The following redline/strikeouts show substantive changes to the Ninth Circuit Model Civil Instructions that took effect in December 2019. An article regarding these changes can be found in the Blog at https://www.trialdex.com/blog.htm.

1.22 SELF-REPRESENTED PARTY

[*Name of party*] is representing [himself] [herself] in this trial. This fact must not affect your consideration of the case. Self-represented parties and parties represented by an attorney are entitled to the same fair consideration.

Because [*name of party*] is acting as [his] [her] own lawyer, you will hear [him] [her] speak at various times during the trial. [He] [She] may make an opening statement and closing argument and may ask questions of witnesses, make objections, and argue legal issues to the court. I want to remind you that when [name of party] speaks in these parts of the trial, [he] [she] is acting as [his] [her] own advocate, and [his] [her] words are not evidence. The only evidence in this case comes from witnesses who testify under oath on the witness stand or by deposition and from exhibits that are admitted into evidence. When a self-represented party testifies, you should treat this testimony just as you would the testimony of any other witness.

Added Dec. 2019

3.9 POST-DISCHARGE INSTRUCTION

Now that the case has been concluded, some of you may have questions about the confidentiality of the proceedings. Now that the case is over, you are free to discuss it with any person you choose. By the same token, however, I would advise you that you are under no obligation whatsoever to discuss this case with any person.

[If you do decide to discuss the case with anyone, I would suggest you treat it with a degree of solemnity in that whatever you do decide to say, you would be willing to say in the presence of the other jurors or under oath here in open court in the presence of all the parties.]

[Finally, always bear in mind that if you do decide to discuss this case, the other jurors fully and freely stated their opinions with the understanding they were being expressed in confidence. Please respect the privacy of the views of the other jurors.]

[Finally, if you would prefer not to discuss the case with anyone, but are feeling undue pressure to do so, please feel free to contact the courtroom deputy, who will notify me and I will assist.]

Comment

See JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 6.1 (2013).

Added Dec. 2019

9. CIVIL RIGHTS ACTIONS—42 U.S.C. § 1983

Introductory Comment

This chapter focuses on 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This chapter is organized to provide separate "elements" instructions for 42 U.S.C. § 1983 claims against individuals (Instructions 9.3–9.4) and against local governing bodies (Instructions 9.5–9.8) because there are different legal standards establishing liability against these two types of defendants. Instructions 9.9–9.33 provide instructions to establish the deprivation of particular constitutional rights. An elements instruction should be used only in conjunction with a "particular rights" instruction appropriate to the facts of the case at hand.

Elements Instructions		
Type of Claim	Elements	Instruction No.
Against Individuals	Individual Capacity	9.3
	Supervisory Defendant in Individual Capacity	9.4
Against Local Governing Body	Based on Official Policy, Practice, or Custom	9.5
	Based on Act of Final Policymaker	9.6
	Based on Ratification	9.7
	Based on Policy that Fails to Prevent Violations of Law or Policy of Failure to Train	9.8

The chart below identifies the instructions for violations of particular federal rights to be used in conjunction with an elements instruction. "Where a particular amendment 'provides an

explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)); *Kirkpatrick v. Cnty of Washoe*, 843 F.3d 784, 788 n.2 (9th Cir. 2016). When necessary, these instructions include right-specific mental states because § 1983 itself "contains no independent state-of-mind requirement" apart from what is necessary to state a violation of the underlying right. *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

Particular Rights Instructions			
Type of Claim by Source	Elements		Instruction No.
First Amendment	Public Employee Speech		9.9 9.10
	"Citizen" Plaintiff		9.11
Fourth Amendment Unreasonable Search	Generally		9.12
	Exception to Warrant Requirement	Search Incident to Arrest	9.13 9.14 (vehicle)
		Consent	9.15
		Exigent Circumstances	9.16
		Emergency Aid	9.17
	Judicial Deception		9.17A
Fourth Amendment Unreasonable Seizure of Property	Generally		9.18
	Exception to Warrant Requirement		9.19
Fourth Amendment Unreasonable Seizure of Person	Generally		9.20
	Exception to Warrant Requirement – *Terry v. Ohio*		9.21 (stop) 9.22 (frisk)
	Probable Cause Arrest		9.23
	Detention During Execution of Search Warrant		9.24
	Excessive (Deadly and Nondeadly) Force		9.25
Eighth Amendment	Convicted Prisoner's Claim of Excessive Force		9.26

