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SEARCH, SEIZURE, AND SNAPCHAT: HOW THE FOURTH AMENDMENT FITS WITHIN THE EVOLVING WORLD OF CIVIL E-DISCOVERY

Anna McMullen*

Historically, privacy was almost implicit, because it was hard to find and gather information. But in the digital world, whether it's digital cameras or satellites or just what you click on, we need to have more explicit rules.¹

INTRODUCTION

When Thomas Jefferson wrote the Declaration of Independence in 1776, he spoke of the inherent and unalienable rights due all men, among which are the preservation of “Life, Liberty, and the pursuit of Happiness.”² Inspired by these words, the Framers envisioned a country of free, autonomous citizens, independent from government’s unnecessary or unduly burdensome interference.³ However, Jefferson did not include “privacy” in his list of unalienable rights.

The United States judicial system is incredibly liberal. The disclosures that civil litigants must make during discovery are tailored not to protect a citizen’s privacy, but to resolve the instant dispute.⁴ In December 2015, the Federal Rules of Civil Procedure (FRCP) were amended.⁵ These amendments made minor adjustments to the timeline

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¹ Interview by Bill Clinton with Bill Gates, in New York, N.Y. (Sept. 23, 2013).

² THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

³ See, e.g., Eric Slauter, *Life, Liberty, and the Pursuit of Happiness*, BOS. GLOBE (July 3, 2011), http://archive.boston.com/bostonglobe/ideas/articles/2011/07/03/life_liberty_and_the_pursuit_of_happiness/?page=full [https://web.archive.org/web/20171002161055/http://archive.boston.com/bostonglobe/ideas/articles/2011/07/03/life_liberty_and_the_pursuit_of_happiness/?page=full] (presenting a history of the perception of the Declaration of Independence).

⁴ See *Managing the EU-US Discovery Conflict*, LAW360 (Oct. 8, 2008, 12:00 AM), <https://www.law360.com/articles/72082/managing-th-eu-us-discovery-conflict> [<https://perma.cc/A4P8-RWPV>] (discussing the liberal nature of United States civil discovery and stating that “the broad standard also allows U.S. litigants to go on fishing expeditions, requesting documents that may, or may not, exist”). This 2008 article raises some points that no longer apply in the wake of the FRCP amendments discussed in this Note; however, the United States remains incredibly liberal with respect to civil discovery. See *infra* Part II.

⁵ See generally CHIEF JUSTICE JOHN ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5, 9 (2015), <https://www.supremecourt.gov/publicinfo/year-end/2015year>

required in discovery and slightly tweaked the forms used to make discovery requests, but the most significant changes were made with respect to discovery of electronically stored information (ESI).⁶ While the FRCP have mentioned ESI since 1970,⁷ the rapidly digitizing world of discovery merited more specific, detailed instructions regarding how ESI can be searched and what kinds of ESI must be produced.⁸

Disputes regarding these rule revisions have cropped up throughout the country, with a few reaching federal appeals courts, but the amendments have yet to receive a bright-line, definitive explanation. When questions arise regarding the reach and scope of the new federal rules, litigants lack the diverse case law to make efficient determinations about their obligations. However, to adjudicate this confusion, these litigants may refer to one of the rights deemed inherent in Jefferson's Preamble: the protection against unreasonable search and seizure guaranteed by the Fourth Amendment.⁹ Using the huge body of case law that evaluates what constitutes a "reasonable" search and seizure under the Fourth Amendment,¹⁰ a confused litigant may analyze what exactly "reasonable" and "proportional" mean under the amended FRCP.

Though the Fourth Amendment was written long before the first computer's invention,¹¹ its scope has been evaluated frequently concerning search and seizure of electronic devices during criminal proceedings.¹² Part I of this Note discusses the Fourth Amendment, its reasonableness test, and the expansion of the "papers and effects" language in the twenty-first century.¹³ Part II discusses the 2015 amendments to the FRCP regarding electronic discovery (e-discovery) and explains the changes and their effects.¹⁴ Part III further explains the new obligations regarding ESI that litigants must confront in a modern civil case.¹⁵ Part IV then reconciles Fourth Amendment precedent with litigants' unclear obligations under the amended FRCP; this Part of

-endreport.pdf [<https://perma.cc/3Y75-BLLB>] (explaining the changes to the rules and stating that the "civil rules amendments are a major stride toward a better federal court system").

⁶ See *id.* at 7–9.

⁷ FED. R. CIV. P. 34 advisory committee's note to 2006 amendment ("In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase.").

⁸ Part II of this Note will delve into the changes in the Rules regarding ESI, but for a graphical representation of the changes see *Comparison of Current Federal Civil Rules and the Proposed Amendments Effective December 1, 2015*, U.S. DIST. CT. OF MD., <http://www.ncmd.uscourts.gov/sites/ncmd/files/RulesComparisonChart.pdf> [<https://perma.cc/YFP9-PR69>] (last visited Oct. 13, 2017) [hereinafter *Comparison Chart*].

⁹ See U.S. CONST. amend. IV; THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776).

¹⁰ See *infra* Section I.A.

¹¹ See *Computer History Timeline, DATES AND EVENTS* (Mar. 2015), <http://www.datesandevents.org/events-timelines/07-computer-history-timeline.htm> [<https://perma.cc/JZC8-YZ7G>].

¹² See, e.g., THOMAS N. MCINNIS, THE EVOLUTION OF THE FOURTH AMENDMENT 223–25 (2009).

¹³ See *infra* Part I.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part III.

the Note works through the e-discovery-specific amendments, paralleling the obligations to particular aspects of Fourth Amendment precedent, and clarifying what is a reasonably permissible search.¹⁶ Furthermore, Part IV also explores Fourth Amendment precedent and correlates solid warrant drafting practice to discovery request drafting under the amended FRCP.¹⁷

Ultimately, this Note endeavors to examine a relatively new problem—a civil litigant’s ambiguous obligations regarding discovery of his ESI—and use the Fourth Amendment to clarify its solution.

I. THE FOURTH AMENDMENT

In his dissent from the 1928 *Olmstead v. United States*¹⁸ decision, Justice Brandeis wrote that in crafting the Fourth Amendment the “makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.”¹⁹ However, nowhere does the United States Constitution expressly provide citizens a right to privacy.²⁰ The Bill of Rights reflects the Framers’ concern for protecting specific types of privacy such as the privacy of belief, the privacy of the home against unauthorized use by soldiers, and privacy of the person and his possessions against unreasonable searches.²¹ Brandeis believed that with the Fourth Amendment, the Founders “conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”²² For Brandeis, any unjustifiable governmental intrusion upon an individual’s privacy, whatever the means, violated the Fourth Amendment.²³

The Fourth Amendment specifically provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

¹⁶ See *infra* Part IV.

¹⁷ See *infra* Part IV.

¹⁸ 277 U.S. 438 (1928).

¹⁹ *Id.* at 478 (Brandeis, J., dissenting).

²⁰ See *generally* U.S. CONST. (never explicitly delineating a general, or broad, right to privacy).

²¹ See Doug Linder, *The Right of Privacy*, EXPLORING CONST. LAW, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html> [<https://perma.cc/D6YA-2LDE>] (last visited Oct. 13, 2017) (discussing various Supreme Court decisions regarding a citizen’s right to privacy as implicated through the Bill of Rights).

²² *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); see also MCINNIS, *supra* note 12, at 224 (“The trespass doctrine [from *Olmstead*] can no longer be regarded as controlling” (quoting *Katz v. United States*, 389 U.S. 347, 353 (1967) and discussing the Court’s evaluation of whether a physical trespass is required to trigger the Fourth Amendment)).

²³ See *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

describing the place to be searched, and the persons or things to be seized.²⁴

Brandeis's passionate *Olmstead* dissent,²⁵ and the rich body of Fourth Amendment case law which followed, elaborate on the Framers' plain text. This case law enumerates what actually makes a search reasonable during criminal investigations, and, in turn, aids a contemporary civil litigant in determining the extent of his obligations during discovery under the amended FRCP.

A. Reasonableness and Particularity

The crux of the Fourth Amendment's protection is that any search the government conducts must be "reasonable."²⁶ The reasonableness requirement "preserve[s] that degree of respect for the privacy of persons and the inviolability of their property that existed when the [Fourth Amendment] was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion 'reasonable.'"²⁷ Before conducting a search, or seeking a warrant for a search, the government must determine if the search satisfies a critical element: "that there is reasonable cause to believe that the specific 'things' to be searched for . . . are located on the property to which entry is sought."²⁸ This "reasonableness determination" must be decided on a case-by-case, fact-specific basis.²⁹ Seizure of a certain material in one setting may be unreasonable with respect to the same material in another.³⁰ There cannot be a blanket warrant or request for a search, and all searches must be reasonable in the instant case *specifically*.³¹

To execute this fact-specific inquiry about the reasonableness of a search, a court should first employ a generalized two-step balancing test.³² This test requires

²⁴ U.S. CONST. amend. IV.

²⁵ For the full Brandeis dissent, see *Olmstead*, 277 U.S. at 441–85 (Brandeis, J., dissenting), which discusses in-depth philosophical justifications for the amendments and why the right to privacy is intrinsic to American society.

²⁶ See U.S. CONST. amend. IV.

²⁷ *Richards v. Wisconsin*, 520 U.S. 385, 392 n.4 (1997) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring)).

²⁸ *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978). In common parlance, this "reasonable" cause is referred to as "probable cause."

²⁹ See *id.* at 564.

³⁰ *Id.* ("A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material." (quoting *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973))).

³¹ See *id.*

³² See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). This two-step test was first envisioned by Justice Harlan in his concurrence to *United States v. Katz*, 389 U.S. 347 (1967). Harlan's concurrence "introduced the 'reasonable expectation of privacy' idea. And within

a court to balance (1) the degree to which the search infringes on an individual's Fourth Amendment interests against (2) the degree to which the search is needed to promote a legitimate governmental interest.³³ While this basic balancing test can be seen throughout Fourth Amendment case law,³⁴ some courts have refined reasonableness requirements further as applied to the facts in the instant case.³⁵ The test can be broken down into the following general questions:

- (1) Is the search limited to the subject matter of the petition?
- (2) Does the search show that the requested data or object is relevant to the action?
- (3) Does the warrant specify data with "reasonable particularity"?
- (4) Does the request cover a reasonable time period with respect to the petition?³⁶

General orders to produce, when not limited to the production of documents or information relevant and pertinent to issues in the instant case, violate the Fourth Amendment and can force case dismissal.³⁷

In a perfect world with no Fourth Amendment violations, every investigation would proceed as follows: investigators, in possession of a valid warrant, search a suspect's property in good faith and follow the warrant's proscriptions exactly.³⁸ An officer cannot search without an individualized suspicion of wrongdoing,³⁹ and though he may conduct a search during a warrant's pendency,⁴⁰ if he conducts the search

a decade after *Katz*, the Court eventually adopted . . . Harlan's formulation." Orin Kerr, *Answering Justice Alito's Question: What Makes an Expectation of Privacy 'Reasonable'?*, WASH. POST (May 28, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/05/28/answering-justice-alitos-question-what-makes-an-expectation-of-privacy-reasonable/?utm_term=.7228bf787127 [<https://perma.cc/3YBB-J9V7>].

³³ *E.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999).

