v. Bracamonte*, No. 11-CV-2380-GPC-KSC, 2013 WL 5418047, at *1 (S.D. Cal. Sept. 26, 2013) (citation omitted). When making the certification demanded

here, the district court must "expressly find in writing that all three § 1292(b) requirements are met." *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010). Congress committed the decision whether to permit an interlocutory appeal of an otherwise non-appealable order to the sound discretion of the district courts. *See Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 47 (1995).

**B. Because the City fails to demonstrate a "controlling question of law," involving a "substantial ground for difference of opinion," and an immediate appeal would not "materially advance the ultimate termination of the litigation," Section 1292(b) does not permit an interlocutory appeal here.**

Title 28 U.S.C. § 1292 provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves [1] a controlling question of law as to which [2] there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). Because none of these three requirements are met here, the City's motion should be denied.

**1. The City has not demonstrated a "controlling question of law" justifying an interlocutory appeal.**

**a) Defendant City is seeking certification of a mixed question of fact and law, thus an interlocutory appeal is inappropriate.**

The Ninth Circuit has described "controlling question[s] of law" as including questions affecting "the determination of who are necessary and proper parties, whether a court to which a cause has been transferred has jurisdiction, or whether state or federal law shall be applied." *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959). To be a "controlling question of law," a "question must be a pure question of law, not a mixed question of law and fact or an application of law to a particular set of facts." *Belin v. Starz Ent., LLC*, No. 2:21-CV-09586-FWS-PLA, 2024 WL 5185313, at *4 (C.D. Cal. Oct. 25, 2024). If a "question requires applying the law to the facts" then it is "not appropriate for certification." *Id.* (collecting cases); *see also Karoun Dairies, Inc. v. Karlacti, Inc.,* No. 08CV1521 AJB (WVG), 2014 WL 11906588, at *4 (S.D. Cal. Sept. 3, 2014) ("The Ninth Circuit has not expressly defined the term 'question of law'; however, a number of other courts have stated that the term means a 'pure question of law' rather than a mixed question of law and fact or the application of law to a particular set of facts.") (citations omitted); *City of Chula Vista v. Monsanto Co.*, No. 18CV1942-WQH-AGS, 2019 WL 1317330, at *7

(S.D. Cal. Mar. 22, 2019) ("Courts in the Ninth Circuit have determined that mixed questions of fact and law are not appropriate for interlocutory appeal under § 1292(b).") (citations omitted).

Here, Defendant City is seeking an expansive *per se* ruling from the Ninth Circuit that *as a matter of law* empirical evidence (i.e., statistical data) cannot be used to demonstrate a pattern and practice of unconstitutional activity or to support a finding of "deliberate indifference" for a *Monell* claim[2]. In support of its request for an order granting it leave to file an interlocutory appeal, the City in unable to find even one case—in or out of this District/in or out of this Circuit—that supports the holding it seeks. The district court cases the City does cite demonstrate that the question it seeks to appeal is not a "controlling question of law," but instead is a mixed question of law and fact. Each of the orders the City cites in its motion (both those that ruled in its favor and those that did not) demonstrates courts diligently applying facts to the law, not interpreting or construing a

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[2] The entirety of the proposed question the City seeks to certify is: "Can statistical data constitute sufficient factual matter of a Monell claim to allege the prima facie existence of a constitutionally violative policy against a municipality?" [ECF 18 at 12.]

"controlling question of law." The City cannot satisfy the first requirement of § 1292(b).