	Convicted Prisoner's Claim re Conditions of Confinement/Medical Care	9.27
	Convicted Prisoner's Claim of Failure to Protect	9.28
Fourteenth Amendment	Pretrial Detainee's Claim of Excessive Force	9.29
	Pretrial Detainee's Claim re Conditions of Confinement/Medical Care	9.30
	Pretrial Detainee's Claim of Failure to Protect	9.31
	Interference With Parent/Child Relationship	9.32
	Deliberate Fabrication of Evidence	9.33
	Deliberate or Reckless Suppression of Evidence	9.33A
	State-Created Danger	9.33B

Person Subject to § 1983 Liability

It is well settled that a "person" subject to liability can be an individual sued in an individual capacity (*see Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc)) or in an official capacity (*see Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013)). A "person" subject to liability can also be a local governing body (*see Waggy v. Spokane County*, 594 F.3d 707, 713 (9th Cir. 2010)).

Local Governing Body Liability

A local governing body is not liable under § 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell v. Dep't of Social Servs. of City of N.Y.*, 436 U.S. 658, 691 (1978). *But see* Instruction 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof) (addressing ratification and causation). "[A] municipality cannot be held liable under §1983 on a respondeat superior theory." *Monell*, 436 U.S. at 691.

An institutional defendant, such as a school district or municipality, is not entitled to qualified immunity. *See Owen v. Independence*, 445 U.S. 622, 638 (1980) (holding that "municipality may not assert the good faith of its officers or agents as a defense to liability under

§ 1983").

"The 'official policy' requirement 'was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality,' and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80 (1986) (emphasis in original). Because there are several ways to establish "*Monell* liability," *see Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999), the Committee also includes in this chapter separate elements instructions for several bases of such liability (Instructions 9.5, 9.6, 9.7, and 9.8).

Eleventh Amendment Immunity

Despite the language of § 1983, "every person" does not have a universal scope; it does not encompass claims against a state or a state agency because the Eleventh Amendment bars such encroachments on a state's sovereignty. *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997) ("States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes are not 'persons' under § 1983," quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989)). Even if a plaintiff seeks only injunctive relief, a state that has not waived its Eleventh Amendment immunity cannot be sued in its own name under § 1983. *Will*, 491 U.S. at 64, 71, n.10.

The Ninth Circuit applies a five-factor test to determine whether a government entity is a state agency for Eleventh Amendment purposes: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued ~~in its own name~~; (4) whether the entity has the ~~authority~~power to

~~hold~~ take property in its own name or only the name of the state; and (5) whether the entity has the corporate status of a state agency. ~~Beentjes~~Mitchell v. ~~Placer~~Los Angeles Cnty. ~~Air Pollution Control~~Coll. Dist., ~~397~~861 F.~~3d 775, 778~~2d 198, 201 (9th Cir. ~~2005) (citations omitted~~1988). The first prong of the test—whether a money judgment would be satisfied out of state funds—is the ~~predominant factor. Id.~~most important. Ray v. City of Los Angeles, 935 F.3d 703, 709-10 (9th Cir. 2019).

In contrast to a state or state ag ency, a state official may be sued in his or her official capacity under § 1983, but only for prospective injunctive relief. This is because "official-capacity actions for prospective relief are not treated as actions against the State." Will, 491 U.S. at 71 n.10. A state official may be sued under § 1983 in his or her individual capacity for damages. Kentucky v. Graham, 473 U.S. 159, 165 (1985); but see Avalos v. Baca, 596 F.3d 583, 587 (9th Cir. 2010) (holding that in order to be individually liable under § 1983, individual must personally participate in alleged rights deprivation).

The Committee also recommends the Section 1983 Outline prepared by the Office of Staff Attorneys, United States Court of Appeals for the Ninth Circuit, available at: https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000724

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9.2 CAUSATION

Comment

General Principles

"In a § 1983 action, the plaintiff must also demonstrate that the defendant's conduct was the actionable cause of the claimed injury." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008). "To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation." *Id*. This standard of causation "closely resembles the standard 'foreseeability' formulation of proximate cause." *Arnold v. Int'l Bus. Mach. Corp.*, 637 F.2d 1350, 1355 (9th Cir. 1981); *see also Stevenson v. Koskey*, 877 F.2d 1435, 1438 (9th Cir. 1989) (noting that federal courts turn to common law of torts for causation in civil rights cases).

