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Can Litigation Analytics Tell Us What Became of the 2015 Proportionality Amendments to the Federal Rules of Civil Procedure?

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INTRODUCTION

In 2015, the Federal Rules of Civil Procedure pertaining to discovery were amended for the seventh time in 40 years–part of a cyclic effort to address the so-called "cost and delay"[1] of litigation. The centerpiece of the

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[1] There is an ongoing debate as to whether federal civil litigation is, in fact, generally subject to undue "cost and delay." *See*, *e.g.*, Danya Shocair Reda, *The Cost-and-Delay Narrative in*

amendments was the reconfigured requirement that requested discovery be "proportional to the needs of the case," in addition to being relevant and nonprivileged.[2] The concept of "proportionality" crystallized the 2015 amendments in a single mantra.

The proposed amendments inspired passionate and polarized public reactions.[3] Plaintiffs' attorneys opposed them as an impediment to obtaining the discovery they needed to prove their case, particularly in civil rights cases and other cases with significant information asymmetry.[4] Defendants' attorneys favored the amendments as a welcome relief from the high cost of what they considered overbroad discovery, especially as it affected the preservation and production of electronically stored information ("ESI").[5] Academic writing mostly opposed the amendments, calling them "anti-plaintiff"[6] and worrying that they marked "a paradigm shift"[7] unjustified by

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Civil Justice Reform: Its Fallacies and Functions, 90 OR. L. REV. 1085, 1090 (2012) ("[T]he resilience of the cost-and-delay narrative does not depend on its accuracy in reflecting the state of civil litigation.").

[2] FED. R. CIV. P. 26(b)(1) ("Unless otherwise limited by court order, the scope of discovery is as follows: Parties 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, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.") [https://perma.cc/2SGB-BV4U].

[3] Over 2,300 comments were submitted in response to the proposed amendments. The Civil Rules Advisory Committee held nationwide public hearings on November 7, 2013, January 9, 2014, and February 7, 2014. *See Proposed Amendments to the Federal Rules of Civil Procedure*, U.S. CTS., https://www.regulations.gov/docket/USC-RULES-CV-2013-0002 (last visited June 24, 2023) [https://perma.cc/RH3J-UA77]. Some individual comments by judges and law professors are collected in Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 23 n.113 (2016). Transcripts of the hearings are available on the federal judiciary's website. *Transcripts and Testimony*, U.S. CTS., https://www.uscourts.gov/rules-policies/records-rules-committees/transcripts-and-testimony (last visited June 24, 2023) [https://perma.cc/KMH4-9A6K].

[4] *See, e.g.*, Testimony of Anna Benvenutti Hoffman, Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure, Advisory Committee on Civil Rules (Nov. 7, 2013), Tr. at 110 ("Obtaining enough discovery, particularly document and deposition discovery, is absolutely critical to the success of our civil rights suits"), https://www.uscourts.gov/sites/default/files/civil-rules-public-hearing-transcript-washington-dc.pdf [https://perma.cc/U23L-DK2A].

[5] *See*, *e.g.*, John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) ("Discovery abuse . . . represents one of the principal causes of delay and congestion in the judicial system").

[6] *See generally* Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1145-46 (2015).

[7] *See* Richard Briles Moriarty, *And Now for Something Completely Different: Are the Federal Civil Discovery Rules Moving Forward into A New Age or Shifting Backward into A "Dark" Age*?, 39 AM. J. TRIAL ADVOC. 227, 227 (2015). *See also* David Marcus, *The Collapse of the Federal Rules System*, 169 U. PA. L. REV. 2485, 2499 (2021) (calling the proportionality amendment "[o]ne of this century's most controversial rule changes").

any serious empirical data showing that discovery in most federal cases actually caused undue cost and delay.[8]

When the amendments became effective on December 1, 2015, despite opposition, Chief Justice John Roberts' end-of-year report heralded them as "a big deal," marking "significant change," taking a "major stride toward a better federal court system."[9] (The Chief Justice also poetically compared discovery to 19th-century dueling.) Defense-oriented publications crowed about the "dramatic" and "revolutionary" amendments,[10] implying that the scope of discovery had been greatly limited.[11] The American Bar Association and the Duke Judicial Center sponsored an unprecedented thirteen-city "roadshow" starring some individual members of the Advisory Committee in their unofficial capacity.[12] Announcements for the roadshow called the amendments "the most significant changes to discovery and case management practices in more than a decade."[13]

Meanwhile, in its official capacity, that same Advisory Committee simultaneously declared that the amendments did not materially change

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[8] *See, e.g*., Reda, *supra* note 1, at 1090; Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules, Fed. Judicial Ctr. (2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf; *See generally* EMERY G. LEE III & THOMAS E. WILLGING, LITIGATION COSTS IN CIVIL CASES: MULTIVARIATE ANALYSIS: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, FED. JUDICIAL CTR., 2-4 (2010). http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/cost civ1.pdf; THOMAS E. WILLGING & EMERY G. LEE III, IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION, FED. JUDICIAL CTR. 1-2 (2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf.

[9] Chief Justice John Roberts, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5, https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf [hereinafter 2015 YEAR-END REPORT] [https://perma.cc/GA92-K7RG].

[10] *See, e.g*., ELECTRONIC DISCOVERY INSTITUTE, THE FEDERAL JUDGES' GUIDE TO DISCOVERY 1 (2015) (a private, defense-oriented publication).

[11] *See*, *e.g*., Martha J. Dawson & Bree Kelly, *The Next Generation: Upgrading Proportionality for a New Paradigm*, 82 DEF. COUNS. J. 434 (Oct. 2015): John J. Jablonski & Alexander R. Dahl, *The 2015 Amendments to the Federal Rules of Civil Procedure: Guide to Proportionality in Discovery and Implementing a Safe Harbor for Preservation*, 82 DEF. COUNS. J. 411 (Oct. 2015).

[12] DUKE U., *Judges, Lawyers Share Feedback on New Discovery Proportionality Rules at Duke-ABA Events* (Mar. 1, 2016), https://judicialstudies.duke.edu/2016/03/judges-lawyers-share-feedback-on-new-discovery-proportionality-rules-at-duke-aba-events/ (last visited Aug. 18, 2023) [https://perma.cc/8HGA-F2DD].

[13] *See, e.g.*, *id*.; K&L GATES, *Upcoming Event: Rules Amendments Roadshow*, https://www.ediscoverylaw.com/2016/04/05/upcoming-event-rules-amendments-roadshow-2/ (last visited Aug. 18, 2023) [https://perma.cc/3ZV4-4TKF]. *See also* Andrew J. Kennedy, *Amended Federal Rules: Streamlining Litigation*, LITIGATION NEWS (ABA SECTION OF LITIGATION), Vol. 41, No. 2, p. 11 (2016) ("Arguably the most significant changes to federal civil practice in the last decade").

existing law.[14] Moreover, it seemed that the district court and magistrate judges did not, in written rulings, treat the amendments as the "big deal" Justice Roberts insisted on: they appeared to continue analyzing discovery motions much the same way as before.[15] Commentators began to weigh in with tentative conclusions to the effect that the 2015 amendments had been "much ado about nothing."[16] In reading numerous post-amendment opinions resolving discovery motions, I began to agree with those commentators who discerned little difference from pre-amendments case law. At face value, courts are still talking about "broad and liberal" discovery and expressly agreeing with the Advisory Committee that the changes to Rule 26(b)(1) did not materially change the scope of discovery.

However, this sense of "plus ça change" may not reflect reality. Federal district court and magistrate judges are not blind: the tightening trajectory of all former amendments, the clear linguistic ratcheting in the restructuring of Rule 26(b)(1), the enthusiasm of the defense bar, the signaling of the Chief Justice and the Roberts Court,[17] and the

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[14] FED. R. CIV. P. 26 advisory committee's notes to 2015 amendments ("Restoring the proportionality calculation to 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations."). *See also* Lee H. Rosenthal & Steven S. Gensler, *From Rule Text to Reality: Achieving Proportionality in Practice*, 99 JUDICATURE 43 (2015), https://judicature.duke.edu/articles/from-rule-text-to-reality-achieving-proportionality-in-practice/ (explaining that the proportionality amendments were intended "to elevate awareness and get lawyers, litigants, and judges to pay more attention to the duties they have had for over three decades") [https://perma.cc/WMS3-L8AJ].

[15] *See infra* at Part III.

[16] Robert H. Klonoff, *Application of the New "Proportionality" Discovery Rule in Class Actions: Much Ado About Nothing*, 71 VAND. L. REV. 1949, 1971–72 (2018) (study of class action discovery disputes under the 2015 amendments finding that "the amended proportionality rule . . . has not fundamentally changed the governing principles. Courts have continued to engage in a nuanced, fact-specific approach to analyzing discovery requests . . ."). *See also* George Shepherd, *Still A Failure: Broad Pretrial Discovery and the Superficial 2015 Amendments*, 51 AKRON L. REV. 817, 833 (2017) (lamenting that the 2015 amendments were "ineffectual" in reducing "cost and delay"); David Herr & Steven Baicker-McKee, *Discovery*, 31 No. 2 FED. LITIGATOR NL 10 (2016) ("We could not locate a single case where we could say with any confidence that the amendment to Rule 26(b)(1) caused a court to rule that the discovery in question was unauthorized."); Thomas Y. Allman, *The Proportionality Principle after the 2015 Amendments*, DEF. COUNS. J. 241, 247 (July 2016) ("many believe that the proportionality relocation [in Rule 26(b)] has had, at the margins, an appreciable and very real impact on parties and the courts in close cases. The Author shares this view although, in the main, the results are more often no different than might be expected under the previous rule."); Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55 (2015) ("The new Rule 26(b)(1), contrary to public perceptions, does not represent a fundamental change in the existing scope of discovery.").

[17] *See* Seth Katsuya Endo, *Discovery Dark Matter*, 101 TEX. L. REV. 1021, 1059-1068 (2023) (arguing that despite the Supreme Court's paucity of actual discovery decisions, its invocation of the "cost-and-delay narrative," even in non-discovery cases such as *Twombly*, might have a downstream effect, as might the Chief Justice's informal "bully pulpit").

unpredictability of the proportionality factors themselves all portended an increased judicial skepticism towards discovery requests post-2015.

In addition, those advocating the 2015 amendments appear to be somewhat mollified. In the aftermath of earlier amendments through which the Advisory Committee (or, in some instances, Congress) tried to quell the voices complaining about abusive discovery, those voices emerged even louder and more dissatisfied. This time, eight years after the 2015 amendments, the chorus of discovery naysayers is comparatively quiet.[18]

Which is it? Was the refocusing of proportionality in discovery a paradigm shift or mere tinkering? Are plaintiffs now denied meaningful discovery? Is litigation less costly and time-consuming?[19] Did the 2015 amendments "work"? Proceduralists sometimes venture into the empirical study of the effect of rule changes despite the challenges in research study design and database construction.[20] Nonetheless, perhaps there are objective measures by which to shed light on these questions.

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[18] Currently, there are no pending or proposed amendments to the federal rules going to the core of discovery. The Advisory Committee has published for comment two new rules, one relating to MDLs that mentions but does not focus on discovery, and the other relating to privilege logs. *See* ADVISORY COMM. ON CIVIL RULES, 118TH CONG., MEETING OF THE ADVISORY COMM. ON CIVIL RULE (Mar. 28, 2023), https://www.uscourts.gov/sites/default/files/civil_agenda_book_october_2022_final.pdf [https://perma.cc/9HUW-YUL2]. The defense-oriented Lawyers for Civil Justice are touting their work on proposed Rule 16.1 (relating to MDLs) and Rule 26(b)(5) (relating to privilege logs), but otherwise appear to have no further discovery irons in the fire. *See Shaping the Future of Litigation*, LAWYERS FOR CIVIL JUSTICE, https://www.lfcj.com/ (last visited Sept. 30, 2023) [https://perma.cc/4TQG-RK7V]. The Federalist Society seems focused on state, not federal, rules amendments. *See* Mark A. Behrens, *2019 Civil Justice Update*, THE FEDERALIST SOC'Y, (Mar. 2, 2020), https://fedsoc.org/commentary/publications/2019-civil-justice-update [https://perma.cc/XL3L-QE3Q]. The US Chamber of Commerce is still concerned about discovery in class actions, Lauren De Lilly & Alexandria Ruiz, *Class Action Abuse: Precertification Discovery as a Fishing Expedition*, U.S. CHAMBER OF COMMERCE (June 17, 2020), https://www.uschamber.com/ lawsuits/class-action-abuse-precertification-discovery-as-a-fishing-expedition [https://perma.cc/6J9S-BLYM], and encouraging states to adopt the proportionality rule, Victor E. Schwartz et al., *101 Ways to Improve State Legal Systems*, U.S. CHAMBER OF COMMERCE INST. FOR LEGAL REFORM, 38 (2022), https://institutefor legalreform.com/wp-content/uploads/2022/10/101-Ways-2022-RGB-WP-FINAL.pdf [https://perma.cc/Z6Y8-RPQ8], but it seems to have largely moved on to other concerns. *See*, *e.g.*, *Texas Establishes Specialized Business Court*, U.S. CHAMBER OF COMMERCE (July 11, 2023), https://institute forlegalreform.com/blog/texas-establishes-specialized-business-court/ [https://perma.cc/HE89-B66V]. Pacific Legal Foundation does not appear to have any ongoing "Research" or "Legislation" relating to civil discovery. *Legislation*, PACIFIC LEGAL FOUND., https://pacificlegal.org/legislation/ (last visited Sept. 30, 2023) [https://perma.cc/6CX4-TX2L].

[19] *See* Christopher C. Frost, *The Sound and the Fury or the Sound of Silence?: Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of the Discovery Scope-Narrowing Language in the 2000 Amendments to Federal Rule of Civil Procedure*, 37 GA. L. REV. 1039, 1059-60 (2003) (posing these same questions in 2003 with regard to the 2000 amendments).

