

# **Constitutional Litigation Under § 1983**

**Second Edition**

**2009 Letter Update**

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## Chapter 1

### **OFFICIAL LIABILITY FOR CONSTITUTIONAL WRONGS**

#### **B. “State Action” Compared**

##### **[1] Official Wrongdoing**

Add the following to note 6 on page 20:

In *Vermont v. Brillon*, 129 S. Ct. 1283 (2009), the Court (per Justice Ginsburg) ruled that just as pre-trial delay caused by retained counsel is charged to a criminal defendant (and not the state), delay caused by a public defender is charged to a defendant for purposes of the Sixth Amendment’s Speedy Trial Clause: “An assigned counsel’s failure ‘to move the case forward’ does not warrant attribution of delay to the State. . . . [A]ssigned counsel generally are not state actors for purposes of a speedy-trial claim. While the Vermont Defender General’s office is indeed ‘part of the criminal justice system,’ the individual counsel here acted only on behalf of [the defendant], not the State.” (Citing *Polk County v. Dodson*, 454 U.S. 312 (1981)).

Add the following to footnote 39 on page 53:

See also Sheldon Nahmod, *Academic Freedom and the Post-Garcetti Blues*, 7 U.N.C. FIRST AMEND. L. REV. 54 (2008) (discussing the Supreme Court’s decision in *Garcetti*).

## Chapter 2

### **OFFICIAL IMMUNITIES**

#### **A. Absolute Immunity**

##### **[1] Legislative Immunity**

Add the following to Note 3 on page 80:

Federal criminal charges flowing from seven alleged bribery schemes have been filed against Congressman William J. Jefferson, the search of whose office was at issue in *United States v. Rayburn Office Building*, 497 F.3d 654 (D.C. Cir. 2007). The Fourth Circuit affirmed the trial court’s refusal to dismiss the indictment, rejecting Jefferson’s argument that evidence of his legislative acts was improperly presented to the grand jury in violation of the Speech or Debate Clause. See *United States v. Jefferson*, 546 F.3d 300 (4<sup>th</sup> Cir. 2008). The Court of Appeals noted that the District Court conducted an in camera review of grand jury materials even though “the controlling authorities did not compel such a comprehensive review,” and properly concluded that “the grand jury had not considered any Speech or Debate Clause material.” *Id.* at

314. Jefferson, who won a primary runoff election in November of 2008, but was defeated in the general election the following month, is scheduled to go to trial in June of 2009.

### **[3] Prosecutorial Immunity**

Add the following to Note 2 on page 97:

A unanimous Supreme Court reversed the Ninth Circuit in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), concluding that a district attorney and his chief deputy were entitled to absolute immunity in connection with claims that they failed to adequately train and supervise their subordinates to ensure they were complying with the constitutional obligation to disclose exculpatory material to criminal defendants. Although the Supreme Court agreed that the plaintiff was challenging “the office’s administrative procedures,” the suit involved an “administrative obligation ... directly connected with the conduct of a trial,” as opposed to “workplace hiring, payroll administration, the maintenance of physical facilities, and the like.” *Id.* at 861-62. “The management tasks,” the Court continued, “insofar as they are relevant, concern how and when to make impeachment information available at a trial [and] are thereby directly connected with the prosecutor’s basic trial advocacy duties.” *Id.* at 863. The Court thus analogized the plaintiff’s claim to a suit filed against supervisory prosecutors alleging that “they should have found and turned over the impeachment material,” actions that clearly would have been entitled to absolute immunity. *Id.* at 862. “[B]ecause better training or supervision might prevent most, if not all, prosecutorial errors at trial,” the Court explained, “the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler*.” *Id.* at 863.

The Supreme Court has agreed to consider another case involving the reach of absolute prosecutorial immunity next Term. See *Pottawattamie County v. McGhee*, No. 08-1065 (cert. granted, Apr. 20, 2009). The Court will review the Eighth Circuit’s holding that a prosecutor who allegedly violated substantive due process by “obtaining, manufacturing, coercing and fabricating evidence before filing formal charges” was not entitled to absolute immunity because “this is not ‘a distinctly prosecutorial function.’” *McGhee v. Pottawattamie County*, 547 F.3d 922, 933 (8<sup>th</sup> Cir. 2008).