³⁴ *See, e.g.*, *United States v. Knights*, 534 U.S. 112 (2001); *Houghton*, 526 U.S. 295; *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Commonwealth v. Gonsalves*, 711 N.E.2d 108 (Mass. 1999); *State v. Sprague*, 824 A.2d 539 (Vt. 2003).

³⁵ *See, e.g.*, *Custodian of Records for the Legislative Tech. Servs. Bureau v. State (In re John Doe Proceeding)*, 689 N.W.2d 908, 909–10 (Wis. 2004). The specific language of the reasonableness questions from the case have been revised in this Note to apply to Fourth Amendment cases in general rather than the particular *In re John Doe Proceeding* facts.

³⁶ *See id.* (taking the specific questions the court employed in its analysis and generalizing them to apply to a broad range of facts).

³⁷ *Red Star Labs. Co. v. Pabst*, 194 N.E. 734, 735 (Ill. 1935).

³⁸ *See United States v. Etchin*, 614 F.3d 726, 733 (7th Cir. 2010) ("It is therefore 'a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980))).

³⁹ *See, e.g.*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 37, 41 (2000).

⁴⁰ *Etchin*, 614 F.3d at 731–32 (explaining that the police entered the premises while another officer applied for a search warrant).

without knowledge of an outstanding warrant, the search may be considered unreasonable.⁴¹ Certain behaviors may seem to tip the balancing test's scales from the outset, but courts must be careful to analyze each case under a totality of the facts and circumstances present before making a determination about whether the search was reasonable.⁴²

In a reasonableness decision, courts should consider whether the warrant is drafted with "reasonable particularity" to satisfy the Fourth Amendment.⁴³ General orders to produce any document obliquely associated with, pertinent to, or relevant to the instant litigation should be considered unconstitutional.⁴⁴ As Adam Gershowitz explains in *The Post-Riley Search Warrant*, warrants cannot allow investigators to "indiscriminate[ly] rummag[e] through citizens' personal effects,"⁴⁵ and a properly drafted, reasonable warrant should "particularly describ[e] the place to be searched, and the persons or things to be seized."⁴⁶ The particularity requirement serves a purpose other than the prevention of overly general searches.⁴⁷ Particularity also "assures the individual whose property is searched . . . of the lawful authority of the executing officer, his need to search, and the *limits* of his power to search."⁴⁸ Reasonable particularity entails describing the items to be seized, or "that such itemization must appear in documents incorporated by reference in the warrant and actually shown to the person whose property is to be searched."⁴⁹

Gershowitz asserts that warrants are particularly difficult to draft with respect to ESI.⁵⁰ "In the context of computers, which house millions of pages of data," Gershowitz explains, "the particularity requirement should take on greater importance. Officers cannot procure a search warrant simply to engage in a 'general search of all of the devices, records, files, and data.'"⁵¹ The difficulty that police officers and prosecutors face when executing proper warrants to search electronic devices⁵² in criminal

⁴¹ See, e.g., *Moreno v. Baca*, 431 F.3d 633, 639 (9th Cir. 2005).

⁴² See *United States v. Macias*, 658 F.3d 509, 517–18 (5th Cir. 2011).

⁴³ See, e.g., *United States v. Hubbell*, 167 F.3d 552, 581 (D.C. Cir. 1999).

⁴⁴ See *id.*; *Red Star Labs. Co. v. Pabst*, 194 N.E. 734, 735 (Ill. 1935).

⁴⁵ Adam M. Gershowitz, *The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 VAND. L. REV. 585, 598 (2016) (first alteration in original) (quoting *United States v. George*, 975 F.2d 72, 75 (2d Cir. 1992)).

⁴⁶ *Id.* at 597 (quoting U.S. CONST. amend. IV).

⁴⁷ *Particularity*, JUSTIA, <http://www.law.justia.com/constitution/us/amendment-04/08-particularity.html> [<https://perma.cc/ZY7C-BW2D>] (last visited Oct. 13, 2017).

⁴⁸ *United States v. Chadwick*, 433 U.S. 1, 9 (1967) (emphasis added) (citation omitted), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991).

⁴⁹ *Particularity*, *supra* note 47.

⁵⁰ Gershowitz, *supra* note 45, at 613.

⁵¹ *Id.* (quoting *United States v. Juarez*, No. 12-CR-59 (RRM), 2013 WL 357570, at *3 (E.D.N.Y. Jan. 29, 2013)).

⁵² *Id.* at 599 ("Because electronic data can be hidden anywhere on a computer or cell phone, it is very hard for officers to narrow down in advance the area that should be searched. Instead,

matters is similar to the problem encountered by attorneys drafting discovery requests in the civil courts.

The digitization of business transactions coupled with the expansion of the average citizen's personal electronic footprint has created a daunting volume of relevant ESI that a litigant may request or produce. This sheer volume of ESI prompted the 2015 amendments to the FRCP, which attempt to facilitate more efficient searching for a microscopic needle in an extremely large, complicated haystack.⁵³

B. "Papers and Effects"

When the Fourth Amendment extended protection to an individual's papers and effects in 1791, the text needed no further explanation.⁵⁴ The "papers" to which the Framers referred were physical documents, chiefly written by hand using a quill dipped in wet ink. After all, the Bill of Rights preceded the United States' first ballpoint pen sale by one hundred fifty-four years,⁵⁵ and the methods of data storage commonplace today likely would have seemed fantastical to the Framers. However, the United States Constitution "is [a document] that evolves, changes over time, and adapts to new circumstances, without being formally amended."⁵⁶

Where an eighteenth-century American kept a physical ledger for his general store's inventory and transactions, a twenty-first century litigant would likely check his point-of-sale (POS) system.⁵⁷ Rather than send handwritten letters, Americans are much more likely to send a text message, a Snapchat image, or an email.⁵⁸ "Recent years have . . . seen a complete transformation in how ordinary citizens make use of digital technology,"⁵⁹ and the Fourth Amendment, as a living document, should be

courts typically let officers search through enormous amounts of data to find the needle in the haystack.").

⁵³ *See id.*

⁵⁴ *See* U.S. CONST. amend. IV.

⁵⁵ *See* Lily Rothman, *Why the Invention of the Ballpoint Pen Was Such a Big Deal*, TIME (Oct. 29, 2015), <http://www.time.com/4083274/ballpoint-pen/> [<https://perma.cc/68AZ-4QXZ>].

⁵⁶ David A. Strauss, *The Living Constitution*, U. CHI. L. SCH. (2010), <http://www.law.u-chicago.edu/alumni/magazine/fall10/strauss> [<https://perma.cc/J9NM-PH6H>]. Though Strauss discusses the Constitution, not the Bill of Rights, the same maxim holds true. The Constitution and its Amendments are "living documents" that should be interpreted to fit with modern society. *Id.*

⁵⁷ *See generally* *Point of Sale (POS) System*, ENTREPRENEUR, <https://www.entrepreneur.com/encyclopedia/point-of-sale-pos-system> [<https://perma.cc/UF7E-U9L9>] (last visited Oct. 13, 2017) (explaining that a POS system is a computerized network operated by a main computer and linked to several checkout terminals).

⁵⁸ *See* John Coleman, *Handwritten Notes Are a Rare Commodity. They're Also More Important than Ever*, HARV. BUS. REV. (Apr. 5, 2013), <https://hbr.org/2013/04/handwritten-notes-are-a-rare-c> [<https://perma.cc/L29B-YKBK>].

⁵⁹ MICHAEL C. GIZZI & R. CRAIG CURTIS, *THE FOURTH AMENDMENT IN FLUX: THE ROBERTS COURT, CRIME CONTROL, AND DIGITAL PRIVACY* 159 (2016).

understood to have evolved concurrently. Michael C. Gizzi and R. Craig Curtis articulate that “[c]onfronting issues of privacy in a digital age will force fundamental conflicts between the more conservative . . . preference for originalism as a means of constitutional interpretation and the necessity of resolving issues” as technology continues to evolve.⁶⁰ Though not without its critics, modern Fourth Amendment jurisprudence has been forced to incorporate digital data compilations into its conception of “papers” and digital devices into its understanding of “effects.”⁶¹

The *United States v. Jones*⁶² decision in 2012 discussed the issues courts confront in this ever-evolving world.⁶³ Justice Scalia wrote for the Court, which held that attaching a Global Positioning System (GPS) tracking device to a suspect’s Jeep constituted a search.⁶⁴ Scalia, ever the staunch originalist,⁶⁵ relied on a traditional, property-based approach in his analysis.⁶⁶ Scalia asserted that answering the question of whether a trespass had occurred through electronic means was unnecessary and would “lead[] [the Court] needlessly into additional thorny problems.”⁶⁷

The concurring opinions, however, delve further into issues arising from electronic privacy invasions.⁶⁸ Justice Alito wrote that “[d]ramatic technological change may lead to periods in which popular expectations [of privacy] are in flux,” and “even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable.”⁶⁹ Alito, too, espouses the value of originalism,⁷⁰ but has stated that when the Court has to apply the text of the Fourth Amendment “to things like a GPS that nobody could have dreamed of [when the Amendment was written], I think all [the Court] ha[s] is the principle and [it] ha[s] to use [its] judgment to apply it.”⁷¹ Accordingly, in *Jones*,

⁶⁰ *Id.* at 160.

⁶¹ *See id.* at 159–60.

⁶² 565 U.S. 400 (2012).

⁶³ *Id.* at 402 (stating that the issue before the Court is the constitutionality of a search for GPS tracking records).

⁶⁴ *Id.* at 404.

⁶⁵ *See* Mary Wood, *Scalia Defends Originalism as Best Methodology for Judging Law*, U. VA. SCH. L. (Apr. 20, 2010), http://content.law.virginia.edu/news/2010_spr/scalia.htm [<https://perma.cc/G6FZ-HKYH>] (“My burden is not to show that originalism is perfect, but that it beats the other alternatives, and that, believe me, is not difficult.”).

⁶⁶ *Jones*, 565 U.S. at 411 (“What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted.”).

⁶⁷ *Id.* at 412.

⁶⁸ *See id.* at 413–18 (Sotomayor, J., concurring); *id.* at 418–31 (Alito, J., concurring).

⁶⁹ *Id.* at 427 (Alito, J., concurring).

⁷⁰ Matthew Walther, *Sam Alito: A Civil Man*, AM. SPECTATOR (Apr. 21, 2014, 4:00 PM), https://spectator.org/58731_sam-alito-civil-man/ [<https://perma.cc/2FGZ-65H8>]. In response to a question regarding the *Jones* opinion, Alito replied: “I start out with originalism. . . . I do think the Constitution means something and that that meaning does not change. . . . I would consider myself a practical originalist.” *Id.*

⁷¹ *Id.*

Alito stated that “[t]he best [the Court] can do in this case is to apply existing Fourth Amendment doctrine and to ask whether the use of GPS tracking . . . involved a degree of intrusion that a reasonable person would not have anticipated.”⁷²

Although the Fourth Amendment may not specifically contemplate the issue of data or data storage devices, it also does not specifically discuss wrapped parcels,⁷³ suitcases,⁷⁴ or dogs,⁷⁵ which have all been justifiably seized during criminal investigations. Despite the fact that the Framers could have never conceived of a modern smartphone, criminal defendants cannot claim their phones’ seizure to be on its face unreasonable.⁷⁶ Alito’s *Jones* concurrence circles back to reasonableness: if a search is reasonable under the circumstances, then the paper, flash drive, or digital file will be considered seizable.⁷⁷ Civil litigants in the throes of e-discovery should also be aware of this maxim.