[20] *See, e.g.*, Jonah B. Gelbach, *Material Facts in the Debate over Twombly and Iqbal*, 68 STAN. L. REV. 369, 376 (2016) ("There are some empirical questions that cannot be clearly

Westlaw's Litigation Analytics ("WLA"),[21] a database drawn from federal district courts' electronic dockets, can generate in a few minutes an endless variety of databases. Herein, I have attempted to design a study using this readily available method. Items that are objectively measurable on WLA before and after the 2015 amendments include the number of discovery motions filed, the parties most frequently filing discovery motions, the outcomes of such motions, and whether those outcomes differ by filing party.[22] I explore the answers to these questions with respect to motions to compel discovery (MTCs) in civil rights cases and contracts cases.[23]

These admittedly imperfect measures by which to explore the effects of the 2015 amendments may yet provide some useful information. Parties file MTCs because their opponent refused the discovery they requested; it is reasonable to postulate that parties think they need that discovery to prove their case. Furthermore, it is widely assumed that, in general, plaintiffs need discovery more than defendants,[24] especially in cases with pronounced information asymmetry such as civil rights cases, and therefore that plaintiffs file more motions to compel discovery than defendants. If courts grant plaintiffs' MTCs less frequently after the 2015 amendments, one possible consequence is that plaintiffs are, in more cases, not receiving the discovery they think they need to prove their case. If fewer MTCs have been filed after the amendments, both sides potentially benefit, at least by saving the time it would take the court to resolve the dispute, but parties may also be missing out on vital evidence.

I explore below the manner in which the WLA database is constructed, which is not entirely transparent,[25] and the sampling biases that may inhere in subsets of the data for academic research.[26] But assuming that the AI-generated data behind WLA is reliable, I can summarize the results of my queries as follows:

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answered using feasible data"); David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1214 (2013).

[21] WESTLAW PRECISION, LITIGATION ANALYTICS, https://1.next.westlaw.com/Analytics/Home?transitionType=Default&contextData=(sc.Default)#/ (Westlaw account needed to access). *See infra* at Part III(A) for a discussion of the composition and reliability of WLA.

[22] WLA offers the ability to research twenty-eight principal motion types (most with many more subtypes), including many kinds of discovery motions. I focused only on motions to compel discovery, but the method I used could easily be applied to other discovery motions such as motions for a protective order or motions for sanctions. According to WLA, motions to compel discovery are the third most commonly filed motion in federal district court, following motions to dismiss and motions for summary judgment.

[23] The categorization of cases into types such as "civil rights" is done in part using the Nature-of-Suit codes in the Civil Cover Sheet accompanying the filing of an original or removed case in federal district court. Additional categories of case types are added by Westlaw in accordance with its Key Nature of Suit system. *See infra* at Part III(A) for further discussion.

[24] *See, e.g.*, Frost, *supra* note 19, at 1044.

[25] *See infra* at Part III(A).

[26] *See infra* at Part IV.

- In the time period covered by WLA (2004 to 2023), plaintiffs filed substantially more MTCs than defendants. Plaintiffs filed roughly two-thirds of the MTCs in civil rights cases. Plaintiffs also filed somewhat more MTCs than defendants in contract cases, but the difference between them was smaller.
- In 2016, the year after the effective date of the 2015 amendments, the total number of MTCs filed by all parties surged, especially in civil rights cases. However, the number of MTCs filed fell sharply after 2016, in both types of cases.
- Courts granted MTCs at a lower rate after the 2015 amendments in both civil rights and contracts cases whether filed by plaintiffs or defendants. Using Interrupted Time Series Analysis,[27] the estimated immediate effect of the 2015 amendments was a five to six percentage point, statistically significant drop in the MTC grant rate for both plaintiffs and defendants in civil rights cases. In contracts cases, the estimated immediate effect of the 2015 amendments was about a four or five percentage point drop in the MTC grant rate for both plaintiffs and defendants, but neither estimate is statistically significant.
- In civil rights cases, plaintiffs' MTCs grant rate was far lower (about 18 percentage points lower) than defendants' both pre- and post-amendments, and the difference is statistically significant.
- In contracts cases, plaintiffs' MTCs grant rate was slightly lower than the defendants', both pre- and post-amendments, but the difference is not significant either before or after the amendments.

Altogether, these results seem consistent with the prediction that the 2015 amendments would lead to a contraction of discovery. The big surprise, at least to me, was the steep decline in the number of MTCs filed after 2016. Perhaps fewer MTCs are being filed because parties are getting what they want in discovery, but this seems dubious. More likely, the decline in the number of motions filed results from pervasive pre-filing restrictions imposed by individual district courts and judges. In addition, the across-the-board decline in the percentage of MTCs granted is consistent with (although insufficient to prove) a contraction of discovery. Furthermore, the results seem to confirm the prediction that the 2015 amendments would further contract discovery for plaintiffs in civil rights cases, although civil rights plaintiffs' pre-2015 MTCs were already usually unsuccessful. However, due to sampling biases and confounding factors, there are myriad reasons not to read too much into these results.

To explore these issues, the article will proceed as follows. Part I below provides a brief background of the 2015 "proportionality" amendments to the FRCP. Part II analyzes a wide (though far from exhaustive) cross-section of written rulings on MTCs by district courts and

[27] *See infra* at notes 141-145 and accompanying text.

magistrate judges since the effective date of the 2015 amendments, focusing particularly on the stated impact of proportionality. Part III describes the WLA database and presents the results of the research questions according to that database, using descriptive statistics as well as a test of statistical significance known as an Interrupted Time Series Analysis. Part IV discusses the results in Part III and offers a compendium of potential sampling biases and confounding factors in the study. One of the most significant compounders is the sweeping use by federal district courts and judges of their own local rules, standing orders, "judge's preferences," and the like, which overlay the 2015 amendments with a raft of additional and ever-changing discovery requirements and techniques.[28] The final part tentatively concludes that the descriptive results from WLA are probably somewhat valid, both because those results confirm theoretical predictions and because WLA's data is drawn directly from federal electronic dockets. However, conclusions drawn about the effects of the 2015 amendments, especially through inferential statistics, may not be reliable.

I. THE FORTY-YEAR LEAD-UP TO AND IMMEDIATE AFTERMATH OF THE 2015 AMENDMENTS

The 2015 amendments to the discovery rules must be placed in the context of previous amendments and legislation spanning the decades.[29] In a sense, the 2015 amendments were not "dramatic" or "revolutionary" but a continued – if heightened – refinement and clarification of the concepts of proportionality, judicial case management, and party cooperation that were developed over the course of forty-five years of amendments.

The FRCP were adopted in 1938, and discovery was "one of the most significant innovations of" the new rules.[30] The scope of discovery, then as now,

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[28] *See, e.g.*, M.D. FLA., *Standing Orders/Plans/Procedures*, https://www.flmd.uscourts.gov/standing-orders-plans-procedures/standing-orders-individual-judges (last visited June 24, 2023) [https://perma.cc/TN72-KY7V]. *See generally* Alexander A. Reinert, *Management's Substantive Edges*, 42 REV. LITIG. 195 (2023).

[29] This brief history does not exhaustively catalog all amendments to the discovery rules of the FRCP but focuses on those most pertinent to the 2015 amendments. A smattering of excellent fuller histories would include, *e.g.*, FED. R. CIV. P. 26 advisory committee's notes to 2015 amendments; Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. Rev. 286, 353-356 (2013); Frost, *supra* note 19, at 1047-1056; Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 532-549 (2001); Jeffrey W. Stempel & David F. Herr, *Applying Amended Rule 26(b)(1) in Litigation: The New Scope of Discovery*, 199 F.R.D. 396, 400-404 (2001); John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 512 & n.28 (2000); Ariana Tadler, *APB to Requesting Parties: Prepare for Proportionality*, PRACTICAL LAW 28 (Nov. 15, 2015).

[30] *See* Hickman v. Taylor, 329 U.S. 495, 500 (1947) ("The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal

was contained in Rule 26(b), and the availability of broad discovery was meant as a counterweight to a liberal notice pleading standard.[31] Criticism of broad discovery, however, began at least as early as the 1960s, and the refrains of "cost and delay" and "discovery abuse" continued virtually unabated through six rounds of amendments to the discovery rules, in 1970,[32] 1980,[33] 1983,[34] 1993,[35] 2000,[36]

Rules of Civil Procedure."). *See* Alexander Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure*, 41 MICH. L. REV. 205, 205 (1942) ("Broad and liberal discovery is one of the outstanding contributions to civil procedure made by the new federal rules.").

[31] *See*, *e.g.*, Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002) ("This simplified notice pleading standard [in the Federal Rules of Civil Procedure] relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.").

[32] Among other changes, the 1970 amendments amended Rule 26(d) "to make clear and explicit the court's power to establish priority by an order issued in a particular case."). FED. R. CIV. P. 26 advisory committee's notes to 1970 amendments. *See also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 450 (1991) ("The 1970 amendments to the Federal Rules significantly strengthened district judges' ability to control the pretrial process by enhancing the existing management tools and encouraging their use.").

[33] The 1980 amendments added a new Rule 26(f) authorizing a party to request a discovery conference with the court if the party "has attempted without success to effect with opposing counsel a reasonable program or plan for discovery . . ." FED. R. CIV. P. 26 advisory committee's notes to 1980 amendments.

[34] The 1983 amendments first added the concept of "proportionality" in discovery to the rules. First, a paragraph was added to Rule 26(b)(1) that listed numerous factors a court could consider to limit discovery: many of those factors are the same as the proportionality factors in the 2015 version of Rule 26(b)(1). Second, then-new Rule 26(g) required lawyers, through their signature on a discovery request, response, or objection, to certify that it was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation . . ." FED. R. CIV. P. 26(g) (1983 version). Third, a sentence that formerly stated that "the frequency of use of these [discovery] methods is not limited" was removed. FED. R. CIV. P. 26(a)(1) (1980 version). *See* PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 90 F.R.D. 451 (1981). This amendment "encourage[d] district judges to identify instances of needless discovery . . ." FED. R. CIV. P. 26 advisory committee's notes to 1983 amendments.

[35] The 1993 amendments added two proportionality factors to a renumbered Rule 26(b)(2)(iii): "the importance of the proposed discovery in resolving the issues" and "the burden or expense of the proposed discovery outweighs its likely benefit." Second, the 1993 amendments required the parties to hold a discovery conference at the beginning of the case, after which the court would issue a scheduling order; the parties were forbidden to seek formal discovery until then. Third, presumptive numerical limits were placed on depositions (ten per side) and interrogatories (twenty-five per party). Fourth, the 1993 amendments sought to limit obstructive conduct at depositions: objections at a deposition would be required to be "stated concisely and in a non-argumentative and non-suggestive manner," and counsel could only direct a deponent not to answer a question on limited grounds.

[36] In 2000, for the first time since 1938, the Advisory Committee explicitly narrowed the scope of discovery in Rule 26(b), which had up to this point allowed discovery "relevant to the subject matter involved in the pending action." In 2000, the scope of discovery was split in two conceptual tiers, party-controlled (discovery without court order that was "relevant to the claims and defenses of the parties") and court-controlled (requiring court's approval to

and 2006.[37] After each round of amendments, conservative jurists and business interests continued to complain that the amendments had not gone far enough to curb "discovery abuse,"[38] even arguing that broad discovery violated due process.[39] At the same time, scholars criticized the pressure towards heavier judicial management of discovery as "a new form of 'judicial activism'" more concerned with the quantity than the quality of decisions,[40] and argued that the most rigorous empirical evidence failed to confirm the existence of widespread discovery problems.[41]

But the voices clamoring for greater limits on discovery were stronger, extending their influence beyond rules amendments to the direct passage of federal statutes[42] such as the Civil Justice Reform Act of 1990[43] and the Private Litigation Securities Reform Act.[44] In 2010, at the request of the Committee on Rules of Practices and Procedure, a conference was held

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obtain discovery "relevant to the subject matter involved in the pending action"). The Advisory Committee explained that the second tier was "designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery." FED. R. CIV. P. 26 advisory committee's notes to 2000 amendments. The 2000 amendments also tried to draw even more attention to the proportionality factors, by inserting a sentence at the end of Rule 26(b)(1) that cross-referenced Rule 26(b)(2), which then contained those factors.

[37] In 2006, further amendments to the discovery rules addressed concerns about preservation, retrieval, and production of ESI. Rule 26(b) and other rules were amended to refer specifically to ESI and to provide that a producing party "need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." New Rule 37(e) added a safe harbor against the imposition of sanctions "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." FED. R. CIV. P. 37(f) (2006 version).

[38] *See*, *e.g.*, FED. R. CIV. P. 26 Advisory committee's notes to 1983 amendments; Beisner, *supra* note 5; Miller, *supra* note 32, at 456-57.

[39] John Beisner, Jessica D. Miller & Jordan Schwartz, *Can E-Discovery Violate Due Process? Part 2*, Legal Tech News (June 10, 2013). *See also* Tom Lin, *The Evolution of American Discovery in Light of Constitutional Challenges: The Role of the 2015 Rule Amendments to the Federal Rules of Civil Procedure*, 44 HASTINGS CONST. L.Q. 225 (2017) (examining and rejecting constitutional challenges to discovery).

[40] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982).

[41] *See*, e.g., Lonny Hoffman, *Examining the Empirical Case for Discovery Reform in Texas*, 58 S. TEX. L. REV. 209, 218 (2016) (surveying empirical research from the 1960's through the 1990's and concluding that "over four decades, the best empirical evidence established that there were no pervasive discovery problems. Yet, over this same four-decade period, reformers continued to be unwilling to acknowledge the available evidence."); Reda, *supra* note 1, at 1090; Linda Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1994).

[42] *See*, *e.g.*, Elizabeth G. Thornburg, *Giving the "Haves" a Little More: Considering the 1998 Discovery Proposals*, 52 S.M.U. L. REV. 229, 231 (1999).

[43] 28 U.S.C. §476.

[44] 15 U.S.C. § 78u-4 ("In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.").

at Duke Law School[45] that eventually produced proposed amendments published for comment in 2013,[46] which after vociferous debate and some changes, became the 2015 amendments.

Amended Rule 26(b)(1) (the scope of discovery) looks very different from the former version. The proportionality factors were transferred, rearranged, expanded, and added smack in the middle of the rule. The talismanic sentence, "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence," was transformed to "Information within this scope of discovery need not be admissible in evidence to be discoverable." The option to request the court to order discovery of "matter relevant to the subject matter of the pending action" was eliminated, limiting all discovery to "matter that is relevant to any party's claim or defense." Examples of common permissible "discovery in aid of discovery" (such as the location of documents) were omitted from the rule entirely.

As a matter of statutory interpretation and logic, and as evidenced by defense enthusiasm, all the changes to Rule 26(b)(1) pointed in one direction: the scope of discovery was being narrowed. Professor Genetin has described these modifications as "eliminat[ing] the remaining vestiges of the liberal discovery principle."[47] But the Advisory Committee insisted otherwise. It maintained that most of the proportionality factors had been in the rule since 1983 and were merely being "restor[ed]" to Rule 26(b)(1) for emphasis.[48] It offered reassurances that removing the examples of permitted discovery-on-discovery was only to de-"clutter" the rule and that "[t]he discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case."[49] And it contended that deleting the sentence that discovery would be permitted if "reasonably

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[45] *See generally, 2010 Civil Litigation Conference*, U.S. CTS., http://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil [https://perma.cc/D69A-LZX2].