"The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). For example, when deprivation of a protected interest is substantively justified but the procedures were deficient, a plaintiff must show injury from the denial of procedural due process itself and cannot recover damages from the justified deprivation. *Carey v. Piphus*, 435 U.S. 247, 260-64 (1978); *Watson v. City of San Jose*, 800 F.3d 1135, 1140-42 (9th Cir. 2015) (expanding types of constitutional tort actions subject to *Carey's* causation analysis and quoting trial court's damages instruction).

A person deprives another of a constitutional right, within the meaning of § 1983, "if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). "An officer's liability under section 1983 is predicated on his integral participation in the alleged violation." *Nicholson v. City of Los Angeles*, 935 F.3d 685, 691 (9th Cir. 2019) (quoting *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007) (internal quotes omitted)). Thus, an "officer could be held liable where he is just one participant in a sequence of events that gives rise to [the alleged] constitutional violation." *Nicholson*, 935 F.3d at 692.

Supervisor Liability

"A defendant may be held liable as a supervisor under § 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *see also Lacey v. Maricopa County*, 693 F.3d 896, 915-16 (9th Cir. 2012) (discussing culpability and intent of supervisors). Supervisors may also be held liable under § 1983 as follows: (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others

to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others." *Starr*, 652 F.3d at 1207-08; *see also OSU Student All. v. Ray*, 699 F.3d 1053, 1076 (9th Cir. 2012) ("Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability … so long as the policy proximately causes the harm—that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy."). However, supervisors may not be held liable under § 1983 for the unconstitutional actions of their subordinates based solely on a theory of *respondeat superior*. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009); *Monell v. Dep't. of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 691 (1978).

Deliberate Fabrication

In deliberate fabrication cases, the filing of a criminal complaint usually immunizes the investigating officers "'because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time.'" *Caldwell v. City & Cnty. of San Francisco*, 889 F.3d 1105, 1115 (9th Cir. 2018) (quoting
Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981), *overruled on other grounds by Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008)). However, the presumption can be overcome if a plaintiff establishes that officers "either presented false evidence to or withheld crucial information from the prosecutor." *Id*. at 1116. At that point, "the analysis reverts back to a normal causation question" and the issue again becomes whether the constitutional violation caused the plaintiff's harm. *Id*.

First Amendment Retaliation Claims

When a § 1983 claim alleges discrimination because of the plaintiff's exercise of a First Amendment right, use the "substantial or motivating factor" formulation already included in Instructions 9.9 (Particular Rights—First Amendment—Public Employees—Speech) and 9.11 (Particular Rights—First Amendment—"Citizen" Plaintiff).

***Monell* Claims**

"Under *Monell*, a plaintiff must also show that the policy at issue was the 'actionable cause' of the constitutional violation, which requires showing both but for and proximate causation." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1146 (9th Cir. 2012) (citing *Harper*, 533 F.3d at 1026). Regardless of what theory the plaintiff employs to establish municipal liability— policy, custom, or failure to train— the plaintiff must establish an affirmative causal link between the municipal policy or practice and the alleged constitutional violation. *See City of Canton*, 489 U.S. 378, 385, 391-92 (1989); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996). If the plaintiff relies on the theory of ratification, *see* Instruction 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification— Elements and Burden of Proof), which discusses ratification and causation.

In *Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir. 1992), the Ninth Circuit approved the

trial court's "moving force" instruction on causation in a § 1983 *Monell* claim as follows:

> The district court instructed the jury that "in order for [the policy] to be the cause of injury, you must find that it is so closely related as to be the moving force causing the ultimate injury." Because this instruction closely tracks the language in *City of Canton*, we find that it correctly stated the law and adequately covered the issue of causation. *See City of Canton*, 489 U.S. at 391 ("the identified deficiency in a city's training program must be *closely related to the ultimate injury*.") (emphasis in original).

Concurrent Cause

In *Jones v. Williams*, the Ninth Circuit affirmed a defense verdict in a § 1983 case in which the district judge gave the following "concurrent cause" instruction to address allegations of supervisory and group liability: "[M]any factors or things or the conduct of two or more persons can operate at the same time either independently or together to cause injury or damage and in such a case each may be a proximate cause." *Jones v. Williams*, 297 F.3d 930, 937 n.6 (9th Cir. 2002).