**b) The City's case citations reveal fact-driven inquiries evaluating individual complaints, not pure questions of law.**

In support of its motion for interlocutory appeal, the City cites numerous other cases filed in the Southern District of California involving *Monell* liability and Fed. R. Civ. P. 12(b)(6) challenges to the allegations. In ruling on Rule 12(b)(6) motions, courts must evaluate if the plaintiff has pled "sufficient factual matter" which, if accepted as true would "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations and citations omitted). The Supreme Court has noted that "facial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

In evaluating the Rule 12(b)(6) motions before them, the various district courts in this District do just that: they evaluate whether the plaintiffs before them have pled sufficient "factual matter" or "factual content" to permit the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." None of the decisions that the City cites involve the resolution of a controlling question of law. None hold that empirical evidence cannot be used to demonstrate

a pattern and practice of unconstitutional activity or to support a finding of "deliberate indifference" on the part of the municipality as required for *Monell* liability. In fact, some of the opinions ruling in the City's favor *expressly disclaim* making that holding. *See, e.g., Spriggs v. City of San Diego*, No. 24-CV-01006-W-KSC, 2024 WL 4469218, at *7 (S.D. Cal. Oct. 9, 2024) ("To be clear, the Court is *not* holding the kinds of studies Plaintiff cites can *never* be used to establish a pattern or practice for *Monell* claims or put municipalities like the City on notice of constitutionally deficient practices . . . .") (emphasis in original) and *Spriggs v. City of San Diego*, No. 24-CV-1006 W (KSC), 2025 WL 474918, at *5 (S.D. Cal. Feb. 12, 2025) (same).

Each case involves different plaintiffs alleging different constitutional violations under different sets of facts. Each supports their claims with different evidence. The courts necessarily evaluated the facts alleged in the complaints, and compared them to the required legal standards. For example, the City cites *Piccini v. City of San Diego,* No. 21-CV-01343-W-KSC, 2022 WL 2788753 (S.D. Cal. July 15, 2022) presumably as an example of the question it wants certified on appeal. [ECF 18 at 9 (showing *Piccini* is a case where the City's motion was "granted" in its favor).] But the question answered by the Court in *Piccini* is not whether "statistical data" can ever support a *Monell* claim for failure to train (as suggested by the City's table). In *Piccini*, the Court (Hon. Thomas J. Whelan) found that the data provided by

the plaintiff suggesting that SDPD "discriminates based on race and color with regard to traffic stops and prosecutions" was not sufficient to show a failure to train relative to that plaintiff's "excessive force" claim, or a failure-to-train claim relative to City's "Use of Force Policy." *Piccini*, 2022 WL 2788753, at *4. Thus, *Piccini* simply holds that data on race-based *stops* by SDPD did not support a reasonable inference of a failure to train *on excessive force* or *the use of force* sufficient to establish *Monell* liability in that complaint.

A close review of the other Judge Whelan opinions cited by the City demonstrate that they also do not support the City's position here. In *Spriggs v. City of San Diego*, cited twice by the City in its table [ECF 18 at 9], the Court takes pains to note that its holding is *not* as broad as the City is currently suggesting: "To be clear, the Court is *not* holding the kinds of studies Plaintiff cites can *never* be used to establish a pattern or practice for *Monell* claims or put municipalities like the City on notice of constitutionally deficient practices . . . ." *Spriggs v. City of San Diego*, No. 24-CV-01006-W-KSC, 2024 WL 4469218, at *7 (S.D. Cal. Oct. 9, 2024) (emphasis in original). The Court then gives the plaintiff in *Spriggs* leave to amend his complaint.

In the second *Spriggs* opinion, the Court again takes pains to point out that it is "*not*" saying such data or studies can "*never* be used to establish a pattern or practice for Monell claims or put municipalities like the City on notice of constitutionally deficient

practices" just that the plaintiff failed to connect the dots in his complaint—and then the Court gives the plaintiff leave to amend once again. *Spriggs v. City of San Diego*, No. 24-CV-1006 W (KSC), 2025 WL 474918, at *5 (S.D. Cal. Feb. 12, 2025) (internal quotation and citation omitted) (emphasis in original).