### **B. Qualified Immunity**

Add the following to Note 8 following *Harlow v. Fitzgerald* on page 108:

To no one’s surprise, the Supreme Court unanimously reversed *Saucier* in *Pearson v. Callahan*, 129 S. Ct. 808 (2009). The Justices pointed to “a considerable body of new experience” that led them to conclude that “a mandatory, two-step rule for resolving all qualified immunity claims should not be retained.” *Id.* at 817. Admonishing that “the sequence set forth [in *Saucier*] is often appropriate,” the Court nevertheless thought that it “should no longer be regarded as mandatory.” *Id.* at 818. Rather, the Court instructed the lower courts to “exercise

their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” *Id.*

*See also Amnesty International, USA v. Battle*, 559 F.3d 1170, 1181 (11<sup>th</sup> Cir. 2009) (“Although this two-step inquiry is no longer mandatory, we think it remains appropriate in this case.”).

Add the following to Note 2 following *Hope v. Pelzer* on page 122:

*Pearson v. Callahan*. The Supreme Court unanimously concluded that police officers were entitled to qualified immunity when they made a warrantless entry into a home after receiving a signal from an undercover informant that he had just purchased drugs in the house. *See Pearson v. Callahan*, 129 S. Ct. 808 (2009). In defending their action, the defendants relied on the “consent-once-removed” doctrine, which “permits a warrantless entry by police officers into a home when consent to enter has already been granted to an undercover officer or informant who has observed contraband in plain view.” *Id.* at 814. Finding that the police had not violated clearly established law, the Supreme Court reasoned that “the ‘consent-once-removed’ doctrine had gained acceptance in the lower courts,” having been approved by three federal courts of appeals and two state supreme courts “starting in the early 1980’s.” *Id.* at 822. The Court also relied on a federal appellate court opinion decided after the entry in question, noting that “prior to the Tenth Circuit’s decision in the present case, no court of appeals had issued a contrary decision.” *Id.* at 823. The Supreme Court therefore thought that the police were “entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on ‘consent-once-removed’ entries,” concluding that “where the divergence of views on the consent-once-removed doctrine was created by the decision of the Court of Appeals in this case, it is improper to subject petitioners to money damages for their conduct.” *Id.*

*Safford Unified School District v. Redding*. The plaintiff’s thirteen-year-old daughter was subjected to a strip search by school officials after another student reported that the girl had given her prescription-strength and over-the-counter pain relievers that were banned by school rules. In an opinion written by Justice Souter, eight Justices (all but Justice Thomas) took the position that although the defendants were entitled to search the girl’s backpack and outer clothing, they acted in violation of the Fourth Amendment by requiring her to remove her clothes and pull out and shake her bra and underwear. *See Safford Unified School District v. Redding*, 129 S. Ct. — (2009). The majority went on to hold, however, that the school officials were entitled to qualified immunity given disagreements that had arisen among the lower courts in other strip search cases applying the Supreme Court’s holding in *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985), that school officials should “limit the intrusiveness of a search, ‘in light of the age and sex of the student and the nature of the infraction.’” The majority did not “suggest that entitlement to qualified immunity is the guaranteed product of disuniform views of the law” and noted that “the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear if we have been clear.” Nevertheless, the Court thought that the “differences of opinion” here were “substantial enough to require immunity,” given that “the cases viewing school strip searches differently from the way we see them are numerous enough, with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law.”

Justices Stevens and Ginsburg dissented on the qualified immunity issue. They argued that “the clarity of a well-established right should not depend on whether jurists have misread our precedents.” These two Justices acknowledged that prior Supreme Court decisions (including *Pearson v. Callahan*) “noted the ‘divergence of views’ among courts in deciding whether to extend qualified immunity,” but distinguished those as cases where the Court “relied on that consideration only to spare officials from having ‘to predict the future course of constitutional law,’” and not, as in this case, where the Court merely applied existing precedent and “chart[ed] no new constitutional path.”

Add the following to Note 5 following *Hope v. Pelzer* on page 127:

In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Court held that a district court decision denying the defendants’ motion to dismiss “turned on an issue of law and rejected the defense of qualified immunity,” and was therefore immediately appealable. The Supreme Court rejected the plaintiff’s contention that “‘a qualified immunity appeal based solely on the complaint’s failure to state a claim’”—rather than on the “‘ultimate’” qualified immunity issue whether the acts allegedly committed by the defendants constituted a violation of clearly established law—“‘is not a proper subject of interlocutory jurisdiction.’” “[A]ppellate jurisdiction is not so strictly confined,” the Court concluded.

The Court went on to distinguish its previous decision in *Johnson v. Jones*, 515 U.S. 304 (1995), noting that “[t]he concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings.” Although the *Iqbal* Court acknowledged that “the categories of ‘fact-based’ and ‘abstract’ legal questions used to guide the Court’s decision in *Johnson* are not well defined,” it thought that the decision to deny the defendants’ motion to dismiss “falls well within the latter class.” The Court reasoned that the case required an appellate court to “consider[] only the allegations contained within the four corners of [the plaintiff’s] complaint,” and that the decision whether a complaint “has the ‘heft’ to state a claim is a task well within an appellate court’s core competency.” “Evaluating the sufficiency of a complaint is not a ‘fact-based’ question of law,” the *Iqbal* Court concluded, and therefore “the problem the Court sought to avoid in *Johnson* is not implicated here.”