II. THE AMENDED FRCP

A. Policy Reasons for the Rules’ Amendments

When investigating potential defendants in criminal trials, investigators find and collect evidence that prosecutors need to get a conviction. These investigations are funded by citizens’ tax dollars, but in civil cases, the litigants must bear the costs incurred during the case themselves. “With few exceptions, attorneys . . . [say] that

⁷² 565 U.S. at 430 (Alito, J., concurring).

⁷³ *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (“When the wrapped parcel involved in this case was delivered to the private freight carrier, it was unquestioningly an effect within the meaning of the Fourth Amendment.”).

⁷⁴ *United States v. Soriano*, 482 F.2d 469, 472 (5th Cir. 1973) (“Warrantless temporary detentions of containers that officials have probable cause to believe contain contraband . . . have been approved by the Supreme Court when demanded by the exigencies of the situation.”).

⁷⁵ *Maldonado v. Fontanes*, 568 F.3d 263, 271 (1st Cir. 2009) (“The killing of a person’s . . . dog . . . by the government without the person’s consent is also a seizure within the meaning of the Fourth Amendment.”).

⁷⁶ *See Jones*, 565 U.S. at 405–06 (noting that Fourth Amendment jurisprudence has expanded from strictly a property-based approach to now also include the *Katz* standard of whether there was a reasonable expectation of privacy).

⁷⁷ *Id.* at 430 (Alito, J., concurring). “Judge Neil Gorsuch, the president’s nominee to succeed Scalia on the Court, also describes himself as an originalist,” and has applied a Scalia-reminiscent analysis to Fourth Amendment cases. Amy Howe, *Gorsuch and the Fourth Amendment*, SCOTUSBLOG (Mar. 17, 2017, 1:35 PM), <http://www.scotusblog.com/2017/03/gorsuch-fourth-amendment/> [<https://perma.cc/NC3J-MK2S>]. The Court will revisit the question of “reasonable expectation of privacy” with respect to technology in October 2017 when hearing arguments for *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, 137 S. Ct. 2211 (June 5, 2017). Perhaps this decision will incorporate the ideas found in both Alito’s and Sotomayor’s *Jones* concurrences, and decide whether an individual can reasonably expect privacy in his digital life.

in their practice the volume of discovery is a primary factor driving the cost of litigation, and many sa[y] it [i]s the most important factor”⁷⁸ Simply put, discovery is incredibly expensive, and the exorbitant costs that litigants can incur do not exactly fit within the FRCP’s goal of achieving the “just, speedy, and inexpensive determination of every action and proceeding.”⁷⁹

In 2010, the Duke Law Center for Judicial Studies’ Conference on Civil Litigation recognized that the rapid growth of e-discovery had caused overall discovery costs to balloon.⁸⁰ This conference, comprised of judges, big-firm lawyers, public interest groups, defense counsel, and plaintiffs’ attorneys, approved a package of amendments,⁸¹ which sought to promote “better case management, proportional discovery, and more cooperation among the parties.”⁸² The amendments conceived during this conference explicitly aimed to curb excessive discovery, and particularly excessive e-discovery, in order to better facilitate the FRCP’s purported objective of inexpensive and speedy adjudication in the courtroom.⁸³

B. Changes to the FRCP’s Language

The most influential changes to the FRCP regarding ESI occurred in the amendments to Rules 16, 26, 34, and 37. This Section explains the substantive changes made to the FRCP’s language, organization, and format. Part IV will analyze the obligations these amendments practically impose. Though the concept of discoverable ESI has been incorporated into the Rules for more than forty years,⁸⁴ each subsequent set of amendments more thoroughly explains or provides for its discovery.⁸⁵ The 2015 amendments continue this trajectory by more explicitly stating a litigant’s obligations to both preserve and produce his ESI.⁸⁶

⁷⁸ Thomas E. Willging & Emery G. Lee III, *In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation*, 2010 FED. JUD. CTR. 14 (Mar. 2010), <https://www.fjc.gov/sites/default/files/2012/CostCiv3.pdf> [<https://perma.cc/Q8AY-6CUW>].

⁷⁹ FED. R. CIV. P. 1.

⁸⁰ Brian Morris, Note, *The 2015 Proposals to the Federal Rules of Civil Procedure: Preparing for the Future of Discovery*, 41 N. KY. L. REV. 133, 133–34 (2014).

⁸¹ *See id.* at 134.

⁸² Amii N. Castle, *A Comprehensive Overview: 2015 Amendments to the Federal Rules of Civil Procedure*, 64 U. KAN. L. REV. 837, 837 (2016).

⁸³ *See id.*; *see also* Daniel B. Garrie & Daniel K. Gelb, *E-Discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U. L. REV. 393, 399 (2010) (discussing that “discovery costs can be determinative of a litigant’s decision to litigate or settle a case,” which indicates that prohibitive discovery costs might unduly influence a litigant’s decision to settle his case or pursue further judicial adjudication).

⁸⁴ FED. R. CIV. P. 34(a) advisory committee’s note to 1970 amendment.

⁸⁵ *See* FED. R. CIV. P. 26(a)–(g) advisory committee’s note to 2006 amendment; FED. R. CIV. P. 34(a) advisory committee’s note to 2006 amendment.

⁸⁶ *See Comparison Chart, supra* note 8, for a visual representation of the language changes with the old rules, new rules, and commentary about the substantive changes in separate

1. Rule 16: Pretrial Conferences; Scheduling; Management

Section (b) of Rule 16 previously read that scheduling conferences must take place by “telephone, mail, or other suitable means.”⁸⁷ This phrase is now deleted in order to indicate that the conference may occur by telephone or “by more sophisticated electronic means.”⁸⁸ Rule 16(b)(3)(B)(iii) formerly read that a scheduling order may provide “for disclosure or discovery of electronically stored information,”⁸⁹ but as amended, the Rule reads that the order may provide for “disclosure, discovery, or *preservation* of electronically stored information.”⁹⁰ This amendment, crucially, does not revise or clarify the older Rule’s language, but rather offers a separate category of discussion in the scheduling conference, which can dictate the proper procedure a litigant must follow in preserving his ESI.⁹¹

2. Rule 26: Duty to Disclose; General Provisions Governing Discovery

Old Rule 26(f)(3)(F) required that disclosure and discovery of ESI be addressed in the discovery plan, but as with Rule 16(b)(3)(B)(iii), the amendments add preservation to the list of parties’ obligations.⁹² Attorneys and clients must discuss factual and legal issues in dispute, any potentially relevant ESI, and what measures should be taken to preserve that data.⁹³ Simply put, the amendment adds a discussion about preserving ESI to the scheduling conference agenda that was not present in the previous versions of the Rule.⁹⁴

Though the amendments to Rules 16(b) and 26(f) impose an entirely new preservation obligation upon litigants, “[p]erhaps the most talked-about revision to the Federal Rules of Civil Procedure is the inclusion of ‘proportional’ in the definition of the scope of discoverable evidence.”⁹⁵ Formerly, Rule 26 stated that “the court may

columns. This Note discusses only Rules 16, 26, 34, and 37, but the chart discusses other Rules that were amended in 2015.

⁸⁷ FED. R. CIV. P. 16(b) (2006).

⁸⁸ FED. R. CIV. P. 16 advisory committee’s note to 2015 amendment.

⁸⁹ FED. R. CIV. P. 16(b)(3)(B)(iii) (2006).

⁹⁰ FED. R. CIV. P. 16(b)(3)(B)(iii) (emphasis added).

⁹¹ FED. R. CIV. P. 16 advisory committee’s note to 2015 amendment.

⁹² Castle, *supra* note 82, at 848. These changes were made to mirror those made in the preservation obligations of Rule 16 for continuity’s sake. *See* FED. R. CIV. P. 16 advisory committee’s note to 2015 amendment.

⁹³ Castle, *supra* note 82, at 848–49.

⁹⁴ *See* FED. R. CIV. P. 26(f)(3)(C). Further additions to Rule 26(f) add a second item to the scheduling conference agenda: a potential court order to protect privilege under Federal Rule of Evidence 502. FED. R. CIV. P. 26(f)(3)(D). This order purports to facilitate faster adjudication, by allowing the producing party to fulfill its obligations more quickly because it can reclaim any inadvertently disclosed privileged information. *Id.*

⁹⁵ Castle, *supra* note 82, at 852.

order discovery of any matter relevant to the subject matter involved in the action,” but the amended Rule deletes this language.⁹⁶ The amended Rule instead states that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”⁹⁷ The advisory notes state that the “any matter relevant” language is rarely invoked, and that the new wording suffices when attorneys are drafting discovery requests and responses.⁹⁸ The Rule further enumerates several factors which should be considered when analyzing a request’s proportionality.⁹⁹ The factors are: (1) “the importance of the issues at stake in the action,” (2) “the amount in controversy,” (3) “the parties’ relative access to relevant information,” (4) “the parties’ resources,” (5) “the importance of the discovery [sought] in resolving the issues,” and (6) “whether the burden or expense of the proposed discovery outweighs its likely benefit.”¹⁰⁰ The Rule further specifies that the information may be within the scope of discovery even if it would not be admissible at trial under the Federal Rules of Evidence.¹⁰¹

3. Rule 34: Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

Through Rule 34, the new amendments impact both requesting data and responding to requests during discovery.¹⁰² Rule 34 has an entirely new addition that addresses ESI.¹⁰³ The Rule now states that “[t]he responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection.”¹⁰⁴ This addition reflects the commonplace practice of producing copies rather than permitting inspection of ESI.¹⁰⁵ Furthermore, Rule 34 has been amended to require that any objections to discovery requests must state with specificity the basis of the objection.¹⁰⁶

⁹⁶ FED. R. CIV. P. 26(b)(1) (2006); FED. R. CIV. P. 26(b)(1).

⁹⁷ FED. R. CIV. P. 26(b)(1).

⁹⁸ FED. R. CIV. P. 26(b)(1) advisory committee’s note to 2015 amendment; *see* Castle, *supra* note 82, at 853–54 (discussing in greater detail the reasons behind the linguistic changes in the rules).

⁹⁹ FED. R. CIV. P. 26(b)(1).

¹⁰⁰ *Id.* The Rule does not break the proportionality factors into a list, but for purposes of this Note, it is helpful to break the factors up, so they can be more easily discussed and analyzed individually.

¹⁰¹ *Id.*

¹⁰² Castle, *supra* note 82, at 854–55.

¹⁰³ *See* FED. R. CIV. P. 34(b)(2)(B).

¹⁰⁴ *Id.*

¹⁰⁵ FED. R. CIV. P. 34(b)(2)(B) advisory committee’s note to 2015 amendment.

¹⁰⁶ FED. R. CIV. P. 34(b)(2)(C). The theme of specificity permeates the amendments, and this change to Rule 34 parallels the changes made to Rules 16 and 26.

