**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*]. To establish 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 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).

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 (citations omitted).” *L.F. v. Lake Washington School District #414*, 947 F.3d 621, 626 (9th Cir. 2020).

Thus, 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); *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). “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.*, 23 F.4th at 1134-35 (applying *Turner* standard to music CDs confiscated as contraband per prison regulations).

*Revised Mar. 2022*