Revised ~~Sept. 2018~~Dec. 2019

9.11 PARTICULAR RIGHTS—FIRST AMENDMENT—"CITIZEN" PLAINTIFF

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] rights under the First Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the First Amendment, a citizen has the right [to free expression] [to petition the government] [to access the courts] [*other applicable right*]. In order to prove the defendant deprived the plaintiff of this First Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. the plaintiff was engaged in a constitutionally protected activity;

2. the defendant's actions against the plaintiff would chill a person of ordinary firmness from continuing to engage in the protected activity; and

3. the plaintiff's protected activity was a substantial or motivating factor in the defendant's conduct.

[I instruct you that the plaintiff's [speech in this case about [*specify*]] [*specify conduct*] was protected under the First Amendment and, therefore, the first element requires no proof.]

A substantial or motivating factor is a significant factor~~.~~, though not necessarily the only factor.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and when the plaintiff is a private citizen. Use Instruction 9.9 (Particular Rights—First Amendment—Public Employees—Speech**)** when the plaintiff is a public employee. Because this instruction is phrased in terms focusing the jury on the defendant's liability for certain acts, the instruction should be modified to the extent liability is premised on a failure to act in order to avoid any risk of misstating the law. *See Clem v. Lomeli*, 566 F.3d 1177, 1181-82 (9th Cir. 2009).

Under the First Amendment to the United States Constitution, a citizen has the right to be free from governmental action taken to retaliate against the citizen's exercise of First Amendment rights or to deter the citizen from exercising those rights in the future. *Sloman v. Tadlock*, 21 F.3d 1462, 1469-70 (9th Cir. 1994). "Although officials may constitutionally impose time, place, and manner restrictions on political expression carried out on sidewalks and median strips, they may not 'discriminate in the regulation of expression on the basis of content of that expression.' State action designed to retaliate against and chill political expression strikes at the very heart of the First Amendment." *Id.* (citations omitted).

Thus, in order to demonstrate a First Amendment violation, a citizen plaintiff must provide evidence showing that "by his actions [the defendant] deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct." *Id.* (quoting *Mendocino Env'l Ctr. v. Mendocino County*, 14 F.3d 457, 459-60 (9th Cir. 1994). Defining "substantial or motivating factor" as a "significant factor" does not misstate the law. *Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 884-85 (9th Cir. ~~2003).~~2003); *see also Capp v. City of San Diego*, 940 F.3d 1046, 1056 (9th Cir. 2019) (explaining that retaliatory intent may still be one substantial or motivating factor for retaliatory conduct even if other, non-retaliatory reasons exist). A plaintiff need not prove, however, that "his speech was actually inhibited or suppressed." *Mendocino Env'l Ctr.*, 192 F.3d at 1288; *see also Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016) ("A plaintiff may bring a Section 1983 claim alleging that public officials, acting in their official capacity, took action with the intent to retaliate against, obstruct, or chill the plaintiff's First Amendment rights. To bring a First Amendment retaliation claim, the plaintiff must allege that (1) it engaged in constitutionally protected activity; (2) the defendant's actions would 'chill a person of ordinary firmness' from continuing to engage in the protected activity; and (3) the protected activity was a substantial or motivating factor in the defendant's conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill speech. Further, to prevail on such a claim, a plaintiff need only show that the defendant 'intended to interfere' with the plaintiff's First Amendment rights and that it suffered some injury as a result; the plaintiff is not required to demonstrate that its speech was actually suppressed or inhibited." (citations omitted)).

But see Sharp v. County of Orange, 871 F.3d 901, 919 (9th Cir. 2017) (applying but-for causation standard in summary judgment context); *see also Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-32 (9th Cir. 2006).

In determining whether the First Amendment protects student speech in a public school, it is error to use the "public concern" standard applicable to actions brought by governmental employees. *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 759 (9th Cir. 2006). Instead, the proper standard to apply to student speech is set forth in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969). *Pinard*, 467 F.3d at 759; *see also Ariz. Students' Ass'n*, 824 F.3d at 867; *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir. 2016); *Corales v. Bennett*, 567 F.3d 554, 562-68 (9th Cir. 2009).

"A speech restriction cannot satisfy the time, place, manner test if the restriction does not contain clear standards." *OSU Student All. v. Ray*, 699 F.3d 1053, 1066 (9th Cir. 2012); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) ("The absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."). Off-campus student speech may not be protected under the First Amendment when, based on the totality of the circumstances, the speech bears a sufficient nexus to the school. *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707 (9th Cir. 2019). Relevant considerations into whether speech bears a sufficient nexus to the

school include: (1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school." *Id*.; *see also C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150-52 (9th Cir. 2016); *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F. 3d. 1062, 1069 (9th Cir. 2013).