4. Rule 37: Failure to Make Disclosures or Cooperate in Discovery; Sanctions

Rule 37(e) formerly stated that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.”¹⁰⁷ While the old Rule stipulated this procedure to *provide* ESI, the amended Rule instead specifies how parties must *preserve* their electronic data.¹⁰⁸

The additions to Rule 37(e) replace the 2006 Rule by authorizing specific measures a court may employ if information that should have been preserved is lost. The Rule further specifies “the findings necessary to justify these measures.”¹⁰⁹ “The new [R]ule applies only to electronically stored information,” and “applies only when such information is lost.”¹¹⁰ The following explanation and accompanying flow chart describe Rule 37(e)’s new test to determine if the court should impose sanctions on parties who have failed to preserve, or “spoliated,”¹¹¹ any relevant ESI.¹¹² The Rule should be analyzed first by asking three questions¹¹³:

- (1) Should the ESI have been preserved?
- (2) Did the responding party fail to take reasonable steps to preserve the lost data?
- (3) Can the lost ESI not be restored or recovered?¹¹⁴

If all three of these questions are answered in the affirmative, then the court’s analysis moves simultaneously to the subparts of Rule 37(e). Under Rule 37(e)(1), the court must determine if the requesting party was prejudiced by the loss of the information.¹¹⁵ If the judge determines there was prejudice, he may impose penalties or measures “no greater than necessary to cure the prejudice.”¹¹⁶

¹⁰⁷ FED. R. CIV. P. 37(e) (2006).

¹⁰⁸ FED. R. CIV. P. 37(e).

¹⁰⁹ FED. R. CIV. P. 37(e) advisory committee’s note to 2015 amendment.

¹¹⁰ *Id.*

¹¹¹ Margaret Koesel & Tracey Turnbull, *Litigation: Sanctions for Spoliation of Evidence*, INSIDE COUNS. (July 18, 2013), <http://www.insidecounsel.com/2013/07/18/litigation-sanctions-for-spoliation-of-evidence> [<https://perma.cc/KU4R-PNEU>] (defining spoliation as “when an individual or entity violates its duty to preserve relevant evidence”).

¹¹² FED. R. CIV. P. 37(e).

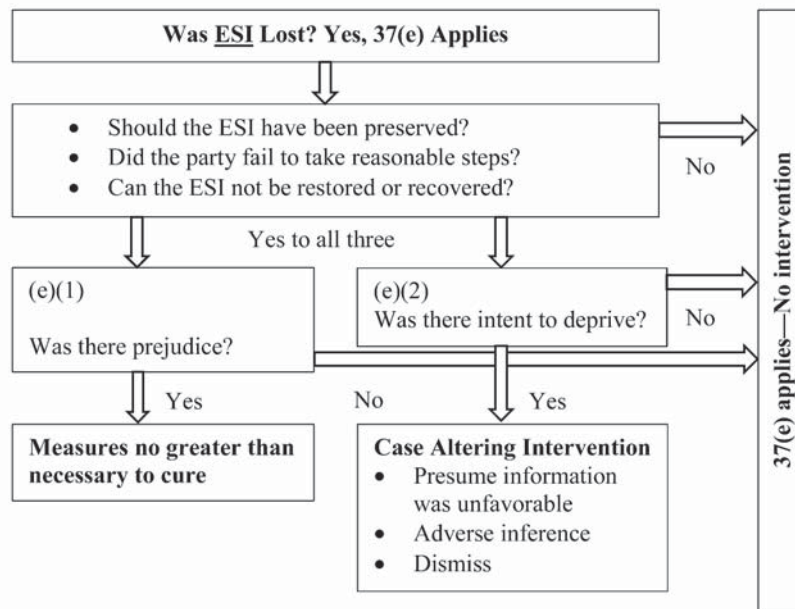
¹¹³ See *infra* text and *Lost ESI Flow Chart* accompanying note 121.

¹¹⁴ FED. R. CIV. P. 37(e).

¹¹⁵ *Id.* The advisory committee’s note states that “[t]he rule does not place a burden of proving or disproving prejudice on one party or the other.” FED. R. CIV. P. 37(e)(1) advisory committee’s note to 2015 amendment. The note further stipulates that the Rule leaves judges with the discretion to determine how best to assess prejudice on a case-by-case basis. *Id.*

¹¹⁶ FED. R. CIV. P. 37(e)(1). The advisory committee’s note stipulates that these measures may include forbidding the spoliating party from presenting certain evidence, or giving the

Although Rule 37(e)(1)'s prejudice question occurs first chronologically, under Rule 37(e)(2), if the responding party intentionally deprived the requesting party of sought information, the court may impose the harshest, case-altering sanctions.¹¹⁷ If a responding party intended to deprive the requesting party any sought data, the Rule 37(e)(1) prejudice question is irrelevant.¹¹⁸ Regardless of whether the lost ESI prejudiced the requesting party, the intentional spoliator can be subject to the most severe sanctions, such as an adverse inference instruction, a jury instruction that the lost evidence should be presumed unfavorable, or even case dismissal.¹¹⁹ While these case-altering sanctions are available to a judge if a party spoliates, the harsh sanctions are not required.¹²⁰ The preceding explanation can be seen more clearly in the following flow chart, which clearly breaks down the components of the new Rule 37(e).¹²¹



jury instructions to assist in its evaluation of such evidence. FED. R. CIV. P. 37(e)(1) advisory committee's note to 2015 amendment.

¹¹⁷ FED. R. CIV. P. 37(e)(2); *see also* FED. R. CIV. P. 37(e)(2) advisory committee's note to 2015 amendment.

¹¹⁸ FED. R. CIV. P. 37(e)(2).

¹¹⁹ *Id.* *See infra* note 121, *Lost ESI Flow Chart*, for a visual representation of the full Rule 37(e) analysis.

¹²⁰ *See, e.g.,* *Internmatch, Inc. v. Nxtbigthing, LLC*, No. 14-cv-05438-JST, 2016 WL 491483 (N.D. Cal. Feb. 8, 2016). This case demonstrates flagrant intent to deprive the requesting party of sought information and data by destroying ESI. *Id.* The judge still chose not to impose the most severe sanctions available under new Rule 37(e)(2). *Id.*

¹²¹ Andrea D'Ambra, *Lost ESI Flow Chart*, Class Lecture "Preservation and Spoliation" at William & Mary Law School (Sept. 2, 2016).

III. PRESERVATION AND ITS CONCURRENT OBLIGATIONS UNDER THE AMENDED FRCP

Civil litigation, unlike criminal prosecution, demands that both parties manage their own cases, abiding by the FRCP with no other governmental interference.¹²² Though the Rules proscribe general discovery procedures, forms, and time tables, the actual process of civil discovery can be categorized into different practical steps which assist litigants in meeting their obligations under the federal rules with respect to ESI.¹²³

The Electronic Discovery Reference Model, an affiliate of the Duke Law Center for Judicial Studies, succinctly breaks down the practical steps of the e-discovery process.¹²⁴ Analyzing these steps alongside the FRCP that govern them makes the assessment of Fourth Amendment applications to the Rules more concrete rather than purely theoretical. One of the most important aspects of a litigant's e-discovery obligations, and the one that will receive the bulk of Fourth Amendment analysis, is his duty to preserve his ESI.¹²⁵

Under the FRCP, a litigant's obligation to preserve his data is triggered "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."¹²⁶ As he initiates the suit, the plaintiff has an advantage in anticipating when litigation is imminent.¹²⁷ Defendants might not so easily be able to anticipate litigation.¹²⁸ Although receiving a complaint definitively puts a defendant on notice, "there are times when a defendant will be considered on notice of likely impending litigation."¹²⁹ For example, a

¹²² See Paula Hannaford-Agor & Nicole L. Walters, *Estimating the Cost of Civil Litigation*, CASELOAD HIGHLIGHTS, Jan. 2013, at 2, http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx [<https://perma.cc/2P3U-6GES>] (providing a "Litigation Tasks" chart that describes the typical obligations that a civil litigant must shoulder during litigation).

¹²³ See *EDRM Diagram Elements*, EDRM, DUKE LAW CTR. FOR JUDICIAL STUDIES, <http://www.edrm.net/resources/diagram-elements> [<https://perma.cc/3GA7-LDLY>] (last visited Oct. 13, 2017). This diagram provides a helpful visual representation of the steps in e-discovery that can help attorneys navigate the tedious and detail-oriented stages necessary in proper discovery of ESI.

¹²⁴ See *id.*

¹²⁵ See FED. R. CIV. P. 37(e).

¹²⁶ *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001)). The anticipation of actual litigation is the true barometer of whether a party must preserve his data. See *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 510 (D. Md. 2009) ("The mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises.").

¹²⁷ *Litigation Hold: When Is Litigation Reasonably Anticipated?*, BUS. & TECH. L. GRP., http://www.btlg.us/News_and_Press/articles/Litigation%20Hold [<https://perma.cc/6U73-UNXW>] (last visited Oct. 13, 2017).

¹²⁸ *Id.*

¹²⁹ *Id.*

defendant can reasonably anticipate litigation when he receives a demand letter or a cease and desist letter.¹³⁰ Once the party has been put on notice, he must ensure that his ESI is protected against inappropriate alteration or destruction.¹³¹

The preservation obligation generally requires the litigant to disable any auto-delete protocols¹³² and institute a preservation system. If relevant ESI can be found in the possession of someone other than the litigant, an attorney should also issue a litigation hold notice to inform that data custodian of the impending litigation and of his obligation to preserve the relevant data.¹³³ The litigant, and any other custodian with potentially relevant ESI, must preserve any data “regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.”¹³⁴ Part IV of this Note will be devoted to determining what exactly falls within this scope of discovery using Fourth Amendment proscriptions.

After suit has been filed, the parties may make discovery requests.¹³⁵ These requests must be stated with specificity¹³⁶ and request only ESI that falls within the appropriate scope of discovery.¹³⁷ Following the requests, the parties must take on their most strenuous obligation: the actual production of the documents.¹³⁸ Production includes identifying,¹³⁹ collecting,¹⁴⁰ processing,¹⁴¹ reviewing,¹⁴² analyzing,¹⁴³ and, finally, actually producing¹⁴⁴ the requested documents. This time-consuming process

¹³⁰ *Id.*

¹³¹ See *EDRM Diagram Elements*, *supra* note 123.

¹³² See *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1134, 1146–47 (N.D. Cal. 2012) (finding that a corporation’s failure to disable its email system’s auto-delete function constituted intentional spoliation).

¹³³ Litigation holds are common in litigation involving a business or corporation with employees who might have access to relevant data and ESI, even though they are not parties to the case. See Marcus R. Chatterton & Elizabeth J. Flachsbarth, *Navigating the Ethical Maze of E-Discovery in Light of the Recent California Bar Ethics Opinion*, 77 ALA. LAW. 109 (2016).

¹³⁴ FED. R. CIV. P. 26(b)(1).

¹³⁵ See FED. R. CIV. P. 34(a).

¹³⁶ FED. R. CIV. P. 34(b)(1)(A).

¹³⁷ See FED. R. CIV. P. 34(a).

¹³⁸ See *EDRM Diagram Elements*, *supra* note 123.

¹³⁹ *EDRM Model*, EDRM, DUKE LAW CTR. FOR JUDICIAL STUDIES, <http://www.edrm.net/frameworks-and-standards/edrm-model/> [<https://perma.cc/TAZ8-6427>] (last visited Oct. 13, 2017) (defining “[i]dentification” as “[l]ocating potential sources of ESI [and] determining its scope, breadth, [and] depth”).

¹⁴⁰ *Id.* (defining “[c]ollection” as “[g]athering ESI for further use in the e-discovery process”).

¹⁴¹ *Id.* (defining “[p]rocessing” as “[r]educing the volume of ESI and converting it, if necessary, to forms more suitable for review [and] analysis”).