In *Whyte v. City of San Diego*, the district court granted the City's Rule 12(b)(6) motion to dismiss the plaintiffs' *Monell* claims. *Whyte v. City of San Diego*, No. 21CV1159-LAB-MDD, 2022 WL 17491178 (S.D. Cal. Dec. 7, 2022)[3]. But that case, too, does not support the broad proposition that the City is seeking that this Court certify here. The court did not hold as a matter of law that empirical evidence/data/studies cannot be used to demonstrate a pattern and practice of unconstitutional activity or to support a finding of "deliberate indifference" under *Monell*. *See generally id.* at *3-5. Instead, the district court evaluated the particular facts put forward by the plaintiffs in that case, measured those facts against the law (again, evincing that this exercise is a mixed question of fact and law),

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[3] In its motion, the City's listed citation for *Whyte* is actually the citation for the first order of this Court in *Russell v. City of San Diego*, No. 24CV0527, from September 2024. [ECF 18 at 9.] The correct citation for the order in *Whyte* is listed *supra*.

and found in that particular case that the plaintiffs fell short of what was required under *Iqbal*. *Id.* at *2-5.

In *Boykins v. City of San Diego*, plaintiffs who were stopped and cited for a broken taillight violation and other offenses brought a § 1983 case alleging that their pretextual stop was a violation of their constitutional rights. *Boykins v. City of San Diego*, No. 21-CV-01812-AJB-AHG, 2022 WL 3362273 (S.D. Cal. Aug. 15, 2022). In a fact-driven inquiry, the district court concluded that the plaintiffs failed to demonstrate a pattern of similar constitutional violations as necessary for their *Monell* claim to continue. *Id.* at *7-9. The court then granted leave to file a second amended complaint to cure these defects. *Id.* at *9. Interestingly, in that same order, the court noted that the race-based statistics should *not* be stricken from the complaint because they were an "attempt to illustrate a 'settled practice or custom' of racial bias within the SDPD" and "relate directly to Plaintiffs' *Monell* claim." *Id.* Thus the court found "these allegations have a bearing on the subject matter of litigation." *Id.* The *Boykins* court therefore did not reject the idea that statistics could demonstrate prior constitutional violations or put the City on notice as to deficient training or practices relative to *Monell* claims. It provides no support to the City here.

Additionally, in *Abdul-Hafeez v. City of San Diego*, another case cited by the City purportedly in support of its position [ECF 18 at 9], the district court also did not hold that empirical evidence could not be

used to support a *Monell* claim. Instead, the district court held that the plaintiff's alleged constitutional violation—that police should not have been *kneeling* on plaintiff's back while he was *prone*—was not addressed by the studies cited by the plaintiff in his complaint. The district court (Hon. Robert S. Huie) granted the City's 12(b)(6) motion to dismiss but gave the plaintiff leave to amend his complaint. *Abdul-Hafeez v. City of San Diego*, No. 24-CV-1184-RSH-DDL, 2025 WL 696993, at *8 (S.D. Cal. Mar. 4, 2025) ("The studies Plaintiff cite do not discuss SDPD officers kneeling on a prone individual's back.").

The orders discussed above as well as those in *McKinnie v. City of San Diego*, No. 3:24-CV-00827-H-SBC, 2024 WL 4126062 (S.D. Cal. Sept. 9, 2024), *Russell v. City of San Diego*, No. 24CV0527-GPC(SBC), 2025 WL 297034 (S.D. Cal. Jan. 24, 2025), and in this matter demonstrate not that there is a "controlling question of law" with which courts of this District are grappling and interpreting in conflicting ways, but instead demonstrate that courts are engaging in fact-driven inquiries dictated by Fed. R. Civ. P. 12(b)(6) under prevailing Supreme Court law.[4] Defendant City fails to meet the first

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[4] The City also cites this Court to the Central District of California case of *Heard v. Cnty. of San Bernardino*, No. 5:20-CV-02335-JWH-KKX, 2021 WL 5083336 (C.D. Cal. Oct. 12, 2021) to emphasize that

requirement of § 1292(b) and on that basis alone the requested certification should be denied.