[46] *Meeting Minutes*, COMM. ON RULES OF PRAC. & PROC.11, http://www.uscourts.gov/rules-policies/archives/meeting-minutes/committee-rules-practice-and-procedure-june-2013 [https://perma.cc/CX6U-RUTF] (June 2013) [hereinafter June 2013 Standing Committee Minutes], at 4 (describing the themes that emerged at the "Duke Conference" as "(1) early and active judicial case management, (2) the necessity for proportionality in discovery, and (3) a duty of cooperation in the discovery process by counsel. The conclusion of the Duke Conference was that at present some or all of these elements are too often missing in civil litigation.").

[47] Bernadette Bollas Genetin, *"Just A Bit Outside!": Proportionality in Federal Discovery and the Institutional Capacity of the Federal Courts*, 34 REV. LITIG. 655, 684 (2015).

[48] FED. R. CIV. P. 26 advisory committee's note to 2015 amendments. Two members of the Advisory Committee wrote an influential article in which they clarified that "[f]or the first time, the word 'proportional' is in the rule text. The provisions on proportionality are moved to become part of the definition of permissible discovery, as opposed to limits on otherwise permissible discovery." Rosenthal & Gensler, *supra* note 14, at 43-44 (2015).

[49] FED. R. CIV. P. 26 advisory committee's notes to 2015 amendments. Similarly, the Advisory Committee affirmed that discovery of "other incidents of the same type, or involving the same product," "information about organizational arrangements or filing systems," and "information that could be used to impeach a likely witness" was still permissible. *Id*.

calculated to lead to the discovery of admissible evidence" was simply intended to prevent any misunderstanding that the "reasonably calculated" language defined the scope of discovery[50] and to clarify that inadmissibility was not a bar to discovery.

Flatly ignoring the Advisory Committee's attempts to soften the blow, corporate-oriented interests immediately spun the amendments as ushering in a new era of restrictive discovery through the concept of proportionality. Chief Justice Roberts' 2015 report on the federal judiciary was a prominent example,[51] but there were many others. Duke Law School's Bolch Center for Judicial Studies, which offers education to federal judges and produces various publications, produced "Guidelines and Practices for Implementing the 2015 Discovery Amendments to Achieve Proportionality,"[52] which were offered as a non-binding resource to judges and lawyers. These Guidelines were part of the materials distributed at a thirteen-city "roadshow" that the Duke Center presented with the American Bar Association.[53] Advertisements for the "roadshow" called the 2015 amendments "the most important federal discovery changes in over a decade,"[54] which was true, since the last major amendments were in 2000, but the unprecedented nature of the roadshow, combined with the fact that it was held in federal courtrooms,[55] could have easily given the impression that

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[50] *Id*. *See* Yphantides v. County of San Diego, No. 21CV1575-GPC(BLM), 2022 WL 3362271, at *3 (S.D. Cal. Aug. 15, 2022) ("The 2015 amendment to Rule 26(b) removed the phrase 'reasonably calculated to lead to the discovery of admissible evidence' because it was often misconstrued to define the scope of discovery.").

[51] *See supra* note 9. For a history of the Chief Justice's Year-End Report on the Federal Judiciary and its use in shaping public perception of litigation, see Howard M. Wasserman, *Civil Procedure in the Chief Justice's Year-End Report on the Federal Judiciary*, 51 STETSON L. REV. 317, 333–34 (2022) ("In wielding the Year-End Report to address issues otherwise on the Court's agenda, Roberts has expanded his predecessors' work and turned the Report into a powerful additional opportunity through which the Chief Justice shapes civil procedure.").

[52] The original version of the "Guidelines and Practices" is available in Judicature. The Guidelines and Practices are in their Third Edition currently, available at https://schol arship.law.duke.edu/cgi/viewcontent.cgi?article=1006&context=bolch [https://perma.cc/8GRT-BTPF] (hereinafter "Duke Guidelines and Practices").

[53] *See* 99 JUDICATURE, No. 3, at 46 (2015). Most of the ABA/Duke program's written materials were by authors with a defense or business orientation, including the Chief Justice's 2015 Year-End Report, the Duke Guidelines, and articles written by a partner at a large defense firm.

[54] *Id*.

[55] The training sessions were allowed to be held in federal courthouses and some of the panelists were former and current federal judges – including members of the Advisory Committee – which tended to give the impression that the "roadshow" had the imprimatur of the federal courts. When this engendered criticism, *see* Suja A. Thomas, *Via Duke, Companies are Shaping Discovery*, law360, https://www.law360.com/articles/723092/opinion-via-duke-companies-are-shaping-discovery [https://perma.cc/7SLG-FKB4], the chairpersons of the Advisory Committee and the Standing Committee disclaimed any official stamp of approval of the ABA/Duke training sessions. *See* Zoe Tillman, *Civil Rules Guidelines Questioned; Officials: They Don't Reflect Judiciary's Views*, National Law Journal (Jan. 4, 2016); Patricia W. Moore, *Law Professor Challenges the Seeming Federal*

the 2015 amendments represented massive shifts in discovery practice or that "proportionality" was a new and difficult concept.

The very title of the "Guidelines and Practices" focused on "proportionality" and arguably imposed more restrictions on discovery than did the enacted 2015 amendments. For example, the guidelines encourage phased sequencing of discovery.[56] In addition, the guidelines and other such publications freely acknowledge that the engine for "proportionality" in discovery is for judges to take firm control.[57] The practices portion of the Duke Center's "Guidelines and Practices" were targeted primarily at judicial control and management of discovery. All ten of the original best practices contained the words "the judge should."[58] Many district court and magistrate judges embraced these suggestions in their individual standing orders.[59] Given all this, it was easy to predict that proportionality would usually be a one-way ratchet: it might allow less, but not more, discovery than would have been allowed before the 2015 amendments.

II. DISTRICT COURT AND MAGISTRATE JUDGES' WRITTEN RULINGS RELATING TO THE SCOPE OF DISCOVERY POST-2015

For the most part, in their publicly-available opinions, federal district court judges and magistrates seemed to take the Advisory Committee at its word that the 2015 amendments did not materially change existing law on the scope of discovery or the parties' obligations in discovery.[60] Some courts

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Endorsement of Duke Nonbinding "Guidelines" on Proportionality Amendments, Civil Procedure and Federal Courts Blog, https://lawprofessors.typepad.com/civpro/2015/11/law-professor-challenges-the-seeming-federal-endorsement-of-duke-nonbinding-guidelines-on-proportion.html, (Nov. 17, 2015). However, it is likely that many of the attendees assumed that the program was federally sponsored.

[56] *See* Duke Guidelines and Practices, *supra* note 52, at 17 (Best Practice 5 suggests, "In a case in which the parties have not done so, or in which discovery is likely to be voluminous or complex, or in which there is likely to be significant disagreement about relevance or proportionality, the parties and the judge should consider and discuss starting discovery with the subjects and sources that are most clearly proportional to the needs of the case."). *Cf.* George S. Bellas & Marcus Neil Bozeman, *Stopping the Proportionality Distortion*, TRIAL (Oct. 2021) 52, 54-55 (criticizing a "Discovery Proportionality Model" promulgated by the James E. Humphreys Complex Litigation Center at The George Washington University Law School).

[57] *See*, *e.g.*, Rosenthal & Gensler, *supra* note 14, at 45 ("Whether proportionality moves from rule text to reality depends in large part on judges.").

[58] *See* Duke Guidelines and Practices, *supra* note 52, at 12-26.

[59] For example, many judges' standing orders have adopted "Best Practice 12," pursuant to which the parties are required to request a conference with the judge before filing a motion to compel discovery. *See infra* at Part V.

[60] *E.g.*, Elliott v. Superior Pool Prod., LLC, No. 15-CV-1126, 2016 WL 29243, at 7 (C.D. Ill. Jan. 4, 2016) ("new Rule 26(b) literally places 'relevance' and 'proportionality' on the same level and the concepts have been conjoined in the federal rules for a long period of time.").

explicitly stated, early on, that the result they reached would have been the same under the prior versions of Rule 26(b)(1) and 26(b)(2).[61]

A. Nonprivileged and Relevant

Most courts, citing the current version of Rule 26(b)(1), continue to describe the scope of discovery as "broad" and/or "liberal,"[62] and often refer to their wide-ranging discretion.[63] Many courts have also concluded that the concept of proportionality has not changed since 1983.[64] An astonishing number of courts continue to use the "reasonably calculated" language that was discarded in 2015.[65] In fact, courts are still citing the 1947 case of

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[61] *E.g.*, Hale v. Leiss, No. 1:21-CV-01028, 2022 WL 6250663, at *1 (M.D. Pa. Oct. 7, 2022) ("In the Third Circuit, 'it is well recognized that the federal rules allow broad and liberal discovery.'"); Bounds v. Capital Area Family Violence Intervention Ctr., Inc., No. CA 14-802-JJB-RLB, 2016 WL 1089266, at *2 n.1 (M.D. La. Mar. 18, 2016); Nomac Drilling, LLC v. USEDC OKC, LLC, No. CIV-14-0155-C, 2015 WL 8773493, at *4 n. (W.D. Okla. Dec. 14, 2015); XTO Energy, Inc. v. ATD, LLC, No. CIV 14-1021 JB/SCY, 2016 WL 1730171, at *18 (D.N.M. Apr. 1, 2016).

[62] *E.g.*, Aspen Specialty Ins. Co. v. Yin Invs. USA, LP, No. 6:20-CV-00153, 2021 WL 4170794, at *1 (E.D. Tex. July 16, 2021); Cent. Baptist Church of Albany Georgia, Inc. v. Church Mut. Ins. Co., No. 1:16-CV-231 (LAG), 2020 WL 13178270, at *1 (M.D. Ga. Nov. 9, 2020); In re Xarelto (Rivaroxaban) Prod. Liab. Litig., No. MDL 2592, 2016 WL 2855221, *3 (E.D. La. May 16, 2016) ("The rules of discovery are to be interpreted with a 'liberal spirit'"); Eramo v. Rolling Stone LLC, 314 F.R.D. 205, 209 (W.D. Va. 2016) ("the discovery rules are to be accorded broad and liberal construction") (citations omitted); Nat'l Found. For Special Needs Integrity, Inc. v. Reese, No. 4:16MC102 RLW, 2016 WL 715729 (E.D. Mo. Feb. 19, 2016) ("Broad discovery is an important tool for the litigant.") (citation omitted).

[63] *E.g.*, Bentley v. Highlands Hosp. Corp., No. 7:15-CV-97-ART-EBA, 2016 WL 762686, at *1 (E.D. Ky. Feb. 23, 2016) ("the scope of discovery is within the broad discretion of the courts").

[64] *See, e.g.*, ValveTech, Inc. v. Arojet Rocketdyne, Inc., 2021 WL 630910, at *2 (W.D.N.Y. Feb. 18, 2021) ("The 2015 amendments ... did not establish a new limit on discovery; rather they merely relocated the limitation from Rule 26(b)(2)(C)(iii) to Rule 26(b)(1)"); Hibu Inc. v. Peck, 2016 WL 4702422, at *2 (D. Kan. Sept. 8, 2016) ("The consideration of proportionality is not new, as it has been part of the federal rules since 1983."); Robertson v. People Magazine, No. 14 CIV. 6759 (PAC), 2015 WL 9077111, at *2 (S.D.N.Y. Dec. 16, 2015) ("the 2015 amendment does not create a new standard; rather it serves to exhort judges to exercise their preexisting control over discovery more exactingly").

[65] *E.g.*, In re Matter of Subpoenas Served on Non-party Series 7 of Paramount Dev. Fin. Partners 3.0 LLC, No. 1-23-MC-00319-DII, 2023 WL 3831794, at *2 (W.D. Tex. June 5, 2023) ("A discovery request is relevant when it seeks admissible evidence or is reasonably calculated to lead to the discovery of admissible evidence."); Oakwood Products, Inc. v. SWK Technologies, Inc., No. 9:20-CV-04107-DCN, 2022 WL 7108844, at *2 (D.S.C. Oct. 12, 2022) ("Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."); Hale v. Leiss, No. 1:21-CV-01028, 2022 WL 6250663, at *3 (M.D. Pa. Oct. 7, 2022) ("The Federal Rules of Civil Procedure allow discovery on any relevant, non-privileged material that is admissible or reasonably calculated to lead to admissible evidence. See Fed. R. Civ. P. 26(b)(1)."); Deutsche Bank Nat'l Tr. Co. as Tr. for Ameriquest Mortg. Sec. Inc. v. Pink, No. 7:18-CV-00020-O-BP, 2019 WL 399533, at *5 (N.D. Tex. Jan. 31, 2019) ("First, with respect to relevance ... the threshold for relevance in discovery matters is extremely low. So long as

Hickman v. Taylor[66] and the 1979 case of *Herbert v. Lando*,[67] both of which recognized a "broad and liberal" view of discovery.[68] More recently, courts sometimes qualify the "broad and liberal discovery" characterization with a recognition of the proportionality requirement[69] and with a need to protect privacy interests.[70]

The 2015 amendments did not change the preexisting requirements that the information sought in discovery be nonprivileged and relevant. Courts continue to address questions of privilege, including the attorney-client privilege[71] and the work-product protection,[72] under preexisting

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discovery is 'reasonably calculated to lead to the discovery of admissible evidence,' it is relevant.") (internal citations omitted). Note, however, that references to the "reasonably calculated" language probably only occur in a tiny minority of discovery opinions. An empirical study found that "more than 93% of published discovery decisions in 2016 mentioned the new proportionality standard" but that in "approximately 7% of published discovery decisions, judges used the pre-amendment standards as if no change had been made." Diego A. Zambrano, *Judicial Mistakes in Discovery*, 113 NW. U. L. REV. 197, 202 (2018) (attributing such noncompliant opinions, in part, to the parties' erroneous briefs).

[66] 329 U.S. 496, 507 (1947) ("No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case.").

[67] 441 U.S. 153, 177 (1979) ("The Court has more than once declared that the deposition discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials.").

[68] *See*, *e.g.*, Dionisio v. S. Fin. Sys., Inc., No. 521CV00068DCBLGI, 2022 WL 2825827, at *1 (S.D. Miss. May 11, 2022); Campbell v. Mayorkas, No. 3:20-CV-697-MOC-DCK, 2022 WL 5265155, at *2 (W.D.N.C. Oct. 6, 2022).