> Retaliation claims involving government speech warrant a cautious approach by courts. Restricting the ability of government decisionmakers to engage in speech risks interfering with their ability to effectively perform their duties. It also ignores the competing First Amendment rights of the officials themselves. The First Amendment is intended to 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.' . . . In accordance with these principles, we have set a high bar when analyzing whether speech by government officials is sufficiently adverse to give rise to a First Amendment retaliation claim.

Mulligan v. Nichols, 835 F.3d 983, 989 (9th Cir. 2016) (citations omitted).

For a discussion of the boundaries between First Amendment protected expression and unprotected business activity by a street performer, *see Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017).

"Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). The filing of a grievance/complaint whether it be verbal or written, formal or informal is protected conduct. Threats to sue and/or pursue criminal charges fall within the purview of the constitutionally protected right to file grievances. *Entler v. Gregoire*, 872 F.3d 1031 (9th Cir. 2017).

9.23 PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEIZURE OF PERSON—PROBABLE CAUSE ARREST

In general, a seizure of a person by arrest without a warrant is reasonable if the arresting officer[s] had probable cause to believe the plaintiff has committed or was committing a crime.

In order to prove the seizure in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that [he] [she] was arrested without probable cause.

"Probable cause" exists when, under all of the circumstances known to the officer[s] at the time, an objectively reasonable police officer would conclude there is a fair probability that the plaintiff has committed or was committing a crime.

Although the facts known to the officer are relevant to your inquiry, the officer's intent or motive is not relevant to your inquiry.

Under [federal] [state] law, it is a crime to [*insert elements or description of applicable crime for which probable cause must have existed*].

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and in conjunction with Instruction 9.20 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

"A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification." *Lacey v. Maricopa County*, 693 F.3d 896, 918 (9th Cir. 2012) (citation omitted). "Probable cause exists if the arresting officers had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that [the arrestee] had committed or was committing a crime." *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097-98 (9th Cir. 2013) (alteration in original) (quoting *Maxwell v. County of San Diego*, 697 F.3d 941, 951 (9th Cir. 2012)). "To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules. It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. Probable cause is not a high bar." *District of Columbia v. Wesby*, 138 S.Ct. 577, 586 (2018) (internal quotations and citations omitted).

In *Devenpeck v. Alford*, the Supreme Court reiterated the Fourth Amendment standards applicable in a § 1983 claim for false arrest:

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

> In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.
>
> Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." . . . "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."

Devenpeck v. Alford, 543 U.S. 146, 152-53 (2004) (citations omitted) (emphasis in original); *see also Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1147 (9th Cir. 2012).

"There is probable cause for a warrantless arrest and a search incident to that arrest if, under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime." *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010) (quoting *United States v. Gonzales*, 749 F.2d 1329, 1337 (9th Cir. 1984)). "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). "'[S]tate restrictions [on arrest] do not alter the Fourth Amendment's protections,' and under federal law, 'warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution.'" *Edgerly v. City & County of San Francisco*, 599 F.3d 946, 956 (9th Cir. 2010) (second alteration in original) (quoting *Virginia v. Moore*, 553 U.S. 164, 176 (2008)). A warrantless arrest for a crime committed in the presence of an arresting officer is permitted, even if the offense, as a matter of state law, was one for which the officers should have issued a summons rather than made an arrest. *Moore*, 553 U.S. at 167-72. Absent exigent circumstances, however, authority to make a warrantless arrest based on probable cause ends at the threshold of a private dwelling, and police may not make a warrantless, nonconsensual entry into a suspect's residence to make a felony arrest. *Payton v. New York*, 445 U.S. 573, 590 (1980); *see also Hopkins v. Bonvicino*, 573 F.3d 752, 773 (9th Cir. 2009). "[A] 'person may not be arrested, or must be released from arrest, if previously established probable cause has dissipated.'" *Nicholson* v. City of Los Angeles, 935 F.3d 685, 691 (9th Cir. 2019).

"While the traditional Fourth Amendment analysis 'is predominantly an objective inquiry,' the 'actual motivations' of officers may be considered when applying the special needs doctrine." *Scott v. City. of San Bernardino*, 903 F.3d 943, 949 (9th Cir. 2018) (affirming summary judgment in favor of plaintiff middle school students unreasonably arrested without probable cause).