Add to the end of Note 5 on page 130:

The Supreme Court in *Robinson v. Lehman*, 128 S. Ct. 1219 (2008), vacated for reconsideration in light of *Scott v. Harris*, 127 S. Ct. 1769 (2007), an interlocutory Ninth Circuit decision affirming a District Court’s denial of qualified immunity to police officers who killed a fleeing motorist.

## Chapter 3

### **SOVEREIGN IMMUNITY**

#### **C. Waiver and Abrogation**

Add the following to Note 7 following *Quern v. Jordan* on page 177:

In *Northwest Austin Municipal Utility District No. 1 v. Holder*, 129 S. Ct. — (2009), a question arose concerning the constitutionality of the provision in Section 5 of the Voting Rights Act of 1965 requiring federal preclearance of any change in any election held in a state covered by the Act. The majority opinion, written by Chief Justice Roberts, ultimately side-stepped the constitutional issue, reasoning that the case could be resolved on statutory grounds. Specifically, the Court interpreted the statute so as to allow the utility district to seek to avoid the preclearance requirement by filing a bailout suit under Section 4(b) of the Act. Before doing so, however, the majority opinion cast doubt on the constitutionality of the preclearance requirement, noting that “Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities” even if “there has never been any evidence of racial discrimination in voting in the district.” The Court also observed that “conditions ... have substantially improved” since the Act was passed, that “[t]he evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance,” and that “there is considerable evidence that it fails to account for current political conditions.” Justice Thomas, writing alone, agreed with the Court’s statutory analysis, but would have gone on to reach the constitutional question and strike down the preclearance provision. “Punishment for long past sins is not a legitimate basis for imposing a forward-looking preventative measure that has already served its purpose,” Justice Thomas wrote.

## Chapter 4

### **LOCAL LIABILITY**

#### **A. Historical Antecedents**

Replace Note 7 on page 194:

**7. Supervisory Liability.** In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), a Muslim Pakistani pretrial detainee (Iqbal) argued that high-ranking officials in the Bush Administration were responsible for racial, religious and ethnic discrimination in causing persons of “high interest” to be illegally detained following the September 11 terrorist attacks. Iqbal argued that “under a theory of ‘supervisory liability,’ [the officials] can be liable for ‘knowledge and acquiescence in their subordinates’ use of discriminatory criteria to make classification decisions among detainees.’ That is to say, [Iqbal] believes a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.” *Id.* at 1949. The Supreme Court in a 5-to-4 opinion, written by Justice Kennedy, “reject[ed] this argument.”

Iqbal’s “conception of supervisory liability,” Justice Kennedy ruled, “is inconsistent with his accurate stipulation that [government officials] may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term ‘supervisory liability’ is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.”

Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented. Justice Souter complained that the majority ignored the government’s concession that supervisory liability based on a supervisor’s knowledge of a subordinate’s wrongdoing was proper, and that the majority’s logic was faulty:

The dangers of the majority's readiness to proceed without briefing and argument are apparent in its cursory analysis, which rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which “an employer is subject to liability for torts committed by employees while acting within the scope of their employment,” or no supervisory liability at all. The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still might be conditions to render a supervisor liable for the conduct of his subordinate.

In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate's constitutional violation and acquiesces, or where supervisors “‘know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,’” or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate, or where the supervisor was grossly negligent. I am unsure what the general test for supervisory liability should be, and in the absence of briefing and argument I am in no position to choose or devise one.

*Id.* at 1958 (Souter, J., dissenting) (citations omitted).

## **B. Municipal Immunity**

Add to Note 3 on page 203:

Justice Ginsburg in a dissenting opinion filed in *Herring v. United States*, 129 S. Ct. 695 (2009)—which refused to extend the Fourth Amendment’s exclusionary rule to most governmental record-keeping errors—stated that “by restricting suppression to bookkeeping errors that are deliberate or reckless, the majority leaves [the defendant], and others like him, with no remedy for violations of their constitutional rights. There can be no serious assertion that relief is available under 42 U.S.C. § 1983. The arresting officer would be sheltered by

qualified immunity, and the police department itself is not liable for the negligent acts of its employees.” *Id.* at 708 (Ginsburg, J., dissenting) (citing *Harlow* and *Monell*).

