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14 UNITED STATES DISTRICT COURT
15 SOUTHERN DISTRICT OF CALIFORNIA

16 ABDULLAH WRIGHT,

17 Plaintiff,

18 vs.

19 CITY OF SAN DIEGO,
20 SDPD Off. Brandon Lopez,

21 Defendants.

Case No.: 24cv2089-GPC-BLM

Hon. Gonzalo P. Curiel

Courtroom: 2D

Date: June 27, 2025

Time: 1:30 p.m.

PLAINTIFF’S MOTION TO STRIKE DEFENDANTS’ REPLY BRIEF (ECF 21) OR, IN THE ALTERNATIVE, CONSTRUE AND PERMIT THIS FILING AS A SURREPLY.

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24 **I. Introduction.**

25 Plaintiff Abdullah Wright respectfully submits this motion to
26 strike Defendants’ “Reply in Support of Their Motion for Certification
27

PLAINTIFF’S MOTION TO STRIKE DEFENDANTS’ REPLY BRIEF (ECF 21) OR, IN THE ALTERNATIVE, CONSTRUE AND PERMIT THIS FILING AS A SURREPLY.

1 of Interlocutory Appeal and Motion for Stay Pending Determination,”
2 [ECF 21] in its entirety because:

3 (1) it is being used as a vehicle to reargue the *merits* of
4 Defendants’ *original motion to dismiss* [ECF 6] and thus is
5 not a proper “reply” brief for the pending motion for leave to
6 file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)
[ECF 18], and

7 (2) it also expands the proposed question from Defendants’
8 original motion for certification of interlocutory appeal and
9 for stay pending determination [ECF 18] and is thus not a
10 proper “reply” brief on this basis as well.

11 Motions to strike are generally disfavored.¹ Mr. Wright would not
12 typically file a motion to strike, however, he stands to be prejudiced if
13 the Court accepts Defendants’ apparent invitation to reconsider the
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16 ¹ See generally *Polaris PowerLED Techs., LLC v. Nintendo Co.*, 623 F.
17 Supp. 3d 1132, 1136 (W.D. Wash. 2022) (explaining that motions to
18 strike are generally disfavored as they are often delaying tactics;
19 courts often require a showing of prejudice prior to granting them).
20 Here, Mr. Wright seeks no delay in the determination of Defendants’
21 pending motion. This motion to strike can be considered on the same
22 timeline as Defendants’ original motion under 28 U.S.C. § 1292(b) or
23 simply construed as a surreply. As explained *infra*, there is a danger
24 of unfair prejudice to Mr. Wright given the manner in which
25 Defendants’ chose to reargue the merits of their underlying motion to
26 dismiss through the reply brief as well as expand the proposed
27 question for certification.

1 merits of the underlying motion to dismiss without Defendants having
2 filed a formal Fed. R. Civ. P. 60(b) motion. Mr. Wright would also be
3 prejudiced if this Court accepts Defendants' late invitation to expand
4 the proposed question for certification posited in their reply. Due to the
5 potential for unfair prejudice, Mr. Wright respectfully files this motion
6 to strike as the entirety of Defendants' reply is improper.

7 If this Court is disinclined to entertain a motion to strike due to
8 the possible delay it may cause in the determination of the underlying
9 motion (or for other reasons), Mr. Wright respectfully requests this
10 Court construe and permit this filing as a surreply.

11 **II. Defendants' reply brief fails to address Plaintiff's**
12 **response brief but instead re-argues at length the merits**
13 **of its original motion to dismiss Plaintiff's complaint and**
14 **also appears to change the question they want certified**
15 **for appeal: these are both improper for a reply brief.**

16 Defendants' reply brief is divided into two parts: the first part
17 addresses whether statistics can be used to show discriminatory intent
18 in Equal Protection cases, see ECF 21 at 2-6, and the second part
19 argues for the first time that Defendants are seeking to appeal both
20 the determination made by this Court about the role of statistics
21 relative to the *Monell* claim (Claim 3) but also as to Mr. Wright's
22 Equal Protection claim (Claim 2) against Defendant Officer Lopez.
23 *Compare* ECF 18 at 5 (posing the question for certification as: "Can
24 statistical data or media reports make a prima facie showing of a
25 *Monell* claim and constitute credible evidence of the existence of a
26 constitutionally violative policy against a municipality?"), *with* ECF 21