[69] *E.g.*, Walsh v. Unforgettable Coatings, Inc., No. 220CV00510KJDDJA, 2022 WL 3647920, at *2 (D. Nev. Aug. 23, 2022) (Rule 26(b) allows "broad and liberal discovery, but limits discovery based on proportionality.").

[70] *E.g.*, Vyanet Operating Grp., Inc. v. Maurice, No. 121CV02085CMASKC, 2023 WL 3791458, at *2 (D. Colo. June 2, 2023) (citing Aguilar v. Aramark Corp., 1998 WL 36030448, at *1 (D.N.M. Aug. 6, 1998) ("While the federal rules provide for broad and liberal discovery, the Court is mindful of the need to balance one party's right of discovery with the opposing party's right of privacy and right to be free from an intrusive and burdensome examination into private matters.")); Clark v. Hyatt Hotels Corp., No. 1:20-CV-01236-RM-SKC, 2022 WL 19416, at *4 (D. Colo. Jan. 3, 2022), objections overruled, No. 20-CV-01236-RM-SKC, 2022 WL 884282 (D. Colo. Mar. 25, 2022) (same). The addition of privacy interests as a new, unstated proportionality factor has been criticized. *See*, *e.g.*, Lee H. Rosenthal & Steven S. Gensler, *The Privacy-Protection Hook in the Federal Rules*, 105 JUDICATURE 77, 78 (2021).

[71] *See, e.g.*, Roytlender v. D. Malek Realty, LLC, No. 21CV00052, 2022 WL 5245584, at *4 (E.D.N.Y. Oct. 6, 2022) (the question of whether a litigation hold notice was ever sent is not attorney-client privileged); Kuriakose v. Veterans Affairs Ann Arbor Healthcare Sys., No. 14-CV-12972, 2016 WL 4662431, at *8 (E.D. Mich. Sept. 7, 2016) ("Under [earlier] precedent, the date on which Plaintiff notified her attorney that she had received the Notice of Right to File or sought advice from her attorney regarding the Notice is not protected by the attorney-client privilege.").

[72] Rule 26(b)(3), which was not amended, codifies the attorney work-product protection. *See*, *e.g.*, Leyva v. Allstate Fire & Casualty Ins. Co., No. 2:21-CV-987, 2022 WL 6747990, at *3 (W.D. Wash. Oct. 11, 2022).

standards.[73] As for relevance, the 2015 amendments eliminated discovery of court-ordered information "relevant to the subject matter of the pending action," leaving the scope to include only matters "relevant to the claims and defenses of any party." However, the 2015 amendments did not narrow the term "relevant" itself, nor is any narrowing of the term "relevant" evident in case law thus far. Courts continue to cite pre-December 1, 2015 case law to define relevance, such as the 1978 Supreme Court case of *Oppenheimer Fund, Inc. v. Sanders*, which held that relevance in discovery "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."[74] Innumerable federal district and magistrate court opinions continue to cite *Oppenheimer* as good law on the breadth of relevance in discovery,[75] so long as the relevance is tied to the pleadings[76] and thus to the governing law.[77]

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[73] *See, e.g.*, Green v. Cosby, 160 F. Supp. 3d 431, 439-440 (D. Mass. 2016) (Massachusetts marital disqualification rule); Bosley v. Valasco, No. 1:14-CV-00049-MJS(PC), 2016 WL 1704159 (E.D. Cal. Apr. 28, 2016), modified, No. 1:14-CV-00049-MJS(PC), 2016 WL 2756590 (E.D. Cal. May 12, 2016) (state official information privilege); Kubik v. Cent. Michigan Univ. Bd. of Trustees, No. 15-CV-12055, 2016 WL 4425174 (E.D. Mich. Aug. 22, 2016) (psychotherapist-patient privilege exists).

[74] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978).

[75] *E.g.*, S.M. v. Tamaqua Area Sch. Dist., No. 3:22-CV-00525, 2023 WL 3689607, at *1 (M.D. Pa. May 26, 2023); USA v. Xlear Inc., No. 2:21-CV-640, 2022 WL 5246717, at *1 (D. Utah Oct. 6, 2022); Atlantic Specialty Ins. Co. v. Blue Cross & Blue Shield of Kansas, Inc., No. 18-2371-DDC, 2022 WL 7483998, at *4 (D. Kan. Oct. 13, 2022); Maiden Biosciences, Inc. v. Document Security Systems, Inc., No. 3:21-CV-0327-D, 2022 WL 7662658, at *3 (N.D. Tex. Oct. 13, 2022) (internal citations omitted) (holding that defendants, responding to plaintiff's document requests, "have failed to demonstrate that the documents included within the scope of RFP No. 3 are outside the scope of discovery: i.e., that there is no possibility that the information sought may be relevant to the claim or defense of any party"); Bertrand v. Yale Univ., No. 3:15 CV 1128 (WWE), 2016 WL 2743489, at *3 (D. Conn. May 11, 2016); Braham v. Perelmuter, No. 3:15CV1094(JCH), 2016 WL 1305118 (D. Conn. Apr. 1, 2016); Benyamini v. Swett, No. 2:13-CV-0735-KJM-EFB-P, 2016 WL 2899029, at *1 (E.D. Cal. May 18, 2016) ("The question of relevancy should be construed 'liberally and with common sense' and discovery should be allowed unless the information sought has no conceivable bearing on the case").

[76] See, e.g., Hale v. Leiss, No. 1:21-CV-01028, 2022 WL 6250663, at *4 (M.D. Pa. Oct. 7, 2022) ("There is no claim in the operative amended complaint that is premised upon the disclosure of 'undisclosed' phone numbers from phone calls Mr. Hale allegedly received on the above-mentioned dates, all of which occurred before the amended complaint was filed. Therefore, having considered the scope of discovery allowed under Federal Rule of Civil Procedure 26(b)(1), the Court finds that the requested documents are beyond the scope of that which is delineated in Rule 26.").

[77] *See, e.g.*, Stephan Zouras LLP v. Marrone, No. 3:20-CV-2357, 2022 WL 4007296, at *4 (M.D. Pa. Sept. 1, 2022) (in a dispute between law firms over the apportionment of fees awarded in a class action, plaintiff sought time records and information about a separate fees case arising from the same class action; defendant claimed time records were irrelevant because the fees award had been a percentage-of-fund; court rejected this argument, holding that "the information sought here is relevant and discoverable. At bottom, this case is a

Just as before the amendments, many courts continue to judge whether information is relevant under Rule 401 of the Federal Rules of Evidence.[78] Relevance is a low bar in itself,[79] and relevance in discovery is even broader than relevance at trial (which is what the evidence rules primarily address).[80] In their public opinions, courts do not explicitly rank relevance above proportionality, but once the court is convinced of the requested discovery's relevance, the proportionality factors will usually not outweigh its production,[81] or proportionality may be mentioned as a kind of afterthought,[82] or the

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contractual and equitable attorneys' fees dispute between rival claimants."); Braud v. Geo Heat Exchangers, L.L.C, 314 F.R.D. 386 (M.D. La. 2016); Saller v. QVC, Inc., No. CV 15-2279, 2016 WL 4063411, at *7 (E.D. Pa. July 29, 2016) (Family Medical Leave Act and Americans with Disabilities Act case) ("the Court finds the requested performance reviews are potentially relevant to showing that Defendant's stated reasons for Plaintiff's termination are pretextual"); Bell v. Reading Hosp., No. CV 13-5927, 2016 WL 162991 (E.D. Pa. Jan. 14, 2016) (tying proportionality discussion to legal standard for final certification of a collective action under the FLSA); Bagley v. Yale, No. 3:13-cv-01890 (D. Conn., Dec. 14, 2015), 2015 WL 8750901 (in Title VII suit alleging failure to reappoint due to sex discrimination, court granted in part plaintiff's motion to compel the defendant university to produce information on whether eleven individuals who were reappointed were comparators to plaintiff, depending on the defendant's theory under the *McDonnell Douglas* standard).

[78] FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."). *See*, e.*g*., St. Clair Cnty. Employees' Ret. Sys. v. Acadia Healthcare Co., Inc., No. 3:18-CV-00988, 2022 WL 4095387, at *3 (M.D. Tenn. Sept. 7, 2022); Akkawi v. Sadr, No. 2:20-CV-1034 MCE AC, 2022 WL 4484056, at *2 (E.D. Cal. Sept. 27, 2022); A.M. v. American School for the Deaf, No. 3:13 CV 1337 (D. Conn., Mar. 22, 2016), 2016 WL 1117363; American Federation of Musicians v. Sony Music Entertainment, No. 15-CV-05249 (S.D.N.Y. Apr. 29, 2016), 2016 WL 2609307.

[79] *E.g*., United States v. Rodriguez-Soler, 773 F.3d 289, 293 (1st Cir. 2014) (the "federal rules of evidence set a very low bar for relevance"), *cert. denied*, 135 S. Ct. 1189 (2015).

[80] *E.g*., Lukis v. Whitepages Inc., 535 F. Supp. 3d 775, 797 (N.D. Ill. 2021), appeal dismissed, No. 21-1798, 2022 WL 16638000 (7th Cir. May 13, 2022); Cont'l Cirs. LLC v. Intel Corp., 435 F. Supp. 3d 1014, 1018–19 (D. Ariz. 2020); Vaigasi v. Solow Mgmt. Corp., No. 11CIV5088RMBHBP, 2016 WL 616386, at *11 (S.D.N.Y. Feb. 16, 2016) ("Relevance is a matter of degree, and the standard is applied more liberally in discovery than it is at trial.").

[81] 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, ET AL., FED. PRAC. & PROC. CIV. § 2008.1 (3d ed. April 2016 update) ("when relevance has been demonstrated courts will scrutinize claims that the burden of producing requested information is disproportionate"). *See, e.g*., Brewer v. Alliance Coal, LLC, No. 720CV00041DLBEBA, 2022 WL 5199868, at *12 (E.D. Ky. Oct. 5, 2022) (finding personnel records requested by plaintiffs in a FLSA collective action "highly probative" of plaintiffs' claims of allegedly unlawful employment practices; not explicitly addressing proportionality factors); Equal Employment Opportunity Comm'n v. Amsted Rail Co., No. 14-CV-1292-JPG-SCW, 2016 WL 2625065, at *3 (S.D. Ill. May 9, 2016) (ordering discovery after finding the requested discovery relevant, the court applied the proportionality factors in a conclusory manner); Wertz v. GEA Heat Exchangers Inc., No. 1:14-CV-1991, 2015 WL 8959408, at *3 (M.D. Pa. Dec. 16, 2015) (plaintiff who made a "particularized showing of relevance" was allowed to take an eleventh deposition in a wrongful termination case).

[82] *See*, *e.g*., Harris v. Gurkins, No. 4:19-CV-111-D, 2022 WL 4351995, at *3 (E.D.N.C. Sept. 19, 2022) (in Fair Housing Act case that had survived a motion for summary judgment,

proportionality factors may not be mentioned at all.[83] Conversely, if the requesting party does not establish the relevance of the discovery sought, the court will inevitably (and unnecessarily as a logical matter) find that the discovery is not proportional to the needs of the case.[84] There is a sense that relevance and proportionality are "conjoined":[85]

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plaintiffs' motion to compel discovery of defendants' financial positions was granted as "relevant to Plaintiffs' claim and . . . proportional to the needs of the case."); Dionisio v. S. Fin. Sys., Inc., No. 521CV00068DCBLGI, 2022 WL 2825827, at *3 (S.D. Miss. May 11, 2022).

[83] *See*, *e.g.*, United States v. Teva Pharms. USA, Inc., No. CV 20-11548-NMG, 2022 WL 6820648, at *1, 4-5 (D. Mass. Oct. 11, 2022) (action for alleged violations of the Anti-Kickback Statute and the False Claims Act, where defendant allegedly caused the submission of false claims to Medicare paid in the form of illegal copay subsidies for its multiple sclerosis drug, Copaxone; court denied defendant's motion to compel the production of all claims for drugs by Medicare patients with MS, closely reading the governing substantive law to reject numerous of defendant's arguments for relevance; proportionality factors were mentioned in the parties' briefs but not in the magistrate's order); Cirves v. Syed, No. 19-CV-725, 2022 WL 7458760, at *7 (W.D. Wis. Oct. 13, 2022) ("a jail-wide (or company-wide) policy about prescribing controlled substances has at least some relevance to whether defendants' treatment decisions were ultimately reasonable"); Roytlender v. D. Malek Realty, LLC, No. 21CV00052, 2022 WL 5245584, at *8 (E.D.N.Y. Oct. 6, 2022) ("Subpoenas issued under Rule 45 are subject to the relevance requirement of Rule 26(b)(1)"; granting defendant's motion to compel plaintiff's daughter, a nonparty, to produce documents and testify, holding her testimony was relevant to the defendant's fraud counterclaim because $30,000 was channeled through the plaintiff's daughter); Cory v. George Carden Int'l Circus, Inc., No. 4:13-CV-760, 2016 WL 3460781, at *2 (E.D. Tex. Feb. 5, 2016) (in a personal injury action where the plaintiff alleged loss of eyesight and other activities due to defendant's negligence, the court ordered limited access to plaintiff's mobile phone, tablet, computer, and fitness monitoring devices, because use of some of the apps on these devices, or use of the device itself, was relevant to rebut plaintiff's claims of injury); Kuriakose v. Veterans Affairs Ann Arbor Healthcare Sys., No. 14-CV-12972, 2016 WL 4662431, at *1, 5 (E.D. Mich. Sept. 7, 2016) (hostile work environment case in which the defendant argued that plaintiff had failed to timely exhaust her administrative remedies, while plaintiff argued that the time for exhausting should be tolled because she was "so traumatized by the sexual assault that she was unable to [effectively] manage her personal and business affairs"; court granted defendant's motion to compel plaintiff to list all creditors and financial institutions to whom she made payments during the time in question, holding that "Plaintiff's financial account activity is relevant to Plaintiff's ability to effectively manage her personal and business affairs, and it is within the scope of discovery . . . because Plaintiff directly placed that ability at issue in relation to the exhaustion of her administrative remedies.").

[84] *See*, *e.g.*, Wall v. Reliance Standard Life Ins. Co., 341 F.R.D. 1, 9 (D.D.C. 2022); Boehm v. Scheels All Sports, Inc., No. 15-CV-379-JDP, 2016 WL 1559183, at *2 (W.D. Wis. Apr. 15, 2016) ("in light of its limited relevance, the discovery plaintiffs seek is out of proportion to the needs of this case."); Sumpter v. Metropolitan Life Ins. Co., No. 1:13-CV-0347-TWP-DKL, 2016 WL 772552, at *4 (S.D. Ind. Feb. 29, 2016) (calling an ERISA plaintiff's requests "disproportional," but actually holding that they were irrelevant under the substantive law of ERISA).