¹⁴² *Id.* (defining “[r]eview” as “[e]valuating ESI for relevance [and] privilege”).

¹⁴³ *Id.* (defining “[a]nalysis” as “[e]valuating ESI for content [and] context, including key patterns, topics, people [and] discussion”).

¹⁴⁴ *Id.* (defining “[p]roduction” as “[d]elivering ESI to others in appropriate forms [and] using appropriate delivery mechanisms”).

can be expensive for clients and arduous for their attorneys.¹⁴⁵ Consequently, attorneys may be forced to engage outside vendors to sift through voluminous data.¹⁴⁶ In most smaller civil litigation cases, “linear review”¹⁴⁷ suffices to sift through data, but the larger the quantity of data sought, the more difficult and time-consuming the data compilation becomes.¹⁴⁸ Clients with terabytes of data within the scope of discovery often choose to implement a “technology-assisted review” (TAR) protocol to narrow the data pool and find what relevant responsive data.¹⁴⁹

Finally, after all relevant documents have been discovered and sequestered, the responding party must deliver the ESI to the requesting party.¹⁵⁰ Absent a court order or a stipulation to the contrary, the responding party must produce all ESI “in a form . . . in which it is ordinarily maintained or in a reasonably usable form.”¹⁵¹ Some courts have even held that a producing party should “produce . . . electronic documents with their metadata intact.”¹⁵² If the responding party’s ESI is searchable, the responding party is not at liberty to produce the ESI in a form that removes this feature.

This brief summary only scratches the surface of the time-consuming, labor-intensive, and money-guzzling e-discovery process that could take an entire Note to explain fully.¹⁵³ The important questions this Note seeks to analyze are: (1) How

¹⁴⁵ See Paul W. Grimm, *Are We Insane? The Quest for Proportionality in the Discovery Rules of the Federal Rules of Civil Procedure*, 36 REV. LITIG. 117, 120–21 (2017) (summarizing results of various legal organizations’ surveys on federal civil discovery rules).

¹⁴⁶ See, e.g., David Ferry, *How to Choose an E-Discovery Vendor*, CAL. LAW. (Sept. 2015), <http://www.callawyer.com/2015/09/how-to-choose-an-e-discovery-vendor/> [<https://perma.cc/G9QL-CW37>]. Todd Stefan, Executive Vice President of SETEC Investigations, said, “[A] lot of . . . attorneys are struggling [to review all the documents they need to]. [E-discovery is] so much more intense than it was historically.” *Id.*

¹⁴⁷ “Linear review” is “[a] [d]ocument-by-[d]ocument [m]annual [r]eview in which the [d]ocuments are examined in a prescribed order, typically chronological order.” Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology-Assisted Review*, 7 FED. CTS. L. REV. 85, 100 (2014).

¹⁴⁸ See A. Clay Rankin, III, *What Every Litigator Needs to Know About Using Web-Based Electronic Document Review Services*, 75 ALA. LAW. 36 (2014).

¹⁴⁹ See Sean Grammel, Comment, *Protecting Search Terms as Opinion Work Product: Applying the Work Product Doctrine to Electronic Discovery*, 161 U. PA. L. REV. 2063, 2064–65, 2065 nn.4–5 & 7 (2013). Courts condone producing parties’ use of TAR. *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 (S.D.N.Y. 2015) (“[I]t is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it.”).

¹⁵⁰ FED. R. CIV. P. 34(b)(2).

¹⁵¹ FED. R. CIV. P. 34(b)(2)(E)(ii); see also FED. R. CIV. P. 34(b) advisory committee’s note to 2006 amendment. This “reasonably usable form” may require certain functions or formatting, such as leaving an Excel workbook in its original format rather than converting it to a PDF. See, e.g., *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640 (D. Kan. 2005).

¹⁵² See *Williams*, 230 F.R.D. at 652.

¹⁵³ To learn more about the e-discovery cycle, see generally EDRM, <http://www.edrm.net/> [<https://perma.cc/U59Q-WP53>] (last visited Oct. 13, 2017), an interactive website dedicated to discussing and exploring the minutiae of the e-discovery process.

much is too much? (2) When do these routine practices start to infringe on a litigant's constitutional rights? and (3) When does a request go too far? The 2015 amendments are still relatively new, so these questions have yet to be answered precisely, but they are still important for a lawyer to consider to best advocate for his client.

IV. USING THE FOURTH AMENDMENT TO CLARIFY CONFUSING DISCOVERY OBLIGATIONS IN THE WAKE OF THE 2015 AMENDMENTS TO THE FRCP

The litigant's obligations under the 2015 amendments have yet to be extensively litigated.¹⁵⁴ Therefore, parties must look elsewhere for guidance on how the amendments affect their civil e-discovery obligations. The Fourth Amendment provides such guidance.

Before analyzing how the Fourth Amendment helps to interpret the amended Federal Rules of Civil Procedure, it is helpful to summarize briefly the Rules' linguistic changes explained more fully in Part II. Rule 16 permits a judge to "provide for disclosure, discovery, or preservation of [ESI]" in his scheduling order.¹⁵⁵ To reiterate, perhaps the most discussed changes to the Rules occur in Rule 26.¹⁵⁶ Rule 26's six proportionality factors replace the rarely used "any matter relevant" language and attempt to narrow the scope of discovery using a concise, objective test.¹⁵⁷ Further, although Rule 26(g) was not amended with respect to ESI, its certification requirements extend to the ESI the litigant preserves or produces.¹⁵⁸ The Rule states that by signing "a discovery request, response, or objection," an attorney attests that discovery was done properly and in accordance with the parties' discovery plan.¹⁵⁹ Rule 34 requires litigants to produce copies of any ESI "in a reasonably usable form," or "in a form . . . in which it is ordinarily maintained."¹⁶⁰ Rule 37(e) has been amended to comport with the discovery obligations that Rules 16, 26, and 34 have added.¹⁶¹ Amended Rule 37(e)'s sanctions apply only when litigants fail to meet their obligations to preserve their relevant ESI under the rest of the Rules.¹⁶²

¹⁵⁴ There have been some cases about specific aspects of the Rules, but there has not yet been a Supreme Court case to dictate how exactly the Rules must be implemented. Opinions dealing with the new obligations will be discussed later in this Note. *See infra* Section IV.B.

¹⁵⁵ FED. R. CIV. P. 16(b)(3)(B)(iii).

¹⁵⁶ *See generally* Castle, *supra* note 82.

¹⁵⁷ *See id.* at 852.

¹⁵⁸ *See* FED. R. CIV. P. 26(g).

¹⁵⁹ *See id.* If the responding party's attorney fails to properly certify his disclosures, he will be subject to judicial sanctions. FED. R. CIV. P. 26(g)(3).

¹⁶⁰ FED. R. CIV. P. 34(b)(2)(E)(ii). The requesting party is not necessarily entitled to inspect either the responding party's ESI storage systems or the relevant ESI itself. FED. R. CIV. P. 34(a) advisory committee's note to 2006 amendment.

¹⁶¹ *See* FED. R. CIV. P. 37(e) advisory committee's note to 2015 amendment.

¹⁶² *See* FED. R. CIV. P. 37(f); *see also* *Lost ESI Flow Chart*, *supra* note 121 (tracing the potential sanctions available under the amended Rule).

These changes to the FRCP certainly affect the civil litigant's discovery obligations, but to what extent must he change his practices developed under the old Rules? In criminal matters, the Fourth Amendment traditionally imposes obligations upon police officers, prosecutors, and even judges to draft paper warrants, and then conduct the searches to properly comport with said warrants.¹⁶³ However, the Fourth Amendment does not, on its face, specifically narrow its scope to criminal proceedings.¹⁶⁴ The Fourth Amendment merely guarantees that all citizens be "secure . . . against unreasonable searches and seizures."¹⁶⁵ Civil litigators should remember the rights and liberties granted to their clients by the Constitution, even in the civil litigation context.¹⁶⁶ With respect to federal litigation governed by the FRCP, Fourth Amendment protection stands.¹⁶⁷ Therefore, the Fourth Amendment protects civil litigants from unreasonable searches into their private life, and, particularly, their data.¹⁶⁸

In 2014, Chad DeVeaux argued that the old civil discovery rules violated the Fourth Amendment because they were overly intrusive and that the FRCP pleading standard was too "modest [of an] obligation."¹⁶⁹ Moreover, DeVeaux argued that the Fourth Amendment should protect against unreasonable searches, and the FRCP in 2014 simply "[did] not employ sufficient rigor to satisfy the Fourth Amendment's reasonableness requirement."¹⁷⁰

DeVeaux's article appeared before the 2015 amendments to the FRCP, and therefore before Rule 26's new proportionality factors limited the scope of discoverable evidence.¹⁷¹ DeVeaux's article argued that the Fourth Amendment requires proper probable cause in conducting a search, but that the FRCP do not adequately require similar probable cause in the context of civil discovery.¹⁷² By comparing the Rules'

¹⁶³ See U.S. CONST. amend. IV.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Charles R. Parker, Presentation at the 34th Annual Page Keeton Civil Litigation Conference: What Every Civil Litigator Needs to Know About Criminal Law (Oct. 28–29, 2010).

¹⁶⁷ See Chad DeVeaux, *A Tale of Two Searches: Intrusive Civil Discovery Rules Violate the Fourth Amendment*, 46 CONN. L. REV. 1083, 1093 (2014) ("[Civil] [d]iscovery is the 'coerced production of information' . . . backed by the power of the State." (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35–36 (1984))).

¹⁶⁸ But see *id.* at 1096 n.84, summarizing *Rekeweg v. Fed. Mut. Ins. Co.*, 27 F.R.D. 431, 437–38 (N.D. Ind. 1961) as follows: The court found that because the "documents sought 'were reasonably calculated to lead to the discovery of admissible evidence,'" the production demanded did not constitute unreasonable search and seizure. This case was decided when the "reasonably calculated" language was still part of the FRCP. When analyzing *Rekeweg* today, a reader must consider if the compelled production fits within the *current iteration* of the FRCP to constitute a reasonable search and seizure.

¹⁶⁹ DeVeaux, *supra* note 167, at 1103.

¹⁷⁰ *Id.* at 1101.

¹⁷¹ See FED. R. CIV. P. 26(b)(1).

¹⁷² See DeVeaux, *supra* note 167, at 1104–06.

new proportionality factors and the reasonableness requirements under the Fourth Amendment, this Note argues that DeVaux's concerns that the Rules permit unconstitutional intrusion into an individual's privacy have been mitigated by the 2015 amendments. Furthermore, not only do the amendments protect against Fourth Amendment violations, but the very amendment DeVaux argued was in danger of being controverted can, in fact, assist in dictating how far discovery obligations can infringe on the litigant's privacy while still maintaining constitutionality.

