

## 9.40 Particular Rights—Fourteenth Amendment—Due Process—State-Created Danger

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 that the defendant [name] deprived the plaintiff [name] of [his] [her] [other pronoun] rights under the Fourteenth Amendment to the Constitution when [insert factual basis of the plaintiff's claim].

Under the Fourteenth Amendment, a person has the constitutional right to be free from a government employee affirmatively placing that person in a position of actual, particularized danger (or in a situation of actual, particularized danger that is more dangerous than the position that the person already faced) if the government employee acted with deliberate indifference to a known or obvious danger.

To prove the defendant deprived the plaintiff [name] of this Fourteenth Amendment right, the plaintiff [name] must prove the following additional elements by a preponderance of the evidence:

First, the defendant [name] committed an affirmative act;

Second, the affirmative act placed the plaintiff [name] in a position of an actual, particularized danger by creating or exposing the plaintiff [name] to a danger that [he] [she] [other pronoun] not have otherwise faced;

Third, the defendant [name] acted with deliberate indifference to a known or obvious danger; and

Fourth, the affirmative act that created the actual, particularized danger caused injury to the plaintiff [name] that was foreseeable.

In this context, “deliberate indifference” means that the defendant [name] disregarded a known or obvious consequence of [his] [her] [other pronoun] action[s]. In other words, the defendant [name] must have known that something was going to happen but ignored the risk and still exposed the plaintiff [name] to that risk.

### Comment

Use this instruction only in conjunction with the applicable elements instruction from Instructions 9.3-9.8.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term “officers” or “defendants.” In *Chinaryan*, the Ninth Circuit explained that the jury instructions were “confusing” where the instructions stated that “to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officers”—plural—“used excessive force.” *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The “officers” jury instruction language was confusing because it “required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force.” *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The “state may be constitutionally required to protect a plaintiff that it affirmatively places in danger by acting with deliberate indifference to a known or obvious danger.” *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019) (quotations omitted); *see also Est. of Soakai v. Abdelaziz*, 137 F.4th 969, 983-85 (9th Cir. 2025) (holding that the plaintiffs plausibly alleged a state-created danger claim where the plaintiffs asserted that the defendants initiated a high speed car chase that led to a crash injuring the bystander plaintiffs and that defendants acted with deliberate indifference to the plaintiffs’ medical conditions because the defendants witnessed the crash and did not stop to render aid nor did they call for help); *Martinez v. High*, 91 F.4th 1022, 1028-29 (9th Cir. 2024) (explaining that an officer acted with deliberate indifference when the police officer disclosed a domestic violence victim’s confidential report of domestic violence to victim’s alleged abuser, who was another police officer, and knew victim was in the room with the abuser and would thus be exposed to his violent reaction, after which the abuser further physically abused the plaintiff); *Polanco v. Diaz*, 76 F.4th 918, 925-29 (9th Cir. 2023) (upholding a claim of state-created danger against prison officials in a case arising from prison guard’s death from COVID-19 complications after 122 ill inmates with COVID-19 were transferred from another prison); *Murguia v. Langdon*, 61 F.4th 1096, 1110-17 (9th Cir. 2023) (“In examining whether an officer affirmatively places an individual in danger, . . . we examine whether the officers left the person in a situation that was more dangerous than the one in which they found him.”); *Sinclair v. City of Seattle*, 61 F.4th 674, 682 (9th Cir. 2023) (holding that the danger of uncontrolled lawlessness created by the city’s decision to withdraw law enforcement from a neighborhood and surrender it to protestors failed to allege that the danger was sufficiently particularized to support a mother’s claim that the city’s actions deprived her of her substantive due process right to son’s companionship); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133-35 (9th Cir. 2018) (stating police officers “shepherding” of presidential candidate’s supporters into a crowd of violent counter-protesters increased the danger to the attendees and was in deliberate indifference to that danger).

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