[85] Elliott v. Superior Pool Prod., LLC, No. 15-CV-1126, 2016 WL 29243, at *7 (C.D. Ill. Jan. 4, 2016).

the more probative the discovery sought, the more "disproportional" it must be to be prohibited.[86]

B. The Six Proportionality Factors

Neither Rule 26(b)(1) nor the official Notes assign weights to the six factors listed after the phrase "proportional to the needs of the case." Thus, courts state that "proportionality determinations are to be made on a case-by-case basis using the factors listed in Rule 26(b)(1)," and that "no single factor is designed to outweigh the other factors in determining whether the discovery sought is proportional,"[87] nor is every factor applicable to every case.[88] To avoid waiver, attorneys' default reaction might be to always address every factor in every motion, a possible waste of time at best, and a near-impossibility if court rules limit the length of the submissions.[89] This formula grants a judge almost unlimited leeway to apply, consciously or not, normative factors to the analysis.[90]

Judges do not have to make formal and explicit findings on each of the six proportionality factors,[91] making already-deferential appellate review even less likely to result in reversal.[92] Moreover, as if six factors were not enough,

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[86] Vaigasi v. Solow Mgmt. Corp., No. 11CIV5088RMBHBP, 2016 WL 616386, at *14 (S.D.N.Y. Feb. 16, 2016) ("the greater the relevance of the information in issue, the less likely its discovery will be found to be disproportionate"). It should be noted that "relevance" under the Federal Rules of Evidence is a binary concept: something is relevant or it is not. To demarcate the strength of evidence, the rules use the term "probative value." *See*, *e.g.*, FED. R. EVID. 403.

[87] *See, e.g.*, Bell v. Reading Hosp., No. CV 13-5927, 2016 WL 162991, *2 (E.D. Pa. Jan. 14, 2016).

[88] *E.g.*, Guadalupe v. City of N.Y., No. 15CIV0220CMJCF, 2016 WL 3570545, at *2 (S.D.N.Y. June 24, 2016) ("not all of the proportionality factors may be relevant in any particular dispute, and they certainly will not each carry the same relative weight in every context"). *But see* Siriano v. Goodman Manufacturing Co., No. 2:14-cv-1131, 2015 WL 8259548, at *6 (S.D. Ohio, Dec. 9, 2015) (providing an example of a magistrate judge applying all the proportionality factors to the case).

[89] *See infra* at Part IV. *See also* Reinert, *supra* note 28, at 215 ("the limitations imposed on the filings made for a premotion conference, particularly in the context of discovery [such as a requirement that the parties submit a joint three-to-five page letter], can implicitly force parties to abandon claims for particular material.").

[90] *See*, *e.g.*, Jonah Gelbach & Bruce Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1112, 1118 ((2016); Maureen Carroll, *Civil Procedure and Economic Inequality*, 69 DEPAUL L. REV. 269, 287-88 (2020) (critically examining the "amount in controversy" factor).

[91] *E.g.*, Meeker v. Life Care Centers of America, Inc., No. 14-cv-02101, 2015 WL 7882695 (D. Colo., Dec. 4, 2015); Ferring Pharms. Inc. v. Braintree Lab'ys, Inc., 168 F. Supp. 3d 355, 359 (D. Mass. 2016) (rejecting plaintiff's argument that the magistrate's ruling failed to discuss proportionality; plaintiff "emphasized the proportionality issue both in its written and oral arguments," and "[i]t was not contrary to law, particularly given the substantial deference due to magistrate judge rulings on heavily fact-intensive questions, for her to allow the motion without expressly acknowledging the proportionality arguments").

[92] *See* Endo, *supra* note 17, at 1039 ("discovery appeals are unlikely to succeed").

courts may invent new ones,[93] including privacy concerns[94] and legal prohibitions on disclosing the information sought.[95] The explicit invitation to courts to subjectively pick and choose among the proportionality factors may lead to unpredictable results, not only as to the overall ruling, but as to which of the factors the court will focus on and how the factors will be interpreted. For example, it seems reasonably clear that the Advisory Committee eschewed an application of the "amount in controversy" factor that explicitly compared the facial ad damnum to the responder's estimate of the cost of responding to the discovery request.[96]

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[93] *See*, *e.g.*, Echon v. Sackett, No. 14-CV-03420, 2016 WL 943485, at *2 (D. Colo. Jan. 27, 2016) (granting almost all of the discovery requested by plaintiffs, the court stated, "This case presents several issues that the court will account for in its consideration of proportionality, including the fact that Defendants are unrepresented; the Parties in this case are related and such relationship has caused complications regarding the progress of this litigation; and the allegations as set forth in the Complaint raise serious issues of human trafficking and violations of labor and wage laws."); Carroll v. Wells Fargo & Co., No. 15CV02321, 2016 WL 4696852, at *3 (N.D. Cal. Sept. 8, 2016) (court ordered defendant Wells Fargo to produce identifying information of putative class members, but "[f]or the sake of proportionality," the court limited the production to a random sample of 25% of the approximately 43,000 putative members).

[94] Creighton v. City of New York, No. 12CV7454 (PGG) (DF), 2016 WL 1178648, at *2-3 (S.D.N.Y. Mar. 17, 2016) (privacy interest in juvenile records). *See also* Cory v. George Carden Int'l Circus, Inc., No. 4:13-CV-760, 2016 WL 3460781, at *2 (E.D. Tex. Feb. 5, 2016) (denying mirror image of plaintiff's mobile phone, tablet, and computer in a personal injury case, citing privacy concerns); In re Anthem, Inc. Data Breach Litig., No. 15-MD-02617 LHK (NC), 2016 WL 11505231, at *1 (N.D. Cal. Apr. 8, 2016) (denying access to plaintiffs' "computer systems that connect to the internet," finding that plaintiffs' privacy interests "greatly" outweighed the likely benefit of providing access); Doe v. Trustees of Boston College, No. 15-10790, 2015 WL 9048225, at *1 (D. Mass., Dec. 16, 2015) (court considered the privacy interests of non-party students to their educational records regarding allegations of sexual assault, but held that college could redact "personally identifiable information" and attempt to notify the non-party students prior to disclosure of any part of their educational record). *See* James C. Francis IV, *Good Intentions Gone Awry: Privacy As Proportionality Under Rule 26(b)(1)*, 59 SAN DIEGO L. REV. 397, 436 (2022) ("Rule 26(c) provides an entirely adequate tool for protecting the privacy interests of litigants and non-parties alike in the context of civil discovery. Efforts to wedge privacy considerations into the proportionality construct of Rule 26(b)(1) are misguided. Neither the language nor the drafting history of that rule supports such an interpretation. Moreover, treating privacy as a proportionality factor has an adverse impact, both on judicial decision making and on the fairness and transparency of the discovery process."); Rosenthal & Gensler, *supra* note 70, at 78.

[95] *See*, *e.g.*, Bentley v. Highlands Hosp. Corp., No. 7:15-CV-97-ART-EBA, 2016 WL 762686, at *11 (E.D. Ky. Feb. 23, 2016) (disclosure of information received from the National Practitioner Data Bank prohibited by federal law). *Cf.* Bertrand v. Yale Univ., No. 3:15 CV 1128 (WWE), 2016 WL 2743489, at *3 (D. Conn. May 11, 2016) (rejecting defendant's argument that state law prohibited its disclosure of other employees' records, where the state law contained an exception for court-ordered production).

[96] FED. R. CIV. P. 26 advisory committee's notes to 2015 amendments.

Nonetheless, the nature of the factor does seem to invite some comparison between the two, and many courts have done so.[97]

Moreover, the proportionality factors tend to overlap, so considering each one separately may double-count some considerations. For example, "the importance of the discovery in resolving the issues," rephrases the requirement that the discovery sought be "relevant to any party's claim or defense," especially when the word "issues," by reference to an earlier factor, means "the issues at stake in the action." Indeed, some courts appear to have equated "the importance of the discovery in resolving the issues" to relevance.[98] The Advisory Committee suggested as much: "A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them"[99] – in other words, the requesting party should state the relevance and the probative value of the discovery sought. But it seems doubtful that in arguing for an item's "relevance," parties would not already refer to considerations bearing on the item's probative value. Hence, the judge has two shots at accepting or rejecting the argument: once when

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[97] Stephan Zouras LLP v. Marrone, No. 3:20-CV-2357, 2022 WL 4007296, at *5 (M.D. Pa. Sept. 1, 2022) (weighing the alleged burden of searching 122,000 electronically-stored emails against the "hundreds of thousands of dollars" at issue in the action, and easily granting the motion to compel); St. Clair Cnty. Employees' Ret. Sys. v. Acadia Healthcare Co., No. 3:18-CV-00988, 2022 WL 4095387, at *11 (M.D. Tenn. Sept. 7, 2022) (addressing defendants' argument that the cost of producing discovery sought in a securities class action would exceed $1 million, the court said, "These are sums that would cause sticker shock in a run-of-the-mill civil action. But this is an expansive action addressing cross-border conduct and hundreds of millions of dollars of profit, and the cost of discovery must be considered in that context"); Bell v. Reading Hosp., No. CV 13-5927, 2016 WL 162991, *3 (E.D. Pa. Jan. 14, 2016) (in an FLSA case seeking unpaid wages for meal breaks, the court compared the amount in controversy for each of the opt-in plaintiffs ($5,000 to $10,000, exclusive of fees, costs, and liquidated damages) to the discovery conducted to date and the discovery requests currently at issue, finding that the latter "would certainly not exceed the amount [in] controversy in this matter."). *See also* Board of Commissioners of Shawnee Cty., Kansas v. Daimler Trucks N. Am., LLC, No. 15-4006-KHV, 2015 WL 9164248, at *4 (D. Kan. Dec. 15, 2015) ("Plaintiff seeks damages in excess of $75,000 from each defendant and defendants fail to make any substantiated undue burden or expense argument suggesting that the burden of producing Mr. Mytty for deposition outweighs the benefit of his testimony"; however, court considered other proportionality factors as well).

[98] *See*, *e.g.*, Yphantides v. County of San Diego, No. 21CV1575-GPC(BLM), 2022 WL 3362271, at *6 (S.D. Cal. Aug. 15, 2022) ("the requested evidence is not relevant to Plaintiff's substantive claims and may not be relevant to the affirmative defense. As such, the importance of the evidence and the amount in dispute are less significant."); Bertrand v. Yale Univ., No. 3:15 CV 1128 (WWE), 2016 WL 2743489, at *3 (D. Conn. May 11, 2016) (in a case brought by a university tennis coach alleging wrongful termination under an employment contract requiring "cause" for termination, the court granted plaintiff's motion to compel production of documents relating to violations of applicable rules by other university coaches or assistant coaches; the defendant apparently pressed no proportionality objection, and objected only on the grounds of relevancy and invasion of other employees' privacy; nonetheless, the court cited "the importance of the discovery in resolving the issues" in its analysis of why plaintiff was entitled to the discovery).

[99] FED. R. CIV. P. 26 advisory committee notes to 2015 amendments.

deciding the discovery's "relevance," and again when deciding how important it is in resolving the issues.

Another instance of plain overlap is the final factor, "whether the burden or expense of the proposed discovery outweighs its likely benefit." This could overlap with any of the previous five factors, again giving the parties and the judge the chance to double-count some consideration. In its overt weighing of costs against benefits, it effectively summarizes proportionality in its entirety.[100] And like the temptation to compare "the amount in controversy" to the cost of production, it is easy to reduce "the burden or expense" and "likely benefit" to dollars and cents,[101] ignoring the social costs of disallowing discovery, such as failure to take appropriate precaution against risk, and the social benefits of allowing discovery, such as the enforcement of public policies expressed in legislation.[102]

Neither the Advisory Committee nor the courts seem worried about the unpredictability of six (or more) unweighted discretionary factors, because the main goal is for the judge to take firm, case-by-case control of the discovery process. Predictability and fairness may be additional goals, of course, but the thought seems to be that the judge will intuitively understand, perhaps through "judicial experience and common sense,"[103] exactly what the parties need and do not need.

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[100] *See*, *e.g.*, Wall v. Reliance Standard Life Ins. Co., 341 F.R.D. 1, 6 (D.D.C. 2022); *Bell v. Taylor*, No. 1:14-cv-00785-TWP-DKL, 2016 WL 1170822, *2 (S.D. Ind. Mar. 25, 2016) ("Rule 26(b)(1) considers whether the burden or expense of the proposed discovery outweighs its likely benefit.").

[101] *See*, *e.g.*, McKinney/Pearl Rest. Partners, L.P. v. Metro. Life Ins. Co., No. 3:14-CV-2498-B, 2016 WL 98603, at *2, *15 (N.D. Tex. Jan. 8, 2016) (granting plaintiffs' motion to compel responses to requests for admission even though defendants had asserted that "it would take more than 50 hours of attorney time and potentially more expert witness time for the Defendants to fully respond to the requests"); Noble Roman's, Inc. v. Hattenhauer Distrib. Co., 314 F.R.D. 304, 306 (S.D. Ind. 2016) (quashing subpoena as not proportional to the needs of the case where plaintiff "would be required to devote employee time and effort, as well as attorney time, effort, and expense, to review the documents requested by [defendant] from [subpoenaed entity], and to devote substantial attorney time and expense for traveling to, preparing for, and cross-examining [subpoenaed deponents] in Atlanta, Georgia").

[102] *See*, *e.g.*, Stephen B. Burbank, *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?,* 34 REV. LITIG. 647, 651-652 (2015) ("If proportionality is not to become a deregulatory tool in cases in which federal regulatory policy is implicated, judges must resist the temptation to privilege costs over benefits, and private over public interests.") (footnote omitted); Gelbach & Kobayashi, *supra* note 90.

[103] Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (reviewing court evaluates the plausibility of a complaint using "its judicial experience and common sense").