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9.34 QUALIFIED IMMUNITY

Comment

The Committee has not formulated any instructions concerning qualified immunity because most issues of qualified immunity are resolved before trial, or the ultimate question of qualified immunity is reserved for the judge to be decided after trial based on the jury's resolution of the disputed facts.

Under the doctrine of qualified immunity, "courts may not award damages against a government official in his personal capacity unless the official violated a statutory or constitutional right, and the right was clearly established at the time of the challenged conduct." *Lane v. Franks*, 573 U.S. 228, 243 (2014). The qualified immunity analysis consists of two prongs: (1) whether the facts the plaintiff alleges make out a violation of a constitutional right; and (2) whether that right was clearly established at the time the defendant acted. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016). A court may "exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (noting that analyzing first then second prong, while not mandatory, "is often beneficial[,] . . . promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable"); *see also Jessop v. City of Fresno*, ~~918~~936 F.3d ~~1031, 1035~~937, 940 (9th Cir. 2019). *But see District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018) ("We continue to stress that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim").

Whether a right is clearly established turns on ~~"~~whether it ~~would be clear to a~~is "sufficiently definite that any reasonable ~~officer that his conduct was unlawful~~official in the ~~situation~~defendant's shoes would have understood he ~~confronted." *Conner*~~was violating it." *Nicholson v. ~~Heiman~~*, ~~672~~*City of Los Angeles*, 935 F.3d ~~1126, 1132~~685, 695 (9th Cir. ~~2012~~2019) (quoting ~~*Saucier*~~*Kisela v. ~~Katz~~*, ~~533 U.~~*Hughes*, 138 S. ~~194, 202 (2001~~Ct. 1148, 1153 (2018)). Regarding the second prong, the Ninth Circuit has explained: "We begin our inquiry into whether this constitutional violation was clearly established by defining the law at issue in a concrete, particularized manner." *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1117 (9th Cir. 2017). The Ninth Circuit also confirmed that it is the plaintiff who bears the burden of showing that the rights allegedly violated were clearly established. *Id*. at 1118.

Qualified immunity is a question of law, not a question of fact. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1210 (9th Cir. 2008). "Immunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Only when "historical facts material to the qualified immunity determination are in dispute" should the district court submit the factual dispute to a jury. *Torres*, 548 F.3d at 1211; *see also Newmaker v. City of*

Fortuna, 842 F.3d 1108, 1116 (9th Cir. 2016) ("Summary judgment is not appropriate in § 1983 deadly force cases that turn on the officer's credibility that is genuinely in doubt."). If the only material dispute concerns what inferences properly may be drawn from the historical facts, a district court should decide the issue of qualified immunity. *Conner*, 672 F.3d at 1131 n.2 ("[W]hile determining the facts is the jury's job (where the facts are in dispute), determining what objectively reasonable inferences may be drawn from such facts may be determined by the court as a matter of logic and law."). Only the judge can decide whether a particular constitutional right was "clearly established" once any factual issues are resolved by a fact finder. *See Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017).

An institutional defendant, such as a school district or municipality, is not entitled to qualified immunity. *See Owen v. Independence*, 445 U.S. 622, 638 (1980) (holding that "municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983").

"The Supreme Court has provided little guidance as to where courts should look to determine whether a particular right was clearly established at the time of the injury . . . . In the Ninth Circuit, we begin our inquiry by looking to binding precedent . . . . If the right is clearly established by decisional authority of the Supreme Court or this Circuit, our inquiry should come to an end. On the other hand, when 'there are relatively few cases on point, and none of them are binding,' we may inquire whether the Ninth Circuit or Supreme Court, at the time the out-of-circuit opinions were rendered, would have reached the same results . . . . Thus, in the absence of binding precedent, we 'look to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, including decisions of state courts, other circuits, and district courts." *Boyd v. Benton County*, 374 F.3d 773, 781 (9th Cir. 2004); *see also Jessop*, ~~918~~936 F.3d at ~~1033-34, 1036~~939, 942 (stating there is "no clearly established law holding that officers violate the Fourth or Fourteenth Amendment when they steal property ~~that is~~ seized pursuant to a warrant," where Ninth Circuit had not decided issue and other circuits are divided; although officers "ought to have recognized that" stealing seized property "~~would be improper~~was morally wrong, they did not have clear notice that it violated the Fourth Amendment").