*A. Fourth Amendment "Reasonableness and Particularity" vs. FRCP
"Reasonableness and Proportionality"*

As discussed in Section I.A of this Note, a court facing a defendant's assertion that his Fourth Amendment rights were violated should employ a two-step balancing test¹⁷³ in determining if the search or seizure was reasonable according to a case-specific analysis.¹⁷⁴ The test's two factors are: (1) the degree to which the search infringes on the individual's constitutional right to be free from unreasonable search; and (2) the degree to which the search is needed to promote a legitimate governmental interest.¹⁷⁵ Now recall the six proportionality factors outlined in amended Rule 26(b)(1): (1) "the importance of the issues at stake in the action," (2) "the amount in controversy," (3) "the parties' relative access to relevant information," (4) "the parties' resources," (5) "the importance of the discovery [sought] in resolving the issues," and (6) "whether the burden or expense of the proposed discovery outweighs its likely benefit."¹⁷⁶

Fourth Amendment case law has indicated that the general two-step test may be expanded and adapted to a case's particular facts.¹⁷⁷ In *In re John Doe Proceeding*,¹⁷⁸ the Supreme Court of Wisconsin asked an additional four questions to ascertain whether a particular search was reasonable.¹⁷⁹ A similar approach can be taken when addressing whether civil discovery sought is reasonable under the Fourth Amendment.

The *John Doe* court took the facts of the case and crafted specific questions to help ascertain search reasonableness.¹⁸⁰ The Fourth Amendment balancing test can be utilized to create a rubric of sorts that can apply generally to civil cases and proposed discovery requests. First, the two-part balancing test can be broken into

¹⁷³ See *supra* notes 32–33 and accompanying text.

¹⁷⁴ See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 665 (1979) (Rehnquist, J., dissenting).

¹⁷⁵ See *id.*

¹⁷⁶ FED. R. CIV. P. 26(b)(1).

¹⁷⁷ See, e.g., *Custodian of Records for the Legislative Tech. Servs. Bureau v. State (In re John Doe Proceeding)*, 689 N.W.2d 908 (Wis. 2004).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 909–10.

¹⁸⁰ *Id.*

a “Personal Element” and “Governmental Element,” respectively.¹⁸¹ From there, the six proportionality factors found in amended Rule 26(b)(1) can be designated as either “Personal,” relating to the litigants’ individual concerns; or “Governmental,” relating to the judge’s necessary determinations about the instant action, in accordance with the reasonableness test employed in Fourth Amendment case law.¹⁸²

To classify as “Personal,” the Rule 26(b)(1) proportionality factor should be related to the litigants in their individual capacities. Therefore, the following three proportionality factors can be classified as “Personal”: (1) the amount in controversy; (2) the parties’ relative access to the information; and (3) the parties’ resources.¹⁸³ The second and third of these factors obviously fall within the “Personal” scope because they relate directly to the parties’ abilities or resources.¹⁸⁴ The amount in controversy should also be considered “Personal” because it is sought by the plaintiff and would be borne by the defendant in the case of an adverse verdict.

The Fourth Amendment balancing test’s “Governmental” factor applies less easily to civil cases than the “Personal” element. Obviously, civil litigants have huge personal stakes in their cases, so the balancing test’s first part intuitively fits, but what interest does the government have in resolving civil disputes? For this answer, a reader should look to the very first rule governing the procedure of civil cases. Federal Rule of Civil Procedure 1 states that the Rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”¹⁸⁵ The Rules endeavor to facilitate a streamlined, cost-effective process. While the government has no stake in a particular civil case, it has a legitimate interest in facilitating more efficient, less costly discovery.¹⁸⁶ Therefore, although the Rule 26(b)(1) factors could technically *all* be classified under the “Governmental” element of the Fourth Amendment balancing test, the true governmental interests arise when a fact-finder, namely a judge, makes decisions or determinations in civil cases that affect the course of the litigation.¹⁸⁷

¹⁸¹ The following demonstrates the two-factor test broken up into my classification of proportionality elements: Part 1 (the “Personal” Element) is the degree to which the search infringes on the individual’s Fourth Amendment rights, and Part 2 (the “Governmental” Element) is the degree to which the search is needed to facilitate legitimate governmental interests.

¹⁸² FED. R. CIV. P. 26(b)(1). *See generally, e.g.*, *Delaware v. Prouse*, 440 U.S. 648 (1978).

¹⁸³ *See supra* notes 99–100 and accompanying text. These three factors match factors (2), (3), and (4) of the those pulled from Rule 26(b)(1) and broken down into list form.

¹⁸⁴ *See supra* notes 99–100 and accompanying text.

¹⁸⁵ FED. R. CIV. P. 1.

¹⁸⁶ *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 240 (1958) (Frankfurter, J., dissenting) (“Simplicity and speed, when consonant with effective protection of the interests of the parties, are touchstones for the interpretation of all the Rules . . .”).

¹⁸⁷ *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 594 n.13 (2007) (Stevens, J., dissenting) (discussing the trial court judge’s discretion under Rule 26).

Considering that a judge represents the government's influence in a civil case, the following three proportionality factors can be classified under the "Governmental" prong of the Fourth Amendment balancing test: (1) the importance of the issues at stake in the action, (2) whether the burden or expense of the proposed discovery outweighs its likely benefit, and (3) the importance of the proposed discovery in resolving the instant issue.¹⁸⁸ All three of these factors share a commonality: the judge must determine the value of the proposed discovery. The first of these "Governmental" factors leaves the most to the judge's discretion; it allows him to make a policy determination about the importance or significance the case might represent.¹⁸⁹ The second and third "Governmental" factors directly relate to the instant action. The second "Governmental" factor requires the judge to consider the purpose of the Federal Rules and determine if the proposed discovery facilitates the purpose of Rule 1.¹⁹⁰ The third factor is the most isolated of all three "Governmental" factors because it focuses specifically on the case, the value of the proposed discovery, and the burden it might impose on the litigants in the case. While this factor might seem more "Personal" than "Governmental," if disputed, the ultimate decision would be made by a judge, not the litigants. Therefore, it should be classified as "Governmental."¹⁹¹

The *John Doe* court used additional questions to further flesh out the standard Fourth Amendment balancing test in determining if a search was reasonable.¹⁹² By breaking down the Rule 26(b)(1) proportionality factors into "Governmental" and "Personal" elements according to the Fourth Amendment test, civil litigants can claim that a discovery request violates their Fourth Amendment rights. In order to comport with the Fourth Amendment, a discovery request must first be proportional under the FRCP. If a litigant believes that a discovery request is disproportionate, he should first specify which proportionality factor of Rule 26(b)(1) was violated. Then, he can argue that the corresponding prong of the Fourth Amendment balancing test was similarly violated. To make his argument that the request is disproportionate he can rely on Fourth Amendment case law which discusses that prong of the balancing test. However, if the civil litigant cannot establish that the discovery request was disproportionate under Rule 26(b)(1), he cannot assert that the request is unconstitutional under the Fourth Amendment.

¹⁸⁸ See *supra* notes 99–100 and accompanying text. These three factors correspond with my (1), (5), and (6) in the list of Rule 26(b)(1) proportionality factors.

¹⁸⁹ See, e.g., *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 128–29 (S.D.N.Y. 2015) (explaining, as a matter of policy, the standards by which TAR procedures should be judged).

¹⁹⁰ See FED. R. CIV. P. 1.

¹⁹¹ For a concise, visual illustration of this author's classification system, see "Rationalizing the Fourth Amendment Reasonableness Balancing Test with Litigants' Rule 26(b)(1) Proportionality Concerns" chart at the end of Section III.A.

¹⁹² See *Custodian of Records for the Legislative Tech. Servs. Bureau v. State (In re John Doe Proceeding)*, 689 N.W. 2d 908, 909–10 (Wis. 2004).

Rationalizing the Fourth Amendment Reasonableness Balancing Test with Litigants' Rule 26(b)(1) Proportionality Concerns

	Fourth Amendment Balancing Test Subparts	26(b) Proportionality Factors
The Personal Element	The degree to which the search infringes on an individual's Fourth Amendment rights	<ul style="list-style-type: none"> - The amount in controversy - The parties' relative access to information - The parties' resources
The Governmental Element	The degree to which the search is needed to promote a legitimate governmental interest	<ul style="list-style-type: none"> - The importance of the issues at stake in the action - The importance of the proposed discovery in resolving the instant issue - Whether the burden/expense of the proposed discovery outweighs its likely benefit

B. Papers, Effects, and Particularity: What Is Actually Discoverable Under the FRCP?

Another obvious parallel between the Fourth Amendment and the FRCP lies in the “particularity” language in both the Rules and the Amendment. The Fourth Amendment particularity requirement is largely meant to protect a criminal suspect and apprise him of the limits on the investigator’s power.¹⁹³ The particularity requirement in Rule 34 has the same restrictive purpose and additionally informs the litigant how and where to look for requested data in his digital footprint.¹⁹⁴

Timothy Chorvat and Laura Pelanek argue that Rule 34’s particularity requirement and the overall evolution of the FRCP are “driven in part by a need for litigation to adapt to new technologies and uses that continue to emerge, such as social media and cloud computing.”¹⁹⁵ Litigants need to be put on notice regarding the specific data they should expect to produce to satisfy their preservation obligations and avoid spoliation sanctions.¹⁹⁶ The 2015 FRCP amendments endeavored to preempt any ESI-related

¹⁹³ See *supra* notes 43–49 and accompanying text.

¹⁹⁴ See FED. R. CIV. P. 34.

¹⁹⁵ Timothy J. Chorvat & Laura E. Pelanek, *Electronically Stored Information in Litigation*, 68 BUS. LAW. 245, 245 (2012). Though this article was written before the 2015 amendments to the Rule, the authors’ arguments merely bolster policy justifications for the amendments.

¹⁹⁶ See FED. R. CIV. P. 37(e), *supra* notes 107–16 and accompanying text, and *Lost ESI*

discovery disputes by mandating when e-discovery plans should be made.¹⁹⁷ These plans should ideally be addressed during the Rule 16 pretrial conference and revisited, if necessary, at the Rule 26 scheduling conference. If parties effectively communicate regarding potentially relevant ESI, the more efficient discovery can be later. Rule 34's particularity requirement, however, truly determines a litigant's obligations with respect to what he has to preserve and how he has to produce it.¹⁹⁸ Practically every task in the twenty-first century can be accomplished entirely through electronic means, which has led to the "accumulat[ion of] vast reservoirs of information that lawyers are seeking to tap in litigation,"¹⁹⁹ making particularity in requests essential to narrow down this sea of data to what is actually useful.

The particularity requirement protects two things: (1) the litigant's Fourth Amendment right to be free from undue prying into his personal life and (2) the litigant's worries that he may accidentally spoliage because he does not understand what the requesting party expects. For example, in *Mailhoit v. Home Depot, U.S.A., Inc.*,²⁰⁰ the Plaintiff sued her employer for discrimination, seeking damages which included those for emotional distress.²⁰¹ Home Depot responded by issuing discovery requests for "[a]ny profiles, postings or messages . . . from social network[s] . . . that reveal, refer, or relate to any emotion, feeling, or mental state of the Plaintiff."²⁰² Home Depot also requested any third-party communications that contextualized the Plaintiff's own messages, any photos either posted by the Plaintiff or in which the Plaintiff was tagged,²⁰³ and all social networking communications related to Home Depot.²⁰⁴ The court held that the majority of Home Depot's requests were not stated with the requisite particularity demanded by Rule 34.²⁰⁵ In this determination, the court relied on a test for reasonable particularity that requires "the request [to] place[] a party upon 'reasonable notice of what is called for and what is not.'"²⁰⁶ The court recognized that social media

Flow Chart, *supra* note 121, to recall a litigant's obligations with respect to preserving his data.

¹⁹⁷ See FED. R. CIV. P. 16 and advisory committee's note to 2015 amendment; *see also supra* notes 87–91 and accompanying text.