C. Burden on Motion to Compel

One final point is the burden on a motion to compel disclosure or a discovery response under Rule 37(a).[104] That rule was not materially changed in the 2015 amendments.[105] However, one of the more contentious issues during the 2015 amendments' comment period was whether the movement of the proportionality factors from their former position in Rule 26(b)(2)(C) to their present position in Rule 26(b)(1) changed the movant's burden on a motion to compel discovery to which the respondent objected. Before the amendments, most courts required the proponent of the discovery request to meet the initial burden of showing that the discovery sought was relevant, and once relevance was shown, required the objecting party to explain its objections.[106]

The Advisory Committee maintained throughout public hearings that moving the proportionality factors did not change the parties' burden on a motion to compel. In the Committee's view, the proportionality factors were a part of the scope of discovery since 1983 and were merely being moved up for greater emphasis. Nevertheless, in response to the plaintiff's bar's concerns, the Committee added a sentence to the Notes stating that the amendments do not "place on the party seeking discovery the burden of addressing all proportionality considerations."[107] This note provided little comfort because the negative implication was that the movant did, in fact, bear some burden in satisfying the proportionality factors. Later remarks

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[104] FED. R. CIV. P. 37(a)(1) ("On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.").

[105] A technical amendment to Rule 37(a)(1)(B)(iv) was made to account for a clarification of Rule 34 that a responding party could produce documents instead of permitting inspection.

[106] *See*, *e.g.*, Frost, *supra* note 19, at 1067; Continental Western Insurance Co. v. Opechee Construction Corp., No. 15-cv-006, 2016 WL 865232 (D.N.H., Mar. 2, 2016) ("The party seeking an order compelling discovery responses over the opponent's objection bears the initial burden of showing that the discovery requested is relevant. Once a showing of relevance has been made, the objecting party bears the burden of showing that a discovery request is improper."); Montanez v. Tritt, No. 3:14-CV-1362, 2016 WL 3035310, at *2 (M.D. Pa. May 26, 2016); Bennett v. Mohr, No. 2:14-CV-1450, 2016 WL 2967794, at *2 (S.D. Ohio May 20, 2016) (citing pre-December 1, 2015 case law); Saller v. QVC, Inc., No. CV 15-2279, 2016 WL 4063411, at *3 (E.D. Pa. July 29, 2016). *See also* Shaffer, *supra* note 16, at 84 ("Assuming that the discovery requests in question seek facially relevant information under Rule 26(b)(1), the burden of proof under Rule 37(a)(3) then shifts to the non-moving party to support its objections.").

[107] FED. R. CIV. P. 26(b)(1), advisory committee notes to 2015 amendments. Numerous courts have cited this note. E.g., Braud v. Geo Heat Exchangers, L.L.C, 314 F.R.D. 386, 389 n.1 (M.D. La. 2016); Hibu Inc. v. Peck, No. 16-CV-1055-JTM-TJJ, 2016 WL 6804996, at *2 (D. Kan. Nov. 17, 2016); Royal Park Investments SA/NV v. Deutsche Bank Nat'l Trust Co., No. 14CV04394AJNBCM, 2016 WL 4613390, at *7 (S.D.N.Y. Aug. 31, 2016); Small v. Amgen, Inc., No. 212CV476FTM29MRM, 2016 WL 7228863, at *2 (M.D. Fla. Sept. 28, 2016); Santiago v. S. Health Partners, No. 1:15CV589, 2016 WL 4435229, at *2 (M.D.N.C. Aug. 19, 2016).

that the parties "shared" the burden of addressing proportionality further confirmed that the burden on a motion to compel would, in many courts, change.[108]

To summarize this section, a bird's-eye view of post-2015 opinions might give the impression that the 2015 amendments pertaining to proportionality did not significantly affect the availability of discovery. However, the proportionality factors' malleability as well as a possible heightening of the movant's burden on a MTC seem to point in the opposite direction.

III. THE CHALLENGE OF MEASURING THE EFFECT OF THE 2015 AMENDMENTS: METHODOLOGY AND RESULTS OBTAINED THROUGH WESTLAW LITIGATION ANALYTICS

Against the backdrop of many courts' pronouncements that the 2015 amendments did not materially change the scope of discovery, we might theorize that litigants' ability to obtain the discovery they seek has not changed much. But there were many reasons to expect the opposite, especially in cases with information asymmetry.[109] First, defendants favored and plaintiffs opposed the amendments, and plaintiffs typically need discovery more than defendants. Second, by any conceivable hermeneutics,

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[108] Fed. R. Civ P. 26 advisory committee's notes to 2015 amendments ("A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them."). *See, e.g.*, A.M. v. American School for the Dea*f*, No. 3:13 CV 1337, 2016 WL 1117363 (D. Conn., Mar. 22, 2016); Salazar v. McDonald's Corp., No. 14-CV-02096-RS (MEJ), 2016 WL 736213, at *2 (N.D. Cal. Feb. 25, 2016) ("Under the Court's reading, the revised rule places a shared responsibility on all the parties to consider the factors bearing on proportionality before propounding discovery requests, issuing responses and objections, or raising discovery disputes before the courts.").

[109] *See*, *e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Stephen B. Burbank & Sean Farhang, *Rulemaking and the Counterrevolution Against Federal Litigation: Discovery* (in WHO WILL WRITE YOUR RULES?), at 21 [https://perma.cc/KS56-3V23]; Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1042–43 (2016) ("While the actual effect of amended Rule 26(b)(1) remains to be seen, there is a good argument that it will have a negative impact on non-one-percent cases."); Moore, *supra* note 6, at 1139 ("Civil rights suits, the third most common type of long-pending case, rely heavily on discovery to uncover enough evidence to survive the de rigueur 12(b)(6) motion and summary judgment motion. It is those cases that will suffer most the fallout of the new rules."); Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1779 (2015) ("The currently proposed amendments to the discovery rules--requiring a demonstration of proportionality in order to gain access to information--are but one example of how the discovery system has shifted from a presumption of plaintiff receptivity to a presumption of plaintiff skepticism."). *Cf.* Andrew Coan & DeLorean Forbes, *Qualified Immunity: Round Two*, 78 WASH. & LEE L. REV. 1433, 1494 (2021) (information asymmetry characterizes many constitutional tort suits).

the combined changes to the language in Rule 26(b)(1) lead to the conclusion that discovery was narrowed. Third, the amendments were an explicit attempt to reduce the "cost and delay" of litigation caused by discovery, not to make sure that parties obtained all the discovery they needed. Fourth, the ubiquitous exhortations to individual judges to aggressively "manage" discovery did not imply that discovery should proceed apace with what the parties think they need.

Is there a satisfactory empirical measure of the effect of this change? I propose to rush in where angels may fear to tread. I employ databases drawn directly from WLA to answer a research question objectively: how, if at all, have the 2015 amendments affected the quantity and the outcomes of motions to compel discovery, and have those outcomes differed by filing party? I recognize that simply comparing the grant rate of motions pre- and post-amendments will fail to capture many subtleties, such as, for example, how the rule changes may have affected litigant choice of motions to present, thereby changing the quantity or quality of the very universe of motions being measured.[110] Nonetheless, I believe the results obtained, albeit imperfect, are still valuable.

A. The Reliability of Westlaw Litigation Analytics

WLA is an extensive database which, in its words, allows users "to discover relevant, data-driven insights from federal and select state dockets and cases."[111] The database in WLA is culled directly from the federal courts' digital dockets.[112] Assuming the data is reliably categorized (which occurs through machine learning backed up by human interpretation), this feature—access to the entire digitized docket—arguably makes empirical research

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[110] *See*, *e.g.*, Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FEDERAL CTS. L. REV. 1, 27-29 (looking only at filing rates and movant success rates of 12(b)(6) motions after *Twombly* and *Iqbal* "does not tell us how many prospective claimants were deterred from seeking legal relief because of the Court's more exacting pleading standard. Indeed, it is not clear how any empirical study could measure the deterrent effect of the Court's decisions.").

[111] There are many other such tools. *See*, *e.g.*, David Freeman Engstrom & Jonah B. Gelbach, *Legal Tech, Civil Procedure, and the Future of Adversarialism*, 169 U. PA. L. REV. 1001, 1010 (2021) (mentioning, among others, Colossus, Ravel, Lex Machina, Gavelytics, and FastCase).

[112] These dockets are available, on an individual basis at least, to anyone with an account for Public Access to Court Electronic Records ("PACER"). WLA contains all newly-filed items on PACER, usually within 24 hours. Zoom Interview with Rachel Beithon, Senior Product Manager, Westlaw Litigation Analytics (Oct. 21, 2022) (hereinafter "Beithon Interview"). The data in Lex Machina and Context on LexisNexis is also pulled from PACER; in addition, Lexis performs language analytics by scanning the language in briefs, pleadings, and motions. LEXISNEXIS, https://www.lexisnexis.com/en-us/products/lexis-plus/litigation-analytics.page.

conducted through WLA superior to methods whereby researchers pulled opinions from Westlaw and LexisNexis.[113]

WLA's database purports to include more than twenty years of docket coverage for all 94 federal district courts.[114] There are search filters for types of motions, outcomes, case types, judges, courts, law firms, and attorneys.[115] The website warns that the results for motions analytics may be "incomplete" because it "only count[s] motions that have been resolved by a court order" and "[n]ot all motions are resolved with an order."[116] The values for party outcomes, motion outcomes, and damages are derived from machine

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[113] *See*, *e.g.*, Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon, *Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules*, FED. JUD. CTR. (Mar. 2011) (suggesting that the findings of three early empirical studies of the effect of *Twombly* and *Iqbal*, including the author's, were limited because the studies were "based on opinions appearing in the Westlaw database, which is likely to overrepresent orders granting motions to dismiss when compared with orders appearing on docket sheets"); Engstrom, *supra* note 20, at 1214 & n. 24 (2013) (collecting studies); Christina L. Boyd, Pauline T. Kim, & Margo Schlanger, *Mapping the Iceberg: The Impact of Data Sources on the Study of District Courts*, 17 J. EMPIR. LEG. STUD. 466, 477 (2020) (finding that only a small percent of motions in employment discrimination cases, all drawn from PACER, were available on Westlaw or Lexis as opinions). It is beyond the scope of the present paper, but it would be interesting to compare results from WLA with results from prior empirical studies of motion outcomes obtained from databases built through the individual coding of cases, whether the cases were retrieved from PACER or from the general Westlaw database. *E.g.*, Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2181 (2015) (study of 15 federal district courts, finding that in ruling on motions to dismiss for failure to state a claim, in calendar year 2010, in Civil Rights cases in which an attorney represented plaintiff, the motions were granted 49% of the time with prejudice, granted 25% of the time without prejudice, and denied 26% of the time; although the equivalent study cannot be performed in WLA due to differences in the way cases and rulings are categorized and the ability to filter for pro se representation, a search of WLA under Case Type "Civil Rights" limited to a date range of 1/1/2010 to 12/31/2010 results in such motions being granted 47%, granted in part 20%, denied 21%, and denied as moot 11% of the time) (search performed on Oct. 24, 2022); Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 RICHMOND L. REV. 603, 618 (2012) (study from randomly selected cases on Westlaw citing Iqbal from 5/18/2009 to 5/19/2010 found, in constitutional Civil Rights cases, 12(b)(6) motions were granted without leave to amend 45% of the time, granted with leave to amend 19% of the time, granted in part and denied in part 26% of the time, and denied 9% of the time; an apples-to-apples search on WLA cannot be performed, a search of WLA under Case Type "Civil Rights" limited to a date range of 1/1/2010 to 12/31/2010 results in such motions being granted 47%, granted in part 20%, denied 21%, and denied as moot 11% of the time) (search performed on Oct. 24, 2022).

[114] *See* Litigation Analytics Federal District Court Coverage Map, https://1.next.westlaw.com/Analytics/Coverage?transitionType=OverviewLitigationAnalytics&contextData=(sc.Default)&firstPage=true&bhcp=1#/coverage/map. Some of the coverage indicates that it extends back to 1998 or earlier. However, when performing searches in WLA, no results were found that predated 2004.

[115] *Id*.

[116] *Id*.

learning, with dozens of staff attorneys reviewing the classifications and making adjustments as necessary.[117]

WLA is primarily marketed to attorneys.[118] There has been little academic research on its suitability for academic studies of the courts. Nonetheless, serious academic studies are beginning to use WLA as a tool for quantitative analysis.[119] In one study, the quantitative analysis was underpinned by manual review and coding of randomly selected dockets within the universe of cases generated by the WLA search.[120]

Practitioner-oriented publications have also used WLA[121] or advocated its use (or the use of similar artificial-intelligence legal tools) for litigators[122] and mediators.[123] In the future, the use of litigation analytics to

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[117] Beithon Interview, *supra* note 112.

[118] *See* Katherine L.W. Norton, *The Middle Ground: A Meaningful Balance Between the Benefits and Limitations of Artificial Intelligence to Assist with the Justice Gap*, 75 U. MIAMI L. REV. 190, 236 (2020).

[119] *See*, *e.g.*, Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1726 (2022) (major study of state-court litigation, mostly consumer contracts and debt collection, "in which a sophisticated corporate plaintiff brings a high volume of similar, small-value claims against individual natural-person defendants who are almost universally unrepresented and who often do not appear in court"; author used Westlaw Analytics to identify the top ten case-filers in civil litigation "across 20 trial courts of general jurisdiction in 18 states"); Jorge Galavis, *Horseshoes and Hand Grenades: Frank v. Gaos and the Problem with Class Action Cy Pres Distributions*, 28 U. MIAMI BUS. L. REV. 88, 98 (2019) (using WLA to compile list of class actions in which a cy pres award was allowed).

[120] *E.g.*, Wilf-Townsend, *supra* note 119, at 1779 n.291, 1781.

[121] *See* Patrick Palmer, *Ramping Up ADA Compliance: The Unintended Consequences of Enforcing the Americans with Disabilities Act and Its Effects on Small Business Growth*, 38 CORP. COUNS. REV. 201, 211 (2019) (using WLA to perform docket analysis on Title III litigation from all four federal Texas districts).

[122] *See*, *e.g.*, Brian Dalton, *Big Data and the Litigation Analytics Revolution*, Above the Law (2020), https://abovethelaw.com/law2020/big-data-and-the-litigation-analytics-revolut ion/ ?rf=1; Lori Strickler Corso, *From Detective to Curator the Evolution of the Modern Legal Researcher*, DEL. LAW., 6, 7 (2021) ("Research platforms are no longer simply information providers but are rebranding themselves as information analysts. Most research systems offer some type of litigation analytics that allows them to leverage information they already have in their system to help attorneys make predictions about what might happen in their own cases."); Nan L. Grube, *Data Analytics and Artificial Intelligence in Litigation*, 78 J. MO. B. 12, 13 (2022) ("popular databases like Lexis, Westlaw, Casetext, Fastcase, and Google Scholar have integrated AI. Primarily, the well-known law research platforms are based in the federal system because it is completely digitized on PACER. . . . However, powerful litigation analytics is not limited to federal court; as more states become digitized and adopt e-filing, a boon in state-based analytics and predictive technologies will follow for state jurisdictions as well."); Nicole Black, *Twenty-First-Century Software for Litigators*, LITIG., Summer 2020, at 13, 14; Kirk C. Jenkins, *Making Sense of the Litigation Analytics Revolution*, PRAC. LAW., Oct. 2017, at 58, 64 ("The advent of litigation analytics and data-driven decision making is a game-changer in terms of intelligent management of litigation risk").

