## 9.5 SECTION 1983 CLAIM AGAINST LOCAL GOVERNING BODY

## DEFENDANTS BASED ON OFFICIAL POLICY, PRACTICE, OR CUSTOM THAT VIOLATES LAW OR DIRECTS EMPLOYEE TO VIOLATE LAW—ELEMENTS

## AND BURDEN OF PROOF

In order to prevail on [his] [her] § 1983 claim against defendant [*name of local governing body*] alleging liability based on an official policy, practice, or custom, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. [*Name of defendant’s official or employee*] acted under color of state law;

2. the act[s] of [*name of defendant’s official or employee*] deprived the plaintiff of [his] [her] particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions;

3. [*Name of defendant’s official or employee*] acted pursuant to an expressly adopted official policy or a widespread or longstanding practice or custom of the defendant [*name of local governing body*]; and

4. the defendant [*name of local governing body*]’s official policy or widespread or longstanding practice or custom caused the deprivation of the plaintiff’s rights by the [*name of defendant’s official or employee*]; that is, the [*name of local governing body*]’s official policy or widespread or longstanding practice or custom is so closely related to the deprivation of the plaintiff’s rights as to be the moving force that caused the ultimate injury*.*

A person acts “under color of state law” when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation. [[The parties have stipulated that] [I instruct you that] [*name of defendant’s official or employee*] acted under color of state law.]

“Official policy” means a formal policy, such as a rule or regulation adopted by the defendant [name of local governing body], resulting from a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

“Practice or custom” means any longstanding, widespread, or well-settled practice or custom that constitutes a standard operating procedure of the defendant [*name of local governing body*]. [A practice or custom can be established by repeated constitutional violations that were not properly investigated and for which the violator[s] [was] [were] not disciplined, reprimanded or punished.]

If you find that the plaintiff has proved each of these elements, and if you find that the plaintiff has proved all the elements [he] [she] is required to prove under Instruction[s] [*specify the instruction[s] that deal with the particular right[s]*], your verdict should be for the plaintiff. If, on the other hand, you find that the plaintiff has failed to prove any one or more of these elements, your verdict should be for the defendant.

**Comment**

Use this instruction only in conjunction with an applicable “particular rights” instruction, such as Instructions 9.9–9.33. Such an instruction should set forth the additional elements a plaintiff must establish to prove the violation of the particular constitutional right or federal law at issue.

In addition, use this instruction only when *Monell* liability is based on an expressly adopted official policy or a widespread or longstanding practice or custom of the defendant that is alleged either to be itself unlawful or to direct employees to act in an unlawful manner. *See*, *e.g.*, *Jackson v. Barnes*, 749 F.3d 755, 763 (9th Cir. 2014). For other bases of *Monell* liability, *see* Instructions 9.6 (Section 1983 Claim Against Local Governing Body Defendants Based on Act of Final Policymaker—Elements and Burden of Proof), 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof) and 9.8 (Section 1983 Claim Against Local Governing Body Defendants Based on a Failure to Prevent Violations of Law or a Failure to Train—Elements and Burden of Proof).

As noted in the Introductory Comment to this chapter, § 1983 liability of a local governing body may not be based on *respondeat* *superior*. *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978). Such liability may attach when an employee committed a constitutional violation pursuant to an expressly adopted official policy. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013). “Official policy” means a formal policy, such as a rule or regulation adopted by the defendant, resulting from a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986); *see also Connick v. Thompson*, 563 U.S. 51, 62 (2011).

Such liability may also attach when an employee committed a constitutional violation pursuant to a widespread practice or custom. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). The plaintiff must prove the existence of such a widespread practice or policy as a matter of fact. *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996) (“Normally, the question of whether a policy or custom exists would be a jury question.”). A widespread “custom or practice” must be so “persistent” that it constitutes a “permanent and well settled city policy” and “constitutes the standard operating procedure of the local governmental entity.” *Id.* at 918 (quoting *Monell*, 436 U.S. at 691); *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992) (providing final quotation).

The Ninth Circuit has held that “a custom or practice can be supported by evidence of repeated constitutional violations which went uninvestigated and for which the errant municipal officers went unpunished.” *Hunter v. County of Sacramento*, 652 F.3d 1225, 1236 (9th Cir. 2011); *see also Nehad v. Browder*, 929 F.3d 1125, 1141 (9th Cir. 2019) (citing evidence

sufficient to create triable issue regarding informal practice or policy). The Ninth Circuit has used the term “longstanding” practice or custom interchangeably with the Supreme Court’s more frequent usage of “widespread.” *See*, *e.g.*, *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999); *Jett v. Dallas Indep. Sch. Dist*., 491 U.S. 701, 737 (1989). Use the bracketed language in the last sentence of the penultimate paragraph of the instruction only when the plaintiff has presented substantial evidence of a failure to investigate or discipline and that theory is central to the plaintiff’s case. *See Hunter*, 652 F.3d at 1235.

A plaintiff seeking to establish municipal liability must demonstrate that the government “had a deliberate policy, custom, or practice that was the ‘moving force’ behind the constitutional violation he suffered.”  *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1096 (9th Cir. 2013) (citations and quotations omitted). “To meet this requirement, the plaintiff must show both causation-in-fact and proximate causation.” *Id. See also Eagle Point Education Assoc. v. Jackson Cnty. School Dist*., 880 F.3d 1007, 1108 (9th Cir. 2018) (holding school district liable for acts of security officer implementing district’s official policy that unconstitutionally restricted student speech) (citing *Monell*, 436 U.S. at 708).

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