¹⁹⁸ See FED. R. CIV. P. 34; *see also supra* notes 103–06 and accompanying text. The particularity requirement was not added with the 2015 amendments; however, when comparing the Fourth Amendment to the FRCP, a discussion of Rule 34 particularity is essential.

¹⁹⁹ Chorvat & Pelanek, *supra* note 195, at 245.

²⁰⁰ 285 F.R.D. 566 (C.D. Cal. 2012).

²⁰¹ *Id.* at 569–70.

²⁰² *Id.* at 569.

²⁰³ *Id.* The court defined "tagging" as "the process by which a third party posts a picture and links people in the picture to their profiles so that the picture will appear in the profile of the person . . . tagged." *Id.* at 569 n.1.

²⁰⁴ *Id.* at 569.

²⁰⁵ *Id.* at 571–72.

²⁰⁶ *Id.* at 570 (quoting Bruggeman *ex rel.* Bruggeman v. Blagojevich, 219 F.R.D. 430, 436 (N.D. Ill. 2004)).

site content may be subject to discovery under Rule 34, but discovering this data must still adhere to basic discovery principles.²⁰⁷ The court ultimately held that only the request aimed at posts and messages about Home Depot met the particularity requirement, because this request would have apprised a person of “ordinary intelligence” on notice of what documents he would be expected to produce.²⁰⁸

Social media data is discoverable even when the user has deemed his Facebook page “private,” and “[o]nly the uninitiated or foolish could believe that Facebook is an online lockbox of secrets.”²⁰⁹ Litigants may argue that their information is only available to a small group of designated friends, but courts “consistently reject this argument.”²¹⁰ If a litigant is truly concerned about his privacy, he may seek a protective order from the court.²¹¹ However, generalized and unspecified boilerplate requests for all social media posts from a certain time period cannot satisfy Rule 34 particularity because the requests are not reasonably calculated to lead to the discovery of admissible evidence.²¹² In fact, permitting the requesting party blanket access to the responding party’s entire social media account is “[o]ne of the most intrusive methods of discovery.”²¹³ A court would not grant a warrant to seize anything in a criminal defendant’s office merely because a single file might be housed there.²¹⁴ Neither should a court allow such an intrusive discovery request to stand.

Justice Alito’s *Jones* concurrence²¹⁵ states that a search is reasonably particular, and therefore lawful, when the search involves a degree of intrusion that a reasonable person would have anticipated.²¹⁶ In *Mailhoit*, the court found that a discovery request satisfied Rule 34 particularity when that request was reasonably calculated to lead to the discovery of admissible evidence.²¹⁷ Though the two definitions of

²⁰⁷ *Id.*; see also Chorvat & Pelanek, *supra* note 195, at 247 (“[A]lthough social media provides a novel context, basic discovery principles apply.” (citation omitted)).

²⁰⁸ *Mailhoit*, 285 F.R.D. at 571–73.

²⁰⁹ Chorvat & Pelanek, *supra* note 195, at 248 (internal citations omitted). Chorvat and Pelanek further explain that “Facebook’s foremost purpose is to ‘help you connect and share’” and therefore cannot be unilaterally excluded from discovery on the basis of privacy. *Id.* (internal citations omitted).

²¹⁰ Margaret DiBianca, *Discovery and Preservation of Social Media Evidence*, AM. BAR ASS’N, http://www.americanbar.org/publications/blt/2014/01/02_dibianca.html [<https://perma.cc/F42P-SUX9>] (last visited Oct. 13, 2017).

²¹¹ See Chorvat & Pelanek, *supra* note 195, at 247 (citation omitted).

²¹² *Mailhoit*, 285 F.R.D. at 571.

²¹³ DiBianca, *supra* note 210.

²¹⁴ See, e.g., *id.* DiBianca analogizes granting access to an entire social media account to granting access to any of a civil litigant’s files in his office. *Id.* This Note adopts her analogy to fit within the Fourth Amendment context.

²¹⁵ See *supra* notes 62–72 and accompanying text for further discussion of *United States v. Jones*.

²¹⁶ *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring).

²¹⁷ 285 F.R.D. at 570–71.

particularity differ slightly, they both implicate a fact-specific analysis to determine if the search or request is *reasonably* particular in the instant case.

C. Properly Drafted Search Warrants and Constitutional Discovery Requests

In order to comport with the Rules of Civil Procedure, a discovery request must first be constitutional.²¹⁸ One way that a litigant and his attorney can be sure that a request does not violate the reasonableness, proportionality, and particularity requirements demanded under the FRCP is to look at properly drafted search warrants that do not violate the Fourth Amendment.

Establishing a reasonable search for Fourth Amendment purposes first requires there to be probable cause greater than a bare suspicion.²¹⁹ This probable cause may be established in a variety of ways, and need not show proof beyond a reasonable doubt.²²⁰ The probable cause requirement resembles the relevance requirement in Rule 26(b)(1)—just as an officer must have probable cause to search or seize a suspect’s possessions, a civil litigator must have a reasonable belief that the requested discovery is relevant to either party’s claim or defense.²²¹

After establishing probable cause, the search warrant must be drafted to particularly describe “the place to be searched, and the person or things to be seized.”²²² For example, the Ohio Police Department has published detailed instructions for filing a proper search warrant as well as examples of properly drafted warrants.²²³ First the warrant must “FULLY describe the person, place, or thing to be searched, and give its EXACT location.”²²⁴ The Ohio Police Department provides two helpful examples for this Note’s purposes: a warrant for a cell phone and a warrant for electronic media.²²⁵

²¹⁸ See, e.g., *Red Star Labs. Co. v. Pabst*, 194 N.E. 734, 735 (Ill. 1935) (finding document production order unconstitutional because it was too general and not limited to documents relevant to the case). See generally, e.g., *DeVeaux*, *supra* note 167 (arguing, in part, that even in the context of civil litigation, document production orders must survive constitutional scrutiny under the Fourth Amendment).

²¹⁹ Sara J. Berman, *Search Warrants and Probable Cause*, NOLO, <http://www.nolo.com/legal-encyclopedia/search-warrants-and-probable-cause.html> [<https://perma.cc/X573-SQ6R>] (last visited Oct. 13, 2017).

²²⁰ *Id.* Berman gives six examples including testimony from the victim of a crime relating to the search, testimony from the witness of a crime related to the search, and testimony from another police officer.

²²¹ See FED. R. CIV. P. 26(b)(1).

²²² U.S. CONST. amend. IV.

²²³ *Ohio Search Warrant Examples*, OHIO POLICE DEP’T, <http://www.ohiopd.com/search/Warrant.php> [<https://perma.cc/2RM7-47WU>] (last visited Oct. 13, 2017). Though these examples are meant to be instructive for Ohio cases, they comport with Fourth Amendment requirements and help conceptualize general benchmarks a warrant must meet.

²²⁴ *Id.*

²²⁵ *Cell Phone Search Warrant Example*, OHIO POLICE DEP’T, <http://ohiopd.com/search/Warrant/cellphoneSearchWarrant.html> [<https://perma.cc/783A-SNLT>] (last visited Oct. 13,

The cell phone search warrant stipulates the phone's brand, color, serial number, and owner.²²⁶ The electronic media warrant specifically names gaming systems, games, controllers, media for the gaming systems, memory devices, and any other storage media.²²⁷ These examples are crafted with such detail as to fully guarantee that any seizure associated therewith comports with the Fourth Amendment.²²⁸

Rule 34 similarly requires that any discovery request for ESI describe with reasonable particularity each item to be inspected; a reasonable time, place, and manner for the inspection; and the form or forms in which ESI is to be produced.²²⁹ In order to fully guarantee that the discovery requests will unquestioningly put the producing party on notice to preserve all desired ESI, the litigator should draft his requests with as much specificity as possible. If a request is drafted with sufficient particularity and endeavors to discover admissible evidence, it complies with the FRCP and the Constitution.²³⁰

If a discovery request has been properly drafted, the responding party will likely have to follow through with his preservation and production obligations without claiming a Fourth Amendment violation. The responding litigant may, of course, object to any of the discovery requests, but those objections must satisfy the amended Rule 34 specificity requirements.²³¹ Any objection must state "the grounds for objecting to the request,"²³² and must state "whether any responsive materials are being withheld on the basis of that objection."²³³ Here the litigant can turn to the Fourth Amendment Rule 26(b) test discussed in Part II of this Note.²³⁴ If he believes that a request is disproportionate to the instant dispute, he should immediately object to the request. However, the objecting litigant must take heed of Rule 34's specificity requirement, or else

2017); *Search Warrant for Electronic Media*, OHIO POLICE DEP'T, <http://ohiopd.com/search/Warrant/mediaSearchWarrant.html> [<https://perma.cc/554P-F4ZG>] (last visited Oct. 13, 2017).

²²⁶ *Cell Phone Search Warrant Example*, *supra* note 225.

²²⁷ *Id.*

²²⁸ That is to say, the warrants require enough facts and observations to satisfy probable cause. *Ohio Search Warrants Examples*, *supra* note 223. The warrants also require a full description of the property to be seized and its connection to the crimes, *id.*, likely satisfying the Fourth Amendment's Particularity Requirement. *See* Gershowitz, *supra* note 45, at 590, 597–600 (discussing the particularity requirement).

²²⁹ FED. R. CIV. P. 34(b)(1)(A)–(C). Note that where the Fourth Amendment particularity requirement leads to the seizure of physical property, Rule 34 requests must describe the data that the requesting party wants to inspect or how it would prefer copies of the requested data provided. The Fourth Amendment ultimately deprives a suspect of his property where the FRCP merely give the requesting party access to the sought data. *See* FED. R. CIV. P. 34(a) (outlining data and documents a party may discover); *see also Ohio Search Warrant Examples*, *supra* note 223 (outlining the information required for seizure of property).

²³⁰ *See supra* note 195 and accompanying text; *see also Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012) (discussing Rule 34 "reasonable particularity").

²³¹ FED. R. CIV. P. 34(b)(2)(B).

²³² *Id.*

²³³ FED. R. CIV. P. 34(b)(2)(C).

²³⁴ *See supra* Part II.

his attorney can face sanctions pursuant to FRCP 26(g).²³⁵ The litigant cannot simply state that a request is overbroad and “unduly burdensome,”²³⁶ because the court will consider him to have waived any legitimate objection that he could have.²³⁷ Potential objections could be that the request is beyond the scope of discovery,²³⁸ that the requested ESI is outside the responding party’s possession, custody, or control,²³⁹ or, with specificity, why the request is unduly burdensome.²⁴⁰

New Rule 37(e) substantiates the importance of fulfilling discovery obligations. As long as the requesting party meets all of its obligations with respect to drafting the discovery request, the responding party should be on notice that he must preserve and eventually produce the ESI sought.²⁴¹ Just as a criminal suspect can face jail time for losing or purposefully destroying evidence described in a search warrant,²⁴² Rule 37(e) protects the legitimacy of the discovery request process by threatening case-ending sanctions on misbehaving responding parties.²⁴³

As an application of the preceding arguments,²⁴⁴ consider the following hypothetical. A female employee, Marsha Wythe, alleges that her employer, ABC, Inc., discriminatorily terminated her due to her gender.²⁴⁵ ABC is incorporated in Delaware, has its principal place of business in New York, and has offices in multiple states, including Williamsburg, Virginia, where Wythe was employed. Wythe seeks \$100,000 in damages and brings her case in the United States District Court for the Eastern District of Virginia.²⁴⁶

ABC contends that Wythe was fired, not because of her gender, but because she was an unreliable employee who, among other infractions, used her cell phone at work despite a supervisor’s repeated requests that she stop. ABC’s Williamsburg office manager frequently caught Wythe sending Snapchats via her cell phone’s application²⁴⁷

²³⁵ FED. R. CIV. P. 26(g) (stipulating that, by submitting a discovery objection, the lawyer certifies that the objection is consistent with the Rules, including Rule 34); *see, e.g.*, *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

²³⁶ *Mancia*, 253 F.R.D. at 358–60 (citations omitted).