[123] *See* Jacqueline Perrotta & Frank Proscia, *Use of Quantitative Data in ADR*, 40 ALT. TO HIGH COST LITIG. 24, 24 (2022) ("By reviewing this data together, neutrals could better guide parties in mediation").

predict outcomes and costs for clients may well be considered to come under an attorney's ethical duty to evaluate the facts and the law.[124]

For academic research, however, the use of WLA must account for several concerns. First, the consistency and reliability of traditional electronic database searches has long been questioned.[125] Second, in WLA, a single order may be listed in the database numerous times, if the order rules on more than one motion. For example, an order may grant a plaintiff's motion to compel in part and deny a defendant's motion to compel; this would be counted as two entries in the database. Relatedly, if one case generates numerous orders over time, each of those is counted separately. A key assumption for certain statistical tests is that the data are independent; but if the same case contributes to the counts multiple times, then this assumption is likely incorrect.

Additional concerns relevant to the use of WLA for academic research include the fact that ongoing improvements to the machine learning underpinning WLA could result in slightly different results in the same search over time.[126] PACER itself (from which WLA draws its data) is subject to human error stemming from the Civil Cover Sheet, which presents the user with the choice of only one "Nature of Suit (NOS),"[127] among other

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[124] *See*, *e.g.*, *ABA Model Rules of Professional Conduct: Preamble & Scope, Preamble: A lawyer's responsibilities* [2], https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/ (stating the attorney's core function in litigation is to evaluate the facts, the law, and the outside factors which may impact the litigation).

[125] *See* Sean La Roque-Doherty, *Not So Predictable Analytics Products Offer Different Results Depending on Data Sources, Quality and the Types of Analytics and Reports They Provide*, ABA J., Aug./Sept. 2020, at 20, 21 (describing a 2020 study by law librarians comparing the litigation analytics for Bloomberg Law, Docket Alarm, Docket Navigator, Lex Machina, Monitor Suite, and Westlaw Edge, finding great variability in the results to simple questions); Susan Nevelow Mart, *The Algorithm As A Human Artifact: Implications for Legal (Re)search*, 109 Law Libr. J. 387, 389–90 (2017) (study comparing Casetext, Fastcase, Google Scholar, Lexis Advance, Ravel, and Westlaw in legal research; finding "[t]here is hardly any overlap in the cases that appear in the top ten results returned by each database," and arguing that legal database providers should provide more "algorithmic accountability").

[126] For example, when researching this article, on Sept. 18, 2022 and Oct. 18, 2022, I ran the same search of a fixed past time period, but WLA yielded different results of the number of motions to compel. The difference was only 0.07% (10 motions out of around 14,000) but was enough to cause momentary panic. A WLA Senior Product Manager, Rachel Beithon, explained that the discrepancy was likely the result of ongoing improvements to the program's machine learning; in addition, staff editors may review and recategorize certain motions that are internally flagged as not meeting their confidence level; Beithon Interview, *supra* note 112. Later, Ms. Beithon explained that these will generally be small changes in the results and it would be extremely rare that overall trends in the data would change. Email from Rachel Beithon (Feb. 15, 2024) (on file with author).

[127] *See* Christina L. Boyd & David A. Hoffman, *The Use and Reliability of Federal Nature of Suit Codes*, 2017 MICH. ST. L. REV. 997, 1013-14 (2017); Gillian K. Hadfield, *Judging Science: An Essay on the Unscientific Basis of Beliefs About the Impact of Legal Rules on Science and the Need for Better Data About Law*, 14 J.L. & POL'Y 137, 145 (2006).

problems.[128] Staff attorneys at WLA, in addition to using the 90 NOS codes from the Civil Cover Sheet, additionally classify cases under its Westlaw Key Nature of Suit system; there are some 400 Keys.[129]

B. Methodology and Results

Despite these aspects of WLA that arguably make it unsuitable for tests of statistical significance, WLA is probably about as accurate as the electronic court dockets from which it is drawn.[130] I make herein a preliminary effort to use WLA to compare the number of and rulings on motions to compel discovery (MTC) in the federal district courts, before and after the 2015 amendments to the Federal Rules of Civil Procedure. I focus on civil rights cases, in which the plaintiff is typically an individual and the defendant is typically a corporate or governmental entity, and where the defendant frequently has greater access to the relevant information than the plaintiff. As a faux sort of "control group,"[131] I also look at contracts cases, in which there is a greater likelihood of the parties being more evenly matched, both in resources and in access to information about the case.[132]

To conduct an analysis of the frequency or outcome of any motion type in WLA, one must choose a court (I chose federal district courts) and a case type. It does not appear that one can combine major case types in a single search, so I separately searched civil rights cases and contracts cases. Once one chooses a case type, one can then filter for "Motions," under which I

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[128] *See* Peter W. Martin, *District Court Opinions That Remain Hidden Despite A Long-Standing Congressional Mandate of Transparency-the Result of Judicial Autonomy and Systemic Indifference*, 110 LAW LIBR. J. 305 (2018) (discussing problems of researching with PACER).

[129] Beithon Interview, *supra* note 112. For example, the WLA case type for "Civil Rights" includes ADA - Non-employment (NOS 446), Appeal of Fee Determination Under Equal Access to Justice (NOS 900), Constitutional Rights (which includes Deprivation of Rights, Freedom of Speech, and Right of Assembly), Discrimination (which includes Uncategorized, Educational Rights, False Arrest, Fire Arms, Harassment, Housing/Accommodations (NOS 443), and Other Federal Civil Rights (NOS 440)), Police Conduct (which includes Excessive Force, Failure to Intervene, False Arrest, Qualified Immunity, and Uncategorized), Prosecutorial Conduct (which includes Malicious Prosecution, Prosecutorial Misconduct, and Uncategorized), Voting (NOS 441), and Welfare (NOS 444). Only those items that include a "NOS" exactly match the categories on the Civil Cover Sheet promulgated by the Administrative Office of the Courts.

[130] However, I did not test this hypothesis directly by attempting to perform the same search in PACER directly as in WLA; perhaps this is an avenue for further research.

[131] Of course, contracts cases are not really a "control group," because those cases (as all others) were subject to the same 2015 amendments as the Civil Rights cases.

[132] *See*, *e.g.*, Gelbach, *supra* note 20, at 376 ("employment discrimination cases may hinge on the underlying motivation for an employer's adverse action, and these motivations may be difficult for an employee to ascertain without discovery. . . . By contrast, it seems reasonable to think that plaintiffs should be able to plead the bases for a breach of contract claim without the benefit of discovery."); William H. J. Hubbard, *The Discovery Sombrero and Other Metaphors for Litigation*, 64 CATH. U. L. REV. 867, 875 (2015) (speculating that information asymmetry is less in contract cases than in employment discrimination cases).

chose "Motion to Compel Discovery."[133] I always included MDL cases (there is a toggle to include these).[134]

I will first illustrate how the results of a simple search appear on WLA. Figure 1 is the chart generated in WLA for the total number of MTCs in civil rights cases, for the entire time period covered by the WLA database (2004 to mid-2023). I toggled "filing role" to show the party filing the MTC.[135]

Figure 1
Number of Motions to Compel Discovery in Civil Rights Cases
As shown in Westlaw Litigation Analytics for Time Period 2004-2023

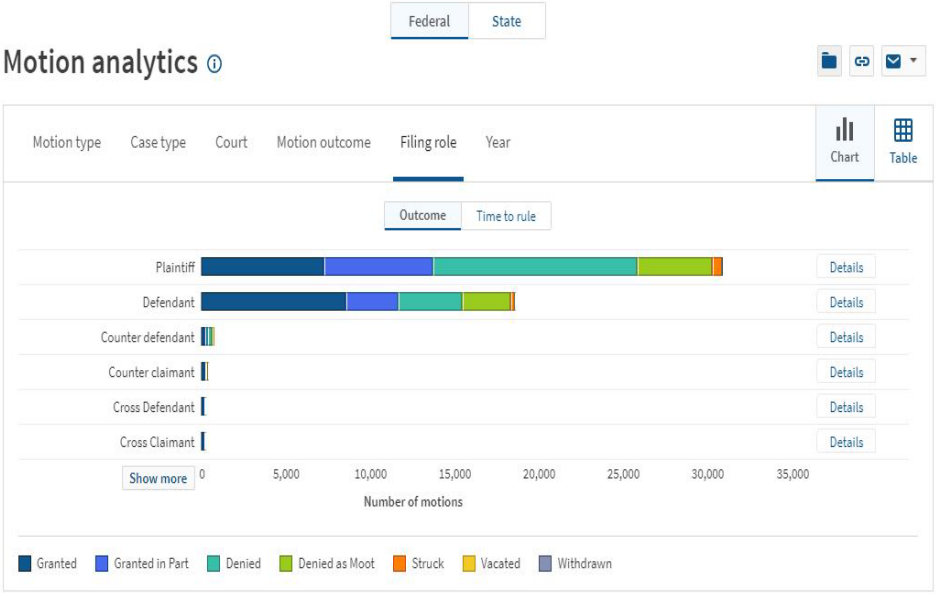


Figure 1 supports the common assumption that plaintiffs, in general, seek court-ordered discovery much more often than defendants in

[133] WLA includes dozens of motion types; most are further divided into many subcategories. "Motion to Compel Discovery" encompasses the subcategories "Uncategorized," "Document," "Deposition," "Record," "Subpoena," "Testimony," "Witness," "Expert," "Exhibit," "Admission," "Evidence," "Interrogatories," "Declaration," "Documents," "Partial," "Daubert," and "Opinion." Not all of these are self-explanatory, but I saw no further explanation of what these categories might contain. My searches included all types of Motions to Compel Discovery.

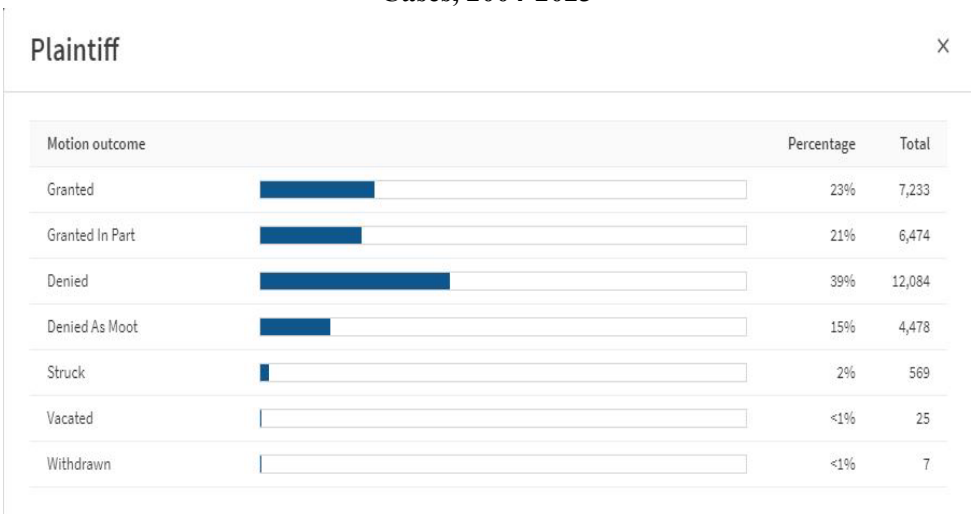
[134] Multidistrict litigation comprises a huge percentage of the civil cases filed in federal district court. *See*, *e.g.*, Patricia W. Moore, *The Civil Caseload of the Federal District Courts*, 2015 U. ILL. L. REV. 1177, 1212-1214. For a recent analysis of the success of MDL, see Lynn A. Baker & Andrew D. Bradt, *MDL Myths*, 101 TEX. L. REV. 1521 (2023).

[135] The copy of this graph omits many of the less common "filing roles" (the ones that would appear underneath "Cross Claimant" in Figure 1 if I had clicked "show more").

civil rights cases.[136] Over the time span covered by WLA, plaintiffs filed 30,870 MTCs and defendants filed 18,577.[137]

Clicking on the "Details" tab in Figure 1 next to the "Plaintiff" and "Defendant" filing roles reveals Figures 2A and 2B, which show the rates of outcomes of MTCs filed by each over the total time period. Figures 2A and 2B offer a visual and numerical comparison of the outcomes on MTCs filed by plaintiffs and defendants and show that defendants fared better than plaintiffs. Sixty-three percent (63%) of MTCs filed by defendants were granted in full or in part, compared to 44% of motions filed by plaintiffs.[138]

Figure 2A
Outcomes of Motions to Compel Discovery Filed by Plaintiffs in Civil Rights Cases, 2004-2023

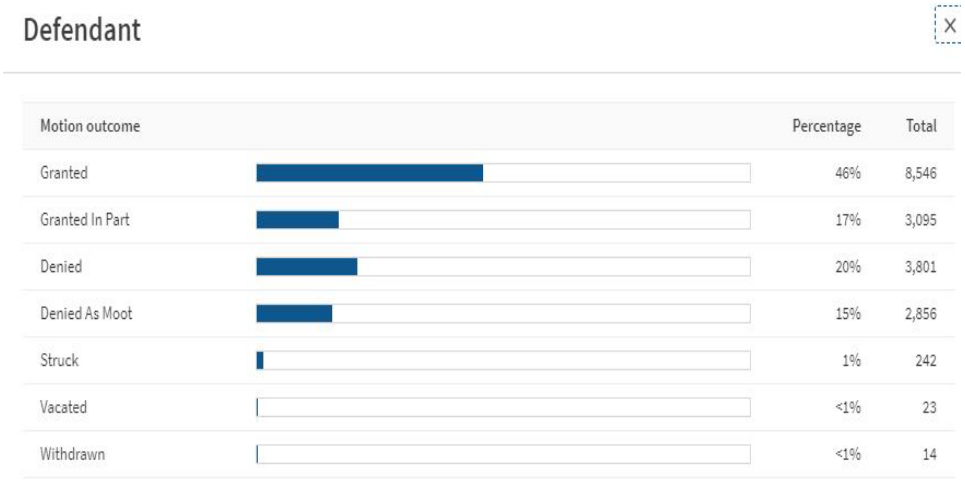


[136] *See*, *e.g.*, Sarah Prescott, *Battling the System to Vindicate Employment Rights*, LITIGATION, Fall 2022, at 20, 22 ("I, as the plaintiff's lawyer, will need to do far, far more work in discovery to begin to approach what the defendant knew before the case was even filed.").

