## 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

 In order to prevail on [his] [her] § 1983 claim against defendant [*name of local governing body*] alleging liability based on a policy [that fails to prevent violations of law by its] [of a failure to train its] [police officers] [employees], the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the [act[s]] [failure to act] of [*name of defendant’s* [*police officer[s]*] [*employee[s]*]] deprived the plaintiff of [his] [her] particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions;

2. [*name of defendant’s* [*police officer[s]*] [*employee[s]*]] acted under color of state law;

3. the [training] policies of the defendant [*name of local governing body*] were not adequate to [prevent violations of law by its employees] [train its [police officers] [employees] to handle the usual and recurring situations with which they must deal];

4. the defendant [*name of local governing body*] was deliberately indifferent to the [substantial risk that its policies were inadequate to prevent violations of law by its employees] [known or obvious consequences of its failure to train its [police officers] [employees] adequately]; and

5. the failure of the defendant [*name of local governing body*] [to prevent violations of law by its employees] [to provide adequate training] caused the deprivation of the plaintiff’s rights by the [*name of defendant’s* [*police officer[s]*][*employee[s]*]]; that is, the defendant’s failure [to prevent violations of law by its employees] [to train] played a substantial part in bringing about or actually causing the injury or damage to the plaintiff.

 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* [*police officer[s]*] [*employee[s]*] acted under color of state law.]

 A policy is 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. [A policy of inaction or omission may be based on a failure to implement procedural safeguards to prevent constitutional violations. To establish that there is a policy based on a failure to preserve constitutional rights, the plaintiff must show, in addition to a constitutional violation, that this policy amounts to deliberate indifference to the plaintiff’s constitutional rights, and that the policy caused the violation, in the sense that the municipality could have prevented the violation with an appropriate policy.]

 “Deliberate indifference” is the conscious choice to disregard the consequences of one’s acts or omissions. The plaintiff may prove deliberate indifference in this case by showing that the facts available to the defendant [*name of local governing body*] put it on actual or constructive notice that its [failure to implement adequate policies] [failure to train adequately] was substantially certain to result in the violation of the constitutional rights of persons such as the plaintiff due to [police officer[s]] [employee[s]]’s conduct.

 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, 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 a local governing body’s policy of inaction, such as a failure to train its police officers. If the plaintiff is alleging

inadequate hiring of employees, inadequate supervision, or failure to adopt a needed policy,

elements 3 through 5 of this instruction should be modified accordingly. *See Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 409-11 (1997) (addressing failure to screen candidates); *Jackson v. Barnes*, 749 F.3d 755, 763-64 (9th Cir. 2014) (addressing failure to supervise), *cert. denied*, 135 S. Ct. 980 (2015); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012) (addressing failure to implement policy). As with a failure to train claim, the plaintiff must show that the failure to hire, supervise, or adopt a policy amounted to deliberate indifference by the governing body. *See*, *e.g.*, *Tsao*, 698 F.3d at 1145. For other bases of *Monell* liability, *see* Instructions 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), 9.6 (Section 1983 Claim Against Local Governing Body Defendants Based on Act of Final Policymaker—Elements and Burden of Proof), and 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—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). Instead, a plaintiff must establish a “direct causal link” between the municipal policy or custom and the alleged constitutional violation. *See Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 681 (9th Cir. 2021). This “requires showing both but for and proximate causation.” *Tsao*, 698 F.3d at 1146 (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008). In *Harper*, the Ninth Circuit approved of a jury instruction that explained that “proximate cause exists where “an act or omission played a substantial part in bringing about or actually causing the injury or damage to plaintiffs.” *Harper*, 533 F.3d at 1026.

 “A policy of inaction or omission may be based on failure to implement procedural

safeguards to prevent constitutional violations.” *Tsao*, 698 F.3d at 1143. “In limited circumstances, a local government’s decision not to train certain employees about their legal duty to avoid violating citizens’ rights may rise to the level of an official government policy for purposes of § 1983.”  *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (holding that county’s failure to train prosecutors regarding *Brady v. Maryland*, 373 U.S. 83 (1963), did not constitute obvious deficiency because attorneys had attended law school and were charged with knowing

the law). “[P]olicies of omission regarding the supervision of employees … can be ‘policies’ or

‘customs’ that create municipal liability … only if the omission ‘reflects a deliberate or

conscious choice’ to countenance the possibility of a constitutional violation.” *Tsao*, 698 F.3d at

1145 (quoting *City of Canton v. Harris*, 489 U.S. 378, 389-90 (1989)). “[A] municipality’s failure to train its employees in a relevant respect must amount to ‘deliberate indifference’ to the rights of persons with whom the [untrained employees] come into contact.” *Connick*, 563 U.S. at 61 (second alteration in original).

 In *Castro v. County of Los Angeles*, 833 F.3d 1060, 1076 (9th Cir. 2016) (en banc), the Ninth Circuit held that the deliberate indifference inquiry is objective. “Deliberate indifference” requires proof that a municipal actor disregarded a known or obvious consequence of his action.  *Connick*, 563 U.S. at 61 (“[W]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens’ constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program.”); *see also Castro*, 833 F.3d at 1077 (discussing constructive notice for entities). “A pattern of similar constitutional violations by untrained employees is ‘ordinarily necessary’ to demonstrate deliberate indifference for purposes of failure to train.”  *Connick*, 563 U.S. at 62; *see also Flores v. County of Los Angeles*, 758 F.3d 1154, 1159-60 (9th Cir. 2014) (holding that, absent pattern of sexual assaults by deputies, alleged failure to train officers not to commit sexual assault did not constitute deliberate indifference); *Marsh v. County of San Diego*, 680 F.3d 1148, 1159 (9th Cir. 2012) (holding that practice must be “widespread” and proof of single inadequately-trained employee was insufficient); *Doughtery v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (“Mere negligence in training or supervision … does not give rise to a *Monell* claim.”).

However, the Supreme Court has “left open the possibility that, ‘in a narrow range of circumstances,’ a pattern of similar violations might not be necessary to show deliberate indifference,” using the hypothetical of a case in which an officer was provided firearms but given no training on the constitutional limits on the use of deadly force. *Connick*, 563 U.S. at 63-64 (quoting *Brown*, 520 U.S. at 409, and citing *Canton*, 489 U.S. at 389-90). In *Kirkpatrick v. Washoe County*, 843 F.3d 784 (9th Cir. 2016) (en banc), the Ninth Circuit held that a county

social services agency’s complete failure to train its social workers on the procedures for obtaining a warrant and when a warrant is required before taking a child from a parent was just such a “narrow circumstance” in which evidence of a pattern of similar violations was unnecessary. *See id.* at 796-97. In *Sandoval v. County of San Diego*, 985 F.3d 657, 682 (9th Cir. 2021), the Ninth Circuit applied an objective deliberate indifference standard to the county’s policy of maintaining a mixed-use cell—sometimes using the cell for medical care and other times as a general holding cell—with only an informal verbal pass-off system for notifying nurses whether the detainee in the mixed-use cell required medical supervision. The court held that the standard “requires a showing that the facts available to the county put it on ‘actual or constructive notice’ that its practices with regard to [the mixed-use] cell were ‘substantially certain to result in the violation of the constitutional rights of [its] citizens.’” *Id*. (footnote omitted) (quoting *Castro*, 833 F.3d at 1076).

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