

9.11 Particular Rights—First Amendment—“Citizen” Plaintiff

As previously explained, the plaintiff [name] has the burden of proving that the act[s] of the defendant [name] deprived the plaintiff [name] of particular rights under the United States Constitution. In this case, the plaintiff [name] alleges the defendant [name] deprived the plaintiff [name] of 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]. To establish the defendant [name] deprived the plaintiff [name] of this First Amendment right, the plaintiff [name] must prove the following additional elements by a preponderance of the evidence:

First, the plaintiff [name] was engaged in a constitutionally protected activity;

Second, the defendant [name]’s actions against the plaintiff [name] would chill a person of ordinary firmness from continuing to engage in the protected activity; and

Third, the plaintiff [name]’s protected activity was a substantial or motivating factor in the defendant [name]’s conduct.

[I instruct you that the plaintiff [name]’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.

If the plaintiff [name] establishes each of the foregoing elements, the burden shifts to the

defendant [name] to prove by a preponderance of the evidence that the defendant [name] would have taken the action(s) in question, even in the absence of any motive to retaliate against the plaintiff [name]. If you find that the defendant [name] is able to demonstrate this, you must find for the defendant [name]. If you find that the defendant [name] is not able to demonstrate this, you must find for the plaintiff [name].

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 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); *see also Hartzell v. Marana Unified Sch. Dist.*, 130 F.4th 722, 737 (9th Cir. 2025) (concluding that a policy that allowed "the District to prohibit speech that it finds 'offensive or inappropriate'" violated the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable") (citation omitted). "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.* at 1469 (citations omitted).

However, "members of the public do not have a constitutional right to force the government to listen to their views . . . [a]nd the First Amendment does not compel the government to respond to speech directed toward it." *L.F. v. Lake Washington School Dist.* #414, 947 F.3d 621, 626 (9th Cir. 2020) (citing *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283 (1984); *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (per curiam)).

"A plaintiff may bring a [§] 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." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016). In *Matsumoto v. Labrador*, 122 F.4th 787, 802 (9th Cir. 2024), the court held that a pre-enforcement action brought by abortion rights advocacy organizations against the Idaho attorney general fell within an exception to *Ex parte Young* for the state's Eleventh Amendment immunity, which allows "actions for prospective declaratory or injunctive relief against state officers in their official capacities" provided that the officer has "some connection with the enforcement of the act." The attorney general had "some connection" to the enforcement because the statute specifically granted authority to the attorney general to prosecute "abortion trafficking." *Id.* "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." *Ariz. Students' Ass'n*, 824 F.3d at 867; *Sanderlin v. Dwyer*, 116 F.4th 905, 910-11 (9th Cir. 2024); *Koala v. Khosla*, 931 F.3d 887, 905 (9th Cir. 2019).

As to the third element, “[w]hether an officer was motivated by discriminatory animus ‘involves questions of fact that normally should be left for trial.’” *Cheairs v. City of Seattle*, 145 F.4th 1233, 1246 (9th Cir. 2025) (holding that the plaintiff failed to show retaliation where the plaintiff presented no evidence that the defendant was aware of underlying protected conduct (filming protest)) (quoting *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 (9th Cir. 2020)). 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); 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). And “[i]f a factfinder concludes that there was no legitimate justification for [the defendant’s] actions, they could reasonably infer that those actions were motivated by retaliatory animus.” *Sanderlin*, 116 F.4th at 911. A plaintiff need not prove, however, that “his speech was actually inhibited or suppressed.” *Mendocino Env’t Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Ariz. Students’ Ass’n*, 824 F.3d at 867.

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 on campus 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 *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 188 (2021) (noting the Court’s prior applications of *Tinker* standard as recognizing schools’ “special interest in regulating speech that ‘materially disrupts classwork or involves substantial disorder or invasion of the rights of others’” (citation omitted)); see also *Waln v. Dysart School District*, 54 F.4th 1152, 1161-63 (9th Cir. 2022).

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.” *Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 720 (9th Cir. 2022); 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). Courts may also consider a student’s age to evaluate whether a school’s actions were reasonably designed to protect the safety and well-being of its students. *B.B. v. Capistrano Unified Sch. Dist.*, 169 F.4th 953, 962-64 (9th Cir. 2026) (per curiam) (observing that “[c]ertain speech may be merely negative or controversial to high schoolers, but may constitute derogatory and injurious remarks against elementary students given their greater vulnerability”).

The Supreme Court has declined to set forth a “broad, highly general First Amendment rule stating just what counts as ‘off campus’ speech” and, instead, set forth three features of off-campus speech that “diminish the strength of the unique educational characteristics that might call for special First Amendment leeway.” *Mahanoy*, 594 U.S. at 189. First, “a school, in relation to off-campus speech, will rarely stand *in loco parentis*.” *Id.* Second, regulation of off-campus speech coupled with regulation of on-campus speech, encompasses the entirety of the speech a student utters in a day. *Id.* at 189-90. Third, schools must be mindful of their own interest in protecting students’ unpopular expression, particularly when that expression occurs off-campus, consistent with the role of America’s public schools as “nurseries of democracy.” *Id.* at 190.

The additional considerations articulated in *Mahanoy* are not inconsistent with the sufficient-nexus test articulated in *McNeil*. *Chen*, 56 F.4th at 720. Thus, the proper inquiry “must apply the *McNeil* sufficient-nexus test to the speech at issue . . . , keeping in mind the additional considerations identified in *Mahanoy*.” *Id.*

“[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) (“[T]he 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).