Add to Note 4 on page 204:

*See also* Ralph W. Kasarda & Robert Luther III, *Why Courts Must Subject Municipalities to Constitutional Tort Liability Under § 1983 When Unconstitutional Race- and Sex-Based Preference Statutes Deprive an Otherwise Lowest Qualified Bidder of a Public Contract*, 19 GEO. MASON U. CIV. RIGHTS J. 371, 394 (2009) (“By forcing legislators to provide taxpayers with the best municipal services at the most cost-efficient price, ‘constitutional tort damage remedies levied against municipalities do, in fact, alter the behavior of government policymakers in desirable ways.’”).

## Chapter 5

### **THE RELATIONSHIP BETWEEN STATE AND FEDERAL LAW IN SECTION 1983 LITIGATION**

#### **B. Notice-of-Claim Requirements**

Add the following to Note 3 on page 276:

In *Haywood v. Drown*, 129 S. Ct. 2108 (2009), the Supreme Court struck down a New York statute that barred its state courts from taking jurisdiction of damages claims filed by prisoners against state prison officials. Instead, the statute required that any such suits be brought against the State in the Court of Claims, where no award of injunctive relief, punitive damages, or attorney’s fees was available. Finding the statute violative of the Supremacy Clause, Justice Stevens’ opinion for the five Justices in the majority refused to characterize the law as “a neutral rule of judicial administration” within the meaning of *Howlett v. Rose*, 496 U.S. 356 (1990). Rather, the Court observed, the statute was based on the legislature’s “judgment that correction officers should not be burdened with suits for damages” because “it regards these suits as too numerous or too frivolous (or both),” a policy that the Court found “contrary to Congress’ judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for damages.” The Court also rejected the state court’s view that the statute passed constitutional muster because it did not differentiate between section 1983 and state law causes of action, noting that “[a]lthough the absence of discrimination is necessary to our finding a state law neutral,... [a] jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear.” The majority declined to entertain the question whether “Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to § 1983,” concluding that the state “made this inquiry unnecessary by creating courts of general jurisdiction that routinely sit to hear analogous § 1983 actions.”

In the portion of his opinion joined by the other three dissenters, Justice Thomas took the position that the Supremacy Clause makes “jurisdictional neutrality ... the touchstone”: the Supremacy Clause “does not fossilize the jurisdiction of state courts in their original form,” but rather allows the states to “alter the structure of their judicial system” so long as they do not discriminate against federal causes of action. Writing only for himself, Justice Thomas went further in other portions of the dissent, arguing that the Constitution envisions that states may choose to entertain federal causes of action but may not be required to do so, and that the Supremacy Clause’s “exclusive focus on substantive state law” means that state jurisdictional statutes may discriminate against federal causes of action because “the superiority of federal law as a substantive matter does not trigger an obligation on States to keep their courts jurisdictionally neutral with respect to federal and state-law claims.”

## Chapter 8

### PRIOR AND PARALLEL STATE PROCEEDINGS

#### B. Habeas Corpus and § 1983

##### [1] Injunctive Relief

Add new Note 3 to page 468:

**3. Using § 1983 to Discover Evidence of Innocence.** Can § 1983 be used by a prisoner to force prosecutors to allow DNA testing of biological evidence in an effort to overturn a conviction? The Ninth Circuit in *Osborne v. District Attorney’s Office for the Third Judicial District*, 423 F.3d 1050 (9<sup>th</sup> Cir. 2005), ruled that it can. Discovery of exculpatory evidence, after all, would not necessarily result in the prisoner’s release. According to the Ninth Circuit, such an action therefore need not proceed through habeas corpus. *See generally Wilkinson v. Dotson*, 544 U.S. 74 (2005) (discussed in Note 6 following *Heck v. Humphrey*, 512 U.S. 477 (1994), in Section [2], *infra*). *See also Bradley v. Pryor*, 305 F.3d 1287 (11<sup>th</sup> Cir. 2002) (holding that § 1983 can be used to gain post-conviction access to biological evidence).

The Supreme Court in *District Attorney’s Office for the Third Judicial District v. Osborne*, No. 08-6 (June 18, 2009), per the Chief Justice, ruled that the Constitution provides no independent right on the part of post-conviction prisoners to discover exculpatory evidence. It accordingly reversed the decision of the Ninth Circuit. In regard to the Ninth Circuit’s conclusion that § 1983 provided an appropriate vehicle for the constitutional argument, the Court stated:

While Osborne's claim falls within the literal terms of § 1983, we have also recognized that § 1983 must be read in harmony with the habeas statute. “Stripped to its essence,” the State says, “Osborne's § 1983 action is nothing more than a request for evidence to support a hypothetical claim that he is actually innocent .... [T]his hypothetical claim sounds at the core of habeas corpus.”