Generally, a plaintiff need not find "a case directly on point," but existing precedent must have placed the statutory or constitutional question beyond debate. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see also White v. Pauly*, 137 S. Ct. 548, 552 (2017) (emphasizing "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality'" (quoting *al-Kidd*, 563 U.S. at 742)); *Hamby v. Hammond*, 821 F.3d 1085, 1091 (9th Cir. 2016). *Daniels Sharpsmart, Inc. v. Smith*, 889 F.3d 608 (9th Cir. 2018) (applying qualified immunity in context of dormant commerce clause). However, "there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018) (citing *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam)). *See also Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) (finding border patrol agent's fatal shooting of teenager on other side of border for no apparent reason to be one such rare but obvious circumstance); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018) (finding police officers' "shepherding" of presidential candidate's supporters into crowd of violent counter-protesters to be one such rare but obvious circumstance); *Hardwick v. Vreeken*, 844 F.3d

1112, 1120 (9th Cir. 2017) (identifying intentional use of perjured or fabricated evidence in child dependency hearing to be one such rare but obvious circumstance).

A defendant is entitled to qualified immunity as a matter of law only if, taking the facts in the light most favorable to the nonmoving party, he or she did not violate any clearly established constitutional right. *Torres*, 548 F.3d at 1210. If reasonable jurors could believe that the defendant violated the plaintiff's constitutional right, and the right at issue was clearly established, the case should proceed to trial. *Id.*; *see also LaLonde v. County of Riverside*, 204 F.3d 947, 953 (9th Cir. 2000) ("If … there is a material dispute as to the facts regarding what the officer or the plaintiff actually did, the case must proceed to trial, before a jury if requested."). "Though we may excuse the reasonable officer for … a mistake, it sometimes proves necessary for a jury to determine first whether the mistake, was, in fact, reasonable." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013) (citations omitted); *see also Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir. 2003) (explaining that if determining reasonableness of officer's action depends on disputed issues of fact—*i.e.*, which version of facts is accepted by jury—this is question of fact best resolved by jury). When a case proceeds to trial, qualified immunity is no longer an "immunity from suit"; rather, it effectively becomes a defense. *Torres*, 548 F.3d at 1211 n. 9.

When there are disputed factual issues that are necessary to a qualified immunity decision, these issues must first be determined by the jury before the court can rule on qualified immunity. *Morales v. Fry*, 873 F.3d 817, 824 (9th Cir. 2017); *see also Nehad v. Browder*, 929 F.3d 1125, 1140 (9th Cir. 2019). The issue should be preserved in a Rule 50(a) motion at the close of evidence and then revisited, if appropriate, after the verdict in a Rule 50(b) motion. *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009) ("When a qualified immunity claim cannot be resolved before trial due to a factual conflict, it is a litigant's responsibility to preserve the legal issue for determination after the jury resolves the factual conflict."); *see also A.D. v. Cal. High. Patrol*, 712 F.3d 446, 452 n.2 (9th Cir. 2013) (noting that defendant preserved his position on qualified immunity—renewed in Rule 50(b) motion after trial—by bringing Rule 50(a) motion for JMOL before case was submitted to jury). Consistent with this case law, there may be particular cases in which a special verdict on a discrete fact is warranted in order to resolve a qualified immunity claim. But a special verdict is not required in every qualified immunity case involving disputed issues of material fact for the purpose of evaluating a post-verdict qualified immunity defense. *See Lam v. City of San Jose*, 869 F.3d 1077, 1086 (9th Cir. 2017).

The district court may raise the issue of qualified immunity *sua sponte*. *Easley v. City of*
Riverside, 890 F.3d 851, 855 (9th Cir. 2018). In *Easley*, the defendant asserted qualified immunity as a defense in his answer, but took no further action on the defense. At the pre-trial conference, the district court directed the parties to brief the issue, and entered summary judgment in defendant's favor. The Ninth Circuit affirmed. *Id*.

Qualified immunity analysis is irrelevant to the issue of liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978). *See Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1250 (9th Cir. 2016).

"State action for § 1983 purposes is not necessarily co-extensive with state action for which qualified immunity is available." *Bracken v. Okura*, 869 F.3d 771, 776 (9th Cir. 2017). Thus, when an off-duty police officer, wearing his uniform, is working as a private security guard, qualified immunity does not apply, even if the off-duty work is with the consent of the police department and the off-duty officer may be found to have been acting under the color of state law. *Id*. at 777-78.