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) (footnote omitted); *accord Chavez v. Robinson*, 12 F.4th 978, 1001 (9th Cir. 2021); *Bird v. Dzurenda*, 131 F.4th 787, 790-91 (9th Cir. 2025) (concluding that “grievances against other prisoners implicate different penological interests than grievances against prison officials”). The filing of a grievance or complaint, whether it be verbal or written, formal or informal, is protected conduct. *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017). Threats to sue and/or pursue criminal charges fall within the purview of the constitutionally protected right to file grievances. *Id.* at 1044. “Prisoners have a First Amendment right to receive information while incarcerated,” but this right must be balanced against a prison’s need for effective administration and reform. *Jones v. Slade*, 23 F.4th 1124, 1134 (9th Cir. 2022). Prison

regulations that affect information or mailings available to inmates are reviewed pursuant to the four-factor deferential standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *Id.* at 1134-35 (applying *Turner* standard to music CDs confiscated as contraband per prison regulations); *see also Prison Legal News v. Ryan*, 39 F.4th 1121, 1131-35 (9th Cir. 2022) (applying *Turner* standard to prison rule prohibiting inmates from receiving mail containing sexually explicit material).

Within the context of First Amendment retaliatory arrest claims, plaintiffs “must generally ‘plead and prove the absence of probable cause,’ because the presence of probable cause generally ‘speaks to the objective reasonableness of an arrest’ and suggests that the ‘officer’s animus’ is not what caused the arrest.” *Ballentine v. Tucker*, 28 F.4th 54, 62 (9th Cir. 2022) (quoting *Nieves v. Bartlett*, 587 U.S. 391, 400 (2019)). However, the Supreme Court has “carved out a ‘narrow’ exception for cases where ‘officers have probable cause to make arrests, but typically exercise their discretion not to do so,’” *Ballentine*, 28 F.4th at 62 (quoting *Nieves*, 587 U.S. at 406). In such cases, which involve offenses like jaywalking and defacing public property with chalk, “the *Nieves* exception only applies ‘when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.’” *Id.* at 407; *see also Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024) (reversing the Fifth Circuit’s “overly cramped view of *Nieves*” and explaining that to fall within the *Nieves* exception a plaintiff must produce objective evidence showing that in circumstances where officers have probable cause to make arrests, they “typically exercise their discretion not to do so”).

If a plaintiff bringing a retaliatory arrest claim establishes that protected conduct was a substantial or motivating factor behind the plaintiff’s arrest, then “the defendant can prevail only by a showing that the [arrest] would have been initiated without respect to retaliation.” *Ballentine*, 28 F.4th at 63 (quoting *Nieves*, 587 U.S. at 404, 406-07). If a plaintiff has established that the police lacked probable cause for an arrest, the plaintiff must show that the alleged retaliation was a substantial or motivating factor behind the arrest, and, if that showing is made, the defendant can prevail only by showing that the arrest would have been initiated without respect to retaliation. *Hill v. City of Fountain Valley*, 70 F.4th 507, 518-19 (9th Cir. 2023) (relying on test set out in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

This instruction properly applies to First Amendment claims concerning speech by elected officials. *See Boquist v. Courtney*, 32 F.4th 764, 774 (9th Cir. 2022) (citing *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 542-43 (9th Cir. 2010)). The first element in Instruction 9.11 “is readily met when elected officials express their views and opinions.” *Id.* at 775. However, the second element is more difficult for elected officials to establish. *Id.* at 776. This is because “the First Amendment . . . ‘doesn’t shield public figures from the give-and-take of the political process.’” *Id.* (citing *Blair*, 608 F.3d at 543-44) (“‘more is fair in electoral politics than in other contexts’”). To establish the second element, an elected official would have to show that the adverse action in question either (i) prevented her from doing her job, (ii) deprived her of

authority she enjoyed by virtue of her popular election, or (iii) otherwise prevented her from enjoying the full range of rights and prerogatives that came with being elected. *See Id.* at 777 (citing *Houston Cmty. Coll. Sys. v. Wilson*, 598 U.S. 468, 479 (2022); *Blair*, 608 F.3d at 544 & n.4).

For a discussion of the “commonality of political purpose” inquiry that applies to First Amendment claims made by, *inter alia*, an appointed volunteer in public service, see *Lathus v. City of Huntington Beach*, 56 F.4th 1238, 1241 (9th Cir. 2023) (quoting *Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (9th Cir. 2001)).

If the plaintiff establishes a *prima facie* case of retaliation, “the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of.” *Hartman v. Moore*, 547 U.S. 250, 260 (2006). In conducting this burden-shifting analysis, courts apply the “but-for” causation standard, under which causation is “established whenever a particular outcome would not have happened but for the purported cause.” *Boquist*, 32 F.4th at 778 (quoting *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020)). “If there is a finding that retaliation was not the but-for cause of the [adverse action], the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official’s mind.” *Hartman*, 547 U.S. at 260. “Conversely, if the government officials would have taken the same adverse action even in the absence of their animus or retaliatory motive arising from the plaintiff’s speech, then the officials’ animus was not a but-for cause of the adverse action, and there was no violation of the plaintiff’s constitutional rights.” *Boquist*, 32 F.4th at 778. If state officials can show that they had “an objectively legitimate need to implement security measures in response to information conveyed by the plaintiff’s speech, and would have implemented the same security measures in the absence of any retaliatory motive . . . any unconstitutional motivation would not be a but-for cause of the officials’ action.” *Id.*

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