[137] Exact numbers are obtained by clicking "Table" instead of "Chart" in WLA. The total number of motions to compel discovery is reported as 59,688, which is more than the sum of motions reportedly filed by plaintiffs (30,870) and by defendants (18,577). Part of the shortfall is explained by motions filed by other party types such as "Counter defendant" and "Counter claimant," but it is unclear what else accounts for the shortfall.

[138] Throughout the remainder of this paper, I will combine the outcomes "granted" (in full) and "granted in part" and refer to that sum as motions "granted."

Figure 2B
Outcomes of Motions to Compel Discovery Filed by Defendants in Civil Rights Cases, 2004-2023



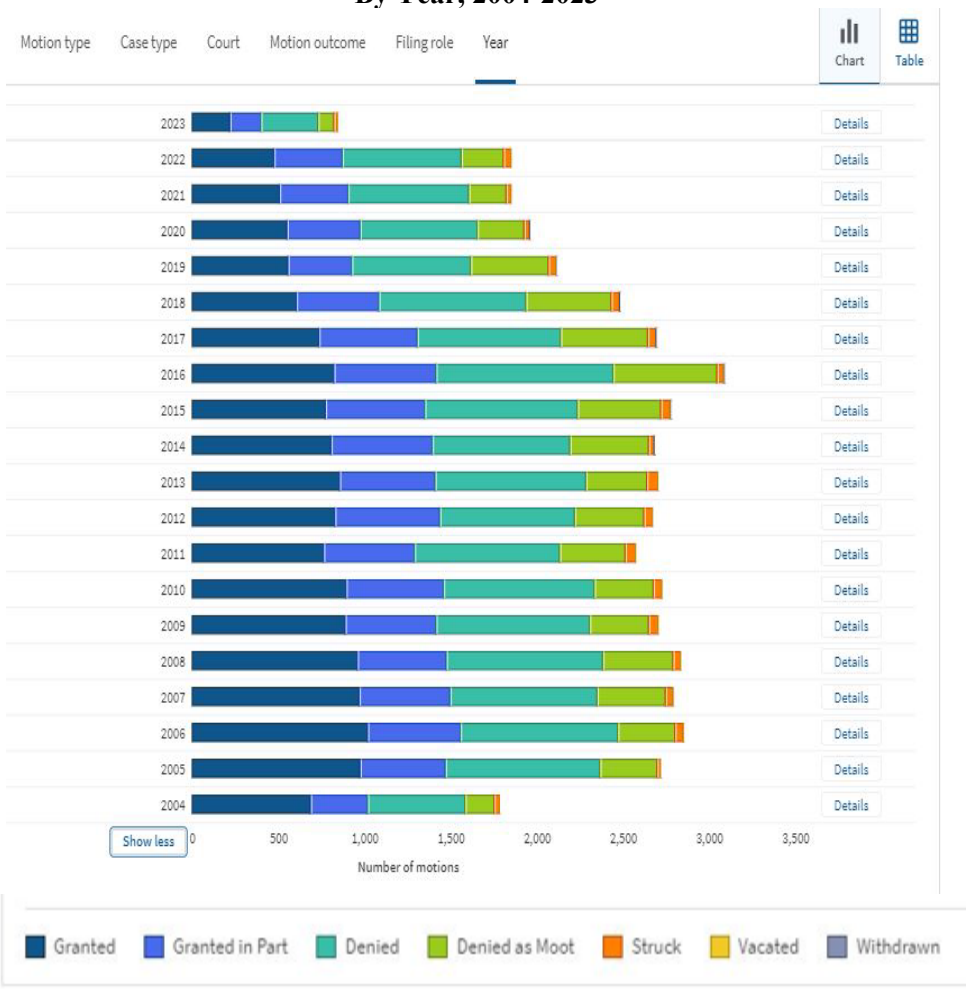
Conversely, only 35% of defendants' MTCs were denied in full or denied as moot, compared to 54% of plaintiffs' MTCs. But these figures cover the entire time span, not just the years after the 2015 amendments.

WLA also allows the researcher to click on "Year" and obtain these results separated by the year in which the order was entered. The resulting chart looks like Figure 3.

Figure 3 indicates that the largest number of MTCs in the entire period were filed in 2016 – the year immediately following the effective date of the 2015 amendments. The number dropped off rather sharply after that.[139]

[139] The total number shown for 2023 is not meaningful, as this search was conducted only halfway through that year, in July 2023.

Figure 3: Number of Motions to Compel Discovery in Civil Rights Cases By Year, 2004-2023



The increase in number of MTCs filed in civil rights cases in 2016 over 2015 almost entirely consisted of MTCs filed by plaintiffs.[140] Perhaps in the immediate aftermath of the 2015 amendments, defendants in civil rights cases objected more frequently to plaintiffs' discovery requests than before the amendments. Litigants' settled expectations of what was reasonable in discovery – termed "Discovery Culture" by Professor Beerdsen – were likely unsettled immediately after the amendments, leading to more requests for judicial intervention.[141]

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[140] According to WLA, plaintiffs filed 1,827 MTCs in 2016 and 1,560 MTCs in 2015 in civil rights cases, an increase of 267 MTCs in one year. Defendants filed 972 MTCs in 2016 and 963 MTCs in 2015 in civil rights cases.

[141] *See* Edith Beerdsen, *Discovery Culture*, 57 GA. L. REV. 981, 1006 (2023) (describing Discovery Culture as "a set of practices that develops in a legal community over time and governs what discovery requests are considered reasonable or excessive, when a party might cooperate or resist, and when it might seek the court's intervention.").

To determine whether these visually observable trends are statistically significant, I used WLA's data and Stata software to perform an Interrupted Time Series Analysis (ITSA).[142] ITSA is "a quasi-experimental research design with a potentially high degree of internal validity."[143] ITSA offers a research methodology when there is an "intervening" event (such as the 2015 amendments) but no control (untreated) group and where the only available data is presented in aggregate form.[144] These are the conditions of the present study: there was no subset of cases exempt from the trans-substantive 2015 amendments (to act as an experimental control group), and WLA presented the data for the number, filing party, and outcomes of motions in aggregate form only.[145] ITSA has been widely used in legal[146] and other

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[142] Nicholas Corsaro, *Interrupted Time Series Analysis Using STATA*, https://www.jrsa.org/events/presentations/western-2018/corsaro.pdf [https://perma.cc/4PX8-JDWX]. Other terms for ITSA are "segmented regression analysis," "segmented intervention analysis," Lagarde at 79, 81, and "segmented regression of interrupted time series." *See* Lihua Li, Meaghan S. Cuerden, Bian Liu, Salimah Shariff, Arsh K. Jain & Madhu Mazumdar, *Three Statistical Approaches for Assessment of Intervention Effects: A Primer for Practitioners*, 14 RISK MANAG. & HEALTHCARE POLICY 757 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7910529 [https://perma.cc/8SZD-TS3L].

[143] Ariel Linden, *Conducting Interrupted Time-Series Analysis for Single- and Multiple-Group Comparisons*, 15 STATA J. 480 (2015). The term "quasi-experimental" distinguishes ITSA from a standard experimental research design where there is a control group. *See also* Mylene Lagarde, *How to Do (Or Not to Do) . . . Assessing the Impact of a Policy Change with Routine Longitudinal Data*, 27 HEALTH POLICY & PLANNING 76 (2012) ("Randomized experiments are the gold standard by which effectiveness is measured in clinical disciplines, but they can be logistically difficult to implement when it comes to social sectors.").

[144] *Id*.

[145] For example, WLA indicates that plaintiffs filed 1,071 motions to compel in civil rights cases in 2022, of which 19% were granted in full, but the only way to break that down into individual observations is to painstakingly look up and code each of the orders on which the aggregate numbers are based. WLA provides citations to the individual orders underlying its aggregate figures, but there is no quick way to turn those into a database of individual orders upon which one could perform other tests of statistical significance.

[146] *E.g*., Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 117, 137 (2016) ("An ITS design uses a time series, which is a series of measurements or observations over time that is 'interrupted' by some intervention or exogenous event. Such intervention divides the time series into two segments, resulting in measurements of time series before and after the intervening event. By 'comparing' patterns in the time series data before and after the interruption, the study can assess the impact of an interrupting intervention or an event."); Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing Auer Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85, 135–36 (2019); Robert Bartlett, Matthew D. Cain, Jill E. Fisch, & Steven Davidoff Solomon, *The Myth of Morrison: Securities Fraud Litigation Against Foreign Issuers*, 74 BUS. LAW. 967, 992 (2019); Chester L. Britt, Gary Kleck, & David J. Bordua, *A Reassessment of the D.C. Gun Law: Some Cautionary Notes on the Use of Interrupted Time Series Designs for Policy Impact Assessment*, 30 LAW & SOC'Y REV. 361, 362 (1996) (referencing "an extensive methodology literature [that] documents the widespread use of interrupted time series designs for testing policy impact").

social sciences academia[147] to study the effect of a given policy over time. Despite ITSA's accepted use, it assumes some conditions that are probably not met, or at least not well met, by this study and this database. In the next section, I discuss these issues and the compounding factors here that counsel against heavy reliance on these results. In this section, I present the facial results, with the numerous caveats to be explored in the next section.

Figure 4

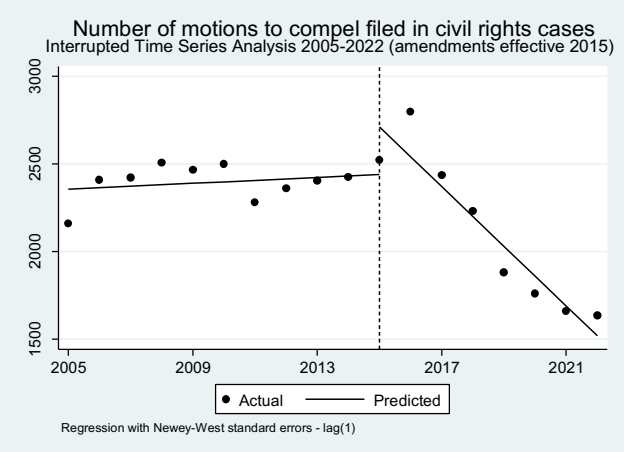


Figure 4 uses the same data that resulted in the chart in Figure 3, minus the years 2004 and 2023, which only cover partial years. In the starting year, 2005, litigants filed 2,356 MTCs in civil rights cases. From 2005 to 2015, the fitted line has a slightly positive slope (coef. = 8.3697), indicating an annual increase of about 8 MTC filed. However, this is not statistically significant (t = 0.66, P = 0.521). In the year following the 2015 amendments, there was an immediate jump of about 271 MTCs filed, which is significant at the 95% confidence level (t = 2.23, P = 0.042). The trend post-2015 is sharply downward and highly significant (t = -7.60, 95% CI = [−217.893, −121.9404]. After 2015, the number of MTCs filed in civil rights cases decreased at an annual rate of approximately 170 MTCs.

With that simple example done, I now look separately at MTCs filed by plaintiffs and defendants in order to compare the frequency and outcomes of MTCs pre- and post-2015 in civil rights cases and contracts cases. Figures 5 and 6 below chart descriptive statistics from WLA (using Stata to create the charts).

[147] Linden, *supra* note 143, at 480-81 (citing studies "assessing the effects of community interventions, public policy, regulatory actions, and health technology assessment") (citations omitted).

Figure 5

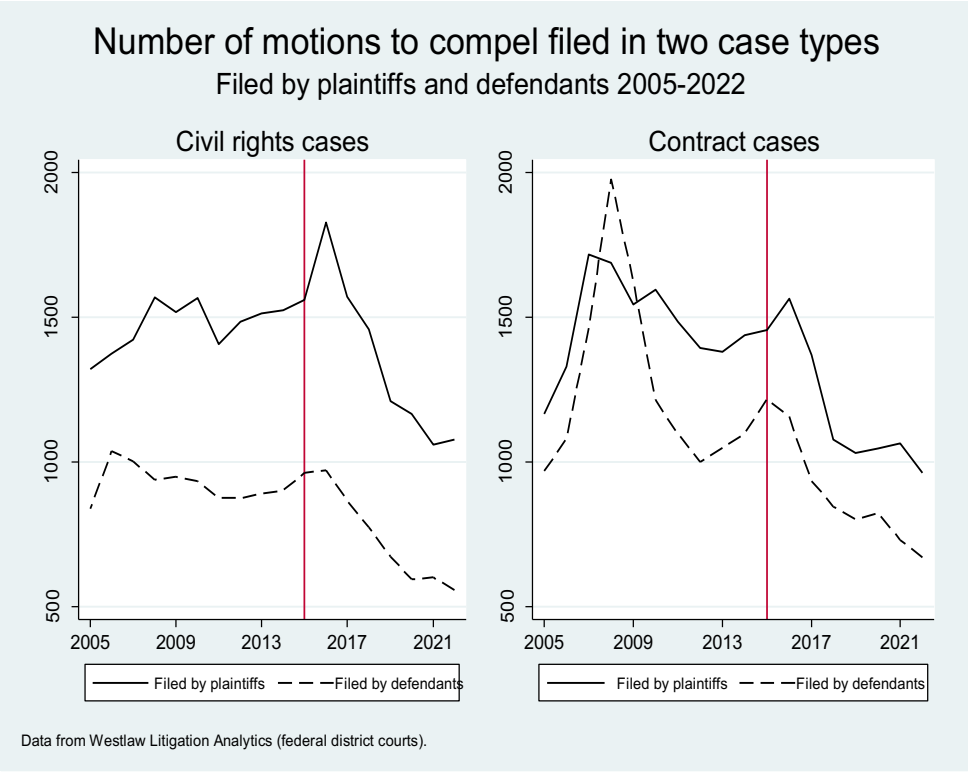


Figure 5 graphs the raw data from WLA showing the number of MTCs filed by plaintiffs and by defendants in civil rights cases and contracts cases.[148] In civil rights cases, plaintiffs filed an average of 550 more (roughly 72%) MTCs than defendants per year, although the number fell sharply after 2016 for both parties. In contracts cases, plaintiffs filed an average of 246 MTCs more than defendants (28% more than defendants) per year, except for 2008 and 2009, when defendants filed more MTCs than plaintiffs, possibly due to the financial crisis. Again, the number of filings by both parties fell after 2016.

[148] In the remainder of the paper, I ignore the less common filing parties such as counterplaintiffs and counterdefendants.

Figure 6