1 at 7 (“If the City prevails on interlocutory appeal, Plaintiff’s second
2 [Equal Protection] and third causes of action [*Monell*] should be
3 dismissed, as his only non-statistical showing consists of the facts
4 surrounding his own arrest.”). While Defendants may want to add into
5 the record arguments it neglected to include in its original motion to
6 dismiss filed back in January 2025 [ECF 6] or even in its motion to
7 permit an interlocutory appeal [ECF 18] filed just last month, the
8 purpose of a “reply” brief is to “reply” to arguments made by the other
9 party in its responsive briefing. As Defendants’ brief fails to “reply” to
10 the issues raised in Plaintiff Wright’s response in opposition, it should
11 be stricken in its entirety.
12

13 **A. Defendants spend the majority of their reply brief**
14 **attempting to convince this Court that its original**
15 **decision was wrong and not replying to Plaintiff’s**
16 **arguments on how they fail to satisfy 28 U.S.C.**
17 **§ 1292(b).**

18 While Defendants’ original motion seeking the opportunity to file
19 an interlocutory appeal was not a paragon of clarity, their most recent
20 filing creates even more confusion and leaves one wondering if this is a
21 request pursuant to 28 U.S.C. § 1292(b) or instead a Fed. R. Civ. P.
22 60(b) motion in disguise. Defendants spend the vast majority of
23 argument in their “Reply” brief not replying to Plaintiff’s Response in
24 Opposition [ECF 20] but instead setting forth substantive arguments
25 for why they believe discriminatory intent in Equal Protection cases
26 cannot be proved via statistics. *See* ECF 21 at 2-5.
27
28

1 If Defendants believed that this Court simply got it wrong in its
2 Order [ECF 13], it could have filed a motion to that effect. *See* Fed. R.
3 Civ. P. 60(b). A motion to reconsider would have been evaluated under
4 the standard set forth in Fed. R. Civ. P. 60(b) for such motions. *Wahoo*
5 *Int'l, Inc. v. Phix Dr., Inc.*, No. 13CV1395-GPCBLM, 2015 WL 410347,
6 at *1 (S.D. Cal. Jan. 29, 2015) (“A motion for reconsideration should
7 not be granted absent highly unusual circumstances.”) (citation
8 omitted). Had Defendants brought a motion for reconsideration,
9 Mr. Wright would have addressed the merits of the original motion to
10 dismiss (just as Defendants do in their most recent reply [ECF 21])
11 instead of addressing the merits of the motion they brought under 28
12 U.S.C. § 1292(b) and its attendant standards. As the record now
13 stands, Mr. Wright has fully briefed why Defendants failed to
14 demonstrate the “exceptional circumstances” necessary to satisfy
15 § 1292(b) while the Defendants have used their reply brief to reargue
16 the merits of their motion to dismiss at length and add additional
17 arguments to the record.
18

19 Defendants give no explanation whatsoever as to why they failed
20 to raise their motion as a motion to reconsider² this Court’s ruling, if
21 that is their desire. They refer this Court to cases from 2011 and 2012
22 [ECF 21 at 5] and 2023 and 2024 [ECF 21 at 4] all of which they claim
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24
25 ² Defendants also fail to comply with Local Rule 7.1(i)(1) if, again, their
26 extensive argument in their reply briefing is an attempt to encourage
27 this Court to reconsider its previous order.