**2. Defendant City can point to no "substantial ground for difference of opinion."**

The Ninth Circuit has articulated that a "substantial ground for a difference of opinion" exists under § 1292(b) "where the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are

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the issue it is seeking to appeal before final judgment presents an issue relevant to other courts. *See* ECF 18 at 11. But *Heard* doesn't support the City's position either. In *Heard*, the district court did not determine as a matter of law that statistics/data/empirical evidence/studies cannot be used to demonstrate a pattern or practice of unconstitutional activity or to establish "deliberate indifference" necessary for a *Monell* claim. Instead, the *Heard* court, just like the district court opinions discussed *supra*, embarked on a fact-specific analysis looking at what the plaintiff alleged in his second amended complaint and determined that he fell short in the required showing he needed to make (not that statistics or studies could never be used to show a municipality was on notice that it needed more or different training to preserve constitutional rights).

presented." *Couch*, 611 F.3d at 633 (internal quotations and citation omitted). But the Court has also noted that a party's strong disagreement with a court's ruling is not sufficient to satisfy this prong.[5] *Id*. The Ninth Circuit has also emphasized that the fact "[t]hat settled law might be applied differently does not establish a substantial ground for difference of opinion." *Id*. (citations omitted). Here, the City has pointed to no other cases in any other circuits that have set forth the broad, *per se* rule it seeks here. That different courts within this District have ruled differently based on the unique set of facts present in each case before them does not constitute a "substantial ground for difference of opinion" per § 1292(b).

There is no "novel" issue the City can point to either. There is no new rule or case that it is seeking to have this Court or the Ninth Circuit interpret or construe. The Ninth Circuit has explained that

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[5] Here, Defendants argue that this Court's denial of their motion to dismiss is the "conflict," on which they base their request to file an interlocutory appeal. *See* ECF 18 at 5 (explaining that they filed a motion to dismiss, this Court ruled against them in a "contrary finding" and "[b]ased on this conflict, Defendants ask this Court" for permission to file an interlocutory appeal). But the Ninth Circuit has noted that disagreement with a ruling, even if it is a "strong disagreement," is not sufficient to satisfy the second prong of § 1292(b).

§ 1292(b)'s discussion of "substantial ground for difference of opinion" applies to situations presenting "novel legal issues." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011); *see also Henley v. Jacobs*, No. C 18-2244 SBA, 2019 WL 8333448, at *3 (N.D. Cal. Oct. 25, 2019) (declining request for interlocutory appeal where defendant could point to no novel or difficult questions of first impression but instead disagreed with the court's application of the facts to the law in ruling on a Fed. R. Civ. P. 12(b)(6) motion). Defendant City fails to satisfy the second § 1292(b) requirement as well.

**3. Defendant City cannot show that an interlocutory appeal here would "materially advance the ultimate termination of the litigation."**

Section 1292(b) also requires the district judge certifying such an appeal to make a determination that the interlocutory appeal may "materially advance the ultimate termination of the litigation." Here, resolution of this issue (the *Monell* claim)—even if the City were to obtain a favorable result on appeal—would not result in dismissal of any parties to this litigation since the City is a defendant in Claims 4, 5, and 6 as well. *Cf. Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (finding interlocutory appeal appropriate under § 1292(b) where favorable appellate determination could result in the appealing defendant being dismissed from the litigation); *see also*

*IBLC Abogados, S.C.*, No. 11-CV-2380-GPC-KSC, 2013 WL 5418047, at *3 ("Material advancement may be found where reversal on interlocutory appeal may remove a defendant or claims in the litigation.") (citation omitted).

Additionally, an interlocutory appeal here would resolve—at most—one cause of action (Claim 3 only) and leave pending the remaining five causes of action against Defendant Lopez and Defendant City. *See U. S. Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (finding interlocutory appeal improvidently granted where appeal involved "uncertain question of law relevant to only one of several causes of action" and thus "no disposition [the appellate court] might make of th[e] appeal on its merits could materially affect the course of the litigation in the district court."). Thus, even a favorable ruling for the City on appeal here would not "materially advance the ultimate termination of the litigation" as required by § 1292(b). The City fails to satisfy the final § 1292(b) factor as well.

**III. Conclusion.**

Because the City fails to demonstrate how it satisfies any of the required showings under § 1292(b), Mr. Wright respectfully requests this Court deny its request for an exception to the final-judgment rule and deny the Defendants' motion to stay these proceedings.

Respectfully submitted,

DATED: June 6, 2025

*s/Michele Akemi McKenzie*

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