Osborne responds that his claim does not sound in habeas at all. Although invalidating his conviction is of course his ultimate goal, giving him the evidence he seeks “would not necessarily imply the invalidity of [his] confinement.” If he prevails, he would receive only *access* to the DNA, and even if DNA testing exonerates him, his conviction is not automatically invalidated. He must bring an entirely separate suit or a petition for clemency to invalidate his conviction. If he were proved innocent, the State might also release him on its own initiative, avoiding any need to pursue habeas at all.

Osborne also invokes our recent decision in *Wilkinson v. Dotson*, 544 U.S. 74 (2005). There, we held that prisoners who sought new hearings for parole eligibility and suitability need not proceed in habeas. We acknowledged that the two plaintiffs “hope[d]” their suits would “help bring about earlier release,” but concluded that the § 1983 suit would not accomplish that without further proceedings. ... Every Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence similarly does not “necessarily spell speedier release,” it can be sought under § 1983. ...

While we granted certiorari on this question, our resolution of Osborne's claims does not require us to resolve this difficult issue. ... [The Ninth Circuit] was wrong to find a due process violation.

Justice Alito, joined by Justice Kennedy, concurred, stating that “a state prisoner asserting a federal constitutional right to perform such testing must file a petition for a writ of habeas corpus, not an action under 42 U.S.C. § 1983 ....”

Justices Stevens, Souter, Ginsburg and Breyer dissented on the merits of the constitutional claim.

## [2] Damages

Add new Note to page 481:

**6.b. Relief Short of Release.** The Ninth Circuit in *Osborne v. District Attorney's Office for the Third Judicial District*, 423 F.3d 1050 (9<sup>th</sup> Cir. 2005), relying on *Wilkinson v. Dotson*, 544 U.S. 74 (2005), ruled that convicted inmates are not barred by *Heck v. Humphrey* from using § 1983 to gain access to biological evidence for DNA testing in order to prove their innocence. Under the logic of *Dotson*, the court stated, “success would yield only *access* to the evidence—nothing more. Second, further DNA analysis may prove exculpatory, inculpatory, or inconclusive; thus, there is a significant chance that the results will either confirm or have no effect on the validity of [the inmate's] confinement.” *Id.* at 1054. The Supreme Court granted review to address the propriety of § 1983 litigation under these circumstances, but ultimately ruled that convicted criminals simply have no constitutional right to DNA testing. *District Attorney's Office for the Third Judicial District v. Osborne*, No. 08-6 (June 18, 2009). The Supreme Court, in an opinion authored by the Chief Justice, noted that “[e]very Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence similarly does not ‘necessarily spell

speedier release,' it can be sought under § 1983.” Because there was no constitutional claim, however, it did not resolve whether § 1983 or habeas governs convicted prisoners’ attempts at uncovering exculpatory evidence.

Justice Alito, joined by Justice Kennedy, concurred, stating that “a state prisoner asserting a federal constitutional right to perform such testing must file a petition for a writ of habeas corpus, not an action under 42 U.S.C. § 1983 ....”

Justices Stevens, Souter, Ginsburg and Breyer dissented on the merits of the constitutional claim.

## **Chapter 9**

### **ATTORNEY’S FEES**

#### **B. Reasonable Fees**

Add new Note to page 514:

**4.a. Is Fee Enhancement Ever Proper?** Some lower courts following *Dague* continued to authorize fee-enhancement under special circumstances, like success involving superior legal work. The Supreme Court in *Perdue v. Kenny A. ex rel. Winn*, 129 S. Ct. 1907 (2009), granted review to decide whether this practice is proper. Specifically, the Court granted review to address whether “a reasonable attorney’s fee award under a federal fee-shifting statute [can] ever be enhanced based solely on quality of performance and results obtained when these factors already are included in the lodestar calculation?” The District Court in *Perdue* had found that “‘the superb quality of [counsel’s] representation far exceeded what could reasonably be expected for the standard hourly rates used to calculate the [fee].’ The court commented that ‘[q]uite simply, plaintiffs’ counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench.’ Finally, the court said that an enhancement was appropriate because ‘the evidence establishes that plaintiffs’ success in this case was truly exceptional.’” 532 F.3d 1209, 1217 (11<sup>th</sup> Cir. 2008). Consequently, the District Court applied a 1.75 multiplier that increased the fee award from \$6 million to \$10.5 million. The Eleventh Circuit reluctantly affirmed, finding that it was bound by Circuit-precedent authorizing fee-enhancement under these circumstances.