1 support the position they argued back in January 2025, but offer no
2 explanation as to why they failed to cite these cases (which plainly
3 existed) at the time of their motion or make these arguments
4 previously. But even if they had cited these cases to the Court earlier,
5 they still provide Defendants with no assistance: these additional
6 cases continue to demonstrate, once again, that district courts
7 throughout the nation are engaging in fact-intensive inquiries at the
8 Fed. R. Civ. P. 12(b)(6) stage as required. They do not support the idea
9 that this Court got it wrong or that there is a *question of law* that
10 Courts of this District or district courts of this Circuit need the
11 appellate court to weigh in on. The portion of Defendants’ reply brief
12 rearguing the merits of its motion to dismiss [ECF 21 at 1-6] should be
13 stricken.
14

15 **B. Defendants’ reply seeks the certification of a**
16 **question which would reject the use of statistical**
17 **evidence in all *Monell* claims and in all Equal**
18 **Protection claims—but this is not the question they**
19 **moved to certify in their original motion.**

20 The second portion of Defendants’ reply seeks to expand the
21 scope of the question originally presented for certification. While the
22 original motion sought certification of whether “statistical data or
23 media reports make a prima facie showing of a *Monell* claim and
24 constitute credible evidence of the existence of a constitutionally
25 violative policy against a municipality” [ECF 18 at 5] its most recent
26 filing focuses its attention on Mr. Wright’s Equal Protection claim
27 [ECF 21 at 2 (“Fourteenth Amendment equal protection cases, such as
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1 Plaintiff's, require a showing of discriminatory intent, which is not
2 supported by Plaintiff's proffered statistics.”), 3.] Defendants then
3 claim that if they prevail on appeal, both Mr. Wright's Equal
4 Protection claim and his *Monell* claim would be dismissed (suggesting
5 that they now believe that the question originally posited for
6 certification should be expanded beyond the *Monell* context to include
7 claims against individuals under the Equal Protection clause as well).
8 [ECF 21 at 7.]

9
10 Generally, it is improper for a party to introduce new arguments
11 or issues in a reply brief that were not raised in a principal brief. *See,*
12 *e.g., Docusign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D.
13 Wash. 2006) (striking reply brief that raised new arguments and
14 evidence); *Gastelum v. TJX Companies*, No. 21CV1435-GPC(BLM),
15 2022 WL 2906492, at *3 (S.D. Cal. July 22, 2022); *Avalyn Pharma, Inc.*
16 *v. Vincent*, No. 20CV2267-GPC(KSC), 2021 WL 5140190, at *6 (S.D.
17 Cal. Nov. 4, 2021). In the appellate context, the Ninth Circuit will
18 allow issues to be raised for the first time in a reply brief: (1) if there is
19 good cause for the failure to raise the issue in the opening brief or if
20 failing to consider the issue would result in a manifest injustice; (2) if
21 it was raised in the responsive briefing; or (3) if the opposing party
22 would not be prejudiced by consideration of the issue that was not
23 previously raised. *See Koerner v. Grigas*, 328 F.3d 1039, 1048-1049
24 (9th Cir. 2003) (internal quotations and citation omitted). Here,
25 Defendants have made no effort whatsoever to demonstrate that they
26 satisfy any of these standards. They show no good cause for their
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1 failure to raise in their primary brief the question they now want
2 certified. Defendants do not indicate that their original question must
3 be modified by virtue of something raised in Plaintiff's response
4 briefing. Nor do Defendants set forth how this new and different
5 question, were it to be certified, would not prejudice Mr. Wright, who
6 responded in his briefing to Defendants' original question. Accordingly,
7 Defendants' suggestion that the question proposed to be certified by
8 this Court should now be modified to include the *Monell* claim (Claim
9 3) as well as the Equal Protection claim (Claim 2) should be rejected
10 and that portion of the reply brief should be stricken [ECF 21 at 6-7].

11 **III. Conclusion.**

12
13 Because the Defendants' reply briefing [ECF 21] does not in fact
14 "reply" to the arguments made in Mr. Wright's response briefing [ECF
15 20] but instead: (1) reargues the merits of Defendants' January 2025
16 motion to dismiss [ECF 6] and (2) improperly expands the question
17 originally posed for certification, it should be stricken in its entirety.
18 In the alternative, Mr. Wright respectfully requests this Court
19 construe and permit this filing as a surreply. If such a construction is
20 made, Mr. Wright respectfully requests this Court simply disregard
21 the arguments made in Defendants' reply brief as they are improper
22 for a reply.

23 //

24 //

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26 //

1 Respectfully submitted,

2 DATED: June 17, 2025

s/Michele Akemi McKenzie

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