²³⁷ *Id.* at 358–59, 364.

²³⁸ FED. R. CIV. P. 26(b). This objection could also be phrased as “unreasonable.” *See id.*

²³⁹ FED. R. CIV. P. 34(a)(1); FED. R. CIV. P. 26(b).

²⁴⁰ *See* FED. R. CIV. P. 26(b)(2)(B).

²⁴¹ *See* *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012) (stating that the test for Rule 34 “reasonable particularity” asks whether a discovery request reasonably places a party on notice of what documentation is required).

²⁴² *See, e.g.*, *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2194 (2016) (Sotomayor, J., dissenting) (“This Court has never cast doubt on the States’ ability to impose criminal penalties for obstructing a search authorized by a lawfully obtained warrant.”).

²⁴³ *See supra* notes 117–21 and accompanying text.

²⁴⁴ *See supra* Part IV.

²⁴⁵ *See* 42 U.S.C. § 2000e-2(a)(1).

²⁴⁶ This suit is proper pursuant to 28 U.S.C. § 1332 (2012). Assume Wythe is domiciled in the Commonwealth of Virginia, so the parties are diverse for jurisdictional purposes.

²⁴⁷ *See generally* Agnieszka McPeak, *Social Data Discovery and Proportional Privacy*, 65 CLEV. ST. L. REV. 61, 64 (2016) (briefly explaining the Snapchat application).

while she was at work. Accordingly, ABC's counsel begins drafting discovery requests for Wythe's Snapchat data to justify her termination.²⁴⁸

Snapchat, though known for its "ephemeral content," stores "account content despite claims that messages completely disappear."²⁴⁹ Snapchat allows users to access some data in the application itself,²⁵⁰ but the platform also permits users to request and download more complete account data through the company's website.²⁵¹ Among the data the user can request for download is that user's Snapchat history, which details the date, time, and recipient of all outgoing "Snaps."²⁵²

If ABC wants to receive Wythe's Snapchat history during discovery, it must carefully craft its request to describe the requested history with reasonable particularity.²⁵³ ABC's request, like a properly executed warrant, should include enough detail to indicate explicitly the information that Wythe should disclose.²⁵⁴ ABC cannot request Wythe's entire Snapchat history indiscriminately,²⁵⁵ but requesting only the Snapchat history during the dates of Wythe's employment complies with the proportionality requirements of Rule 26(b).²⁵⁶ Wythe could not object to an appropriately narrow discovery request because such a request would satisfy the Fourth Amendment reasonableness requirement. Simply filling out an online request would not infringe on Wythe's Fourth Amendment right to be free from "unreasonable search[] and seizure[],"²⁵⁷ because the requested data would be directly correlative to ABC's defense.²⁵⁸ Pursuant to this

²⁴⁸ See FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense . . .").

²⁴⁹ McPeak, *supra* note 247, at 64.

²⁵⁰ See *Accessing Your Snapchat Data*, SNAPCHAT, <https://support.snapchat.com/en-US/a/download-my-data> [<https://perma.cc/XGC8-G6K5>] (last visited Oct. 13, 2017) (stating that the application stores information provided when the user creates the account, such as a username, profile picture, email address, and selected privacy settings).

²⁵¹ A user can access this data by visiting <https://accounts.snapchat.com> and logging in with his user credentials. Once the user requests his data, he receives a file via email containing his account history and information, "snap count," and advertisement engagement history, among other data categories.

²⁵² *Accessing Your Snapchat Data*, *supra* note 250; see also *Here's How You Can Download Every Piece of Your Snapchat History*, ZMONLINE (Jan. 25, 2017), <http://www.zmonline.com/random-stuff/heres-how-you-can-download-every-piece-of-your-snapchat-history/> [<https://perma.cc/2UFC-DC6C>].

²⁵³ FED. R. CIV. P. 34.

²⁵⁴ See *supra* notes 223–28 and accompanying text.

²⁵⁵ See, e.g., *Mailhoit v. Home Depot, U.S.A., Inc.*, 285 F.R.D. 566, 569 (C.D. Cal. 2012) (evaluating overly broad requests for social media data).

²⁵⁶ FED. R. CIV. P. 26(b).

²⁵⁷ U.S. CONST. amend. IV; see *supra* notes 181–92 and accompanying text. ABC's request would not offend the "Personal Element" of the reasonableness test because it would not constitute a major personal burden on Wythe.

²⁵⁸ See U.S. CONST. amend IV; see also *supra* notes 181–92 and accompanying text. ABC's request would also comply with the "Governmental Element" because it relates directly to resolving the instant issue.

request, Wythe would be expected to request her data from Snapchat and to disclose only her Snapchat history from during her employment. Wythe would not be compelled to disclose her history from before or after her employment.

Requesting Snapchat data illustrates a particularly interesting situation in modern e-discovery,²⁵⁹ but modern technology presents innumerable scenarios where data privacy and Fourth Amendment concerns might collide.²⁶⁰ As Americans' digital footprints continue to grow, the scope of discoverable ESI will expand in tandem. Lawmakers must continue to innovate and clarify what is—and what is not—discoverable.²⁶¹ Although technology, and the rules governing e-discovery, may be in constant flux, civil litigants can take comfort in having a constant source of protection from unreasonable intrusion into their data: the Fourth Amendment.

CONCLUSION

Justice Brandeis's plea for privacy in his *Olmstead* dissent is important to recall before concluding. By writing the Bill of Rights—including the Fourth Amendment—the Framers “undertook to secure conditions favorable to the pursuit of happiness,”²⁶² originally espoused in Jefferson's preamble to the Declaration of Independence.²⁶³ The Framers “sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations,” and by conferring upon these Americans the right to be free from unreasonable search and seizure, Brandeis believed the Fourth Amendment accomplished this goal.²⁶⁴ Brandeis also wrote, however, that this ideological freedom came from the “satisfactions of life . . . found in material things.”²⁶⁵ Civil e-discovery requests digital, not material, things. How then can Marsha Wythe protect her Snapchat data through the same “right to be let alone” that Brandeis praised?²⁶⁶

In the last 226 years, the very concept of individual privacy has revolutionized. High schoolers send each other text messages rather than pass notes in class; interviews

²⁵⁹ Requesting Snapchat data presents an interesting conundrum because, even though the platform primarily functions to share images, the recipient of a request for Snapchat data would not necessarily be subject to Rule 37(e) sanctions for failing to disclose the images that corresponded to the time frame of the request. *See supra* notes 107–21 and accompanying text. Unless the user had stored his Snaps in his “Memories,” and then deleted them upon receipt of a discovery request, he would not be subject to Rule 37(e) spoliation sanctions. *See id.*; *see also* McPeak, *supra* note 247, at 64 (explaining briefly the “Memories” feature).

²⁶⁰ *See, e.g.,* United States v. Carpenter, 819 F.3d 880 (6th Cir. 2016), *cert granted*, 137 S. Ct. 2211 (June 5, 2017).

²⁶¹ *See supra* Section II.A.

²⁶² *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

²⁶³ *See* THE DECLARATION OF INDEPENDENCE pmb1. (U.S. 1776).

²⁶⁴ *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

²⁶⁵ *See id.*

²⁶⁶ *Id.*

can be conducted over Skype rather than in person;²⁶⁷ and the number of Americans who own a smartphone now outstrips the number of those who do not.²⁶⁸ Americans need protection in different areas now, and courts' conceptions of the Fourth Amendment have evolved to meet that need.²⁶⁹

Federal civil discovery is governed by the FRCP, and therefore any obligations or disclosures the FRCP compel must first comply with the Fourth Amendment.²⁷⁰ The 2015 amendments to these Rules took a big step in clarifying expectations regarding e-discovery by facilitating more open communication between the parties,²⁷¹ by providing more detailed framework for data within the scope of discovery,²⁷² and by emphasizing how important it is for a litigant to preserve his data properly.²⁷³ But any change, regardless of intent, comes with concurrent confusion, and the FRCP's amendments are no exception. However, since the Fourth Amendment protects against unreasonable intrusion by the government, there is no better place to look for guidance than jurisprudence regarding the Amendment's reach.

Fourth Amendment case law and corresponding search warrant procedure can assist both litigants and courts in civil cases. The Amendment can help civil litigants and their attorneys determine what might be considered reasonable in the instant action, and can inform courts about how best to analyze the reasonableness of a certain disputed request. Just as the seizure of a certain item might be appropriate in one setting and inappropriate in another, a certain discovery request might be satisfactory for one case, but completely outside discovery's scope in the next. Courts evaluating appropriateness of discovery request objections can learn from courts that have determined search and seizure appropriateness after Fourth Amendment challenges.²⁷⁴

Civil litigants should always be aware that they have the right to be let alone when ESI requested from them is disproportionate. A multimillion-dollar suit against a large corporation with thousands of employees might merit the expensive and time-consuming implementation of a TAR system, but a straightforward breach of

²⁶⁷ See Karl Rooke, *An Increase in Skype Interviews*, LINKEDIN (Feb. 7, 2015), <https://linkedin.com/pulse/increase-skype-interviews-karl-rooke> [<https://perma.cc/2BNV-R4US>].

²⁶⁸ Nick Mediati, *Pew Survey Shows 68 Percent of US Adults Now Own a Smartphone*, PCWORLD (Nov. 1, 2015, 1:49 PM), <http://www.pcworld.com/article/2999631/phones/pew-survey-shows-68-percent-of-americans-now-own-a-smartphone.html> [<https://perma.cc/U9XR-XSN6>].

²⁶⁹ See *supra* Section I.B; see also, e.g., Gershowitz, *supra* note 45, at 587–88 (discussing *Riley v. California*, 134 S. Ct. 2473 (2014), in which the United States Supreme Court held warrantless searches of cell phones unconstitutional).

²⁷⁰ See DeVeaux, *supra* note 167, at 1092 (“Civil [d]ocument [p]roduction [o]rders [c]onstitute ‘[s]earches’ [w]ithin the [m]eaning of the Fourth Amendment[.]”).

²⁷¹ See *supra* Sections II.B.1–2.

²⁷² See Castle, *supra* note 82, at 851–55 (discussing, in part, changes to Rule 26 and Rule 34 and consequent changes to the scope of discovery).

²⁷³ See *id.* at 840–43 (discussing changes to Rule 37 preservation duties).

²⁷⁴ See *supra* Part I.

contract claim with diversity jurisdiction probably should not. Even though the 2015 FRCP amendments made huge strides in clarifying and narrowing appropriate e-discovery obligations, the civil litigant must always remember that his right “against unreasonable searches and seizures . . . shall not be violated,”²⁷⁵ and that he can resort to the Fourth Amendment when he encounters an unknown or unlitigated e-discovery issue.

²⁷⁵ U.S. CONST. amend. IV.