For a discussion of when a law enforcement officer is entitled to rely on the judgment of a government agency for purposes of the second prong of the qualified immunity analysis, *see Sjurset v. Button*, 810 F.3d 609 (9th Cir. 2015).

"As a general rule, members of the public have no constitutional right to sue [public] employees who fail to protect them against harm inflicted by third parties." *Juan Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018) (quoting *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992)). There is an exception to this rule, however, called the state-created danger doctrine. Under this exception, a government employee must have affirmatively placed the plaintiff in a position of danger, that is, the employee's actions must have created or exposed an individual to a danger that he or she would not have otherwise faced. *Id*. To prove that the exception applies, "[t]he affirmative act must create an actual, particularized danger," "the ultimate injury to the plaintiffs must be foreseeable," and "the employees must have . . . acted with 'deliberate indifference' to a 'known or obvious danger.'" *Id*. (citations omitted). For a further discussion of the state-created danger doctrine, *see also Bracken*, 869 F.3d at 778-79; *Pauluk v. Savage*, 836 F.3d 1117, 1122 (9th Cir. 2016).

In *Thompson v. Raheem*, 885 F. 3d 582, 586 (9th Cir. 2018), the Ninth Circuit clarified that a qualified immunity defense to an excessive force claim is analyzed in three stages. In the first stage, the court assesses the severity of the intrusion by evaluating the type and amount of force inflicted. In the second stage, the court evaluates the government's interest by assessing the severity of the crime; whether the suspect posed an immediate threat to the officers' or public's safety; and whether the suspect was resisting arrest or attempting to escape. In the third and final stage, the court balances the gravity of the intrusion against the government's need for the intrusion.

18.3 SECURITIES—MISREPRESENTATIONS OR OMISSIONS—MATERIALITY

The plaintiff must prove by a preponderance of the evidence that the defendant's misrepresentation or omission was material.

A factual representation concerning a security is material if there is a substantial likelihood a reasonable investor would consider the fact important in deciding whether to buy or sell that security.

An omission concerning a security is material if a reasonable investor would have regarded what was not disclosed to [him] [her] [it] as having significantly altered the total mix of information [he] [she] [it] took into account in deciding whether to buy or sell the security.

You must decide whether something was material based on the circumstances as they existed at the time of the statement or omission.

Comment

In *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988), the Supreme Court adopted the standard for materiality developed in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), (whether a reasonable shareholder would "consider it important" or whether the fact would have "assumed actual significance") as the standard for actions under 15 U.S.C. § 78j(b).

In discussing materiality, the Ninth Circuit has applied *TSC Industries* and *Basic Inc.* in various formulations. *See, e.g.*, *SEC v. Hui Feng*, 935 F.3d 721, 736 (9th Cir. 2019) (applying *TSC* materiality test); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946-48 (9th Cir. 2005) (applying *Basic Inc.* materiality test); *No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003) (declining to adopt bright line rule for materiality that would require immediate change in stock price and instead engaging in "fact-specific inquiry" under *Basic Inc.*); *In re Stac Electrs. Sec. Litig.*, 89 F.3d 1399, 1408 (9th Cir. 1996) (applying test of whether there was substantial likelihood that omitted fact would have been viewed by reasonable investor as having significantly altered "total mix" of information made available); *Kaplan v. Rose*, 49 F.3d 1363, 1371 (9th Cir. 1994) (applying test of whether omission or misrepresentation would have misled reasonable investor about nature of his or her investment); *McGonigle v. Combs*, 968 F.2d 810, 817 (9th Cir. 1992) (applying test of whether there was substantial likelihood that, under all the circumstances, omitted fact would have assumed actual significance in deliberations of reasonable shareholder); *see also In re Atossa Genetics Inc. Sec. Litig.*,868 F.3d 784,

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795-96 (9th Cir. 2017) (discussing relationship between materiality and reliance and noting that "materiality" may be different when plaintiff alleges direct reliance on misrepresentation, rather than fraud-on-the-market theory).

For a discussion of the distinction between mere puffery, which is not material, and a statement that is materially misleading, *see In re Quality Systems, Inc. Sec. Litig.*, 865 F.3d 1130, 1143-44 (9th Cir. 2017).

The Ninth Circuit has held that stock price movements are relevant to reliance, and not to materiality. *See Retail Wholesale & Dep't Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1277 (9th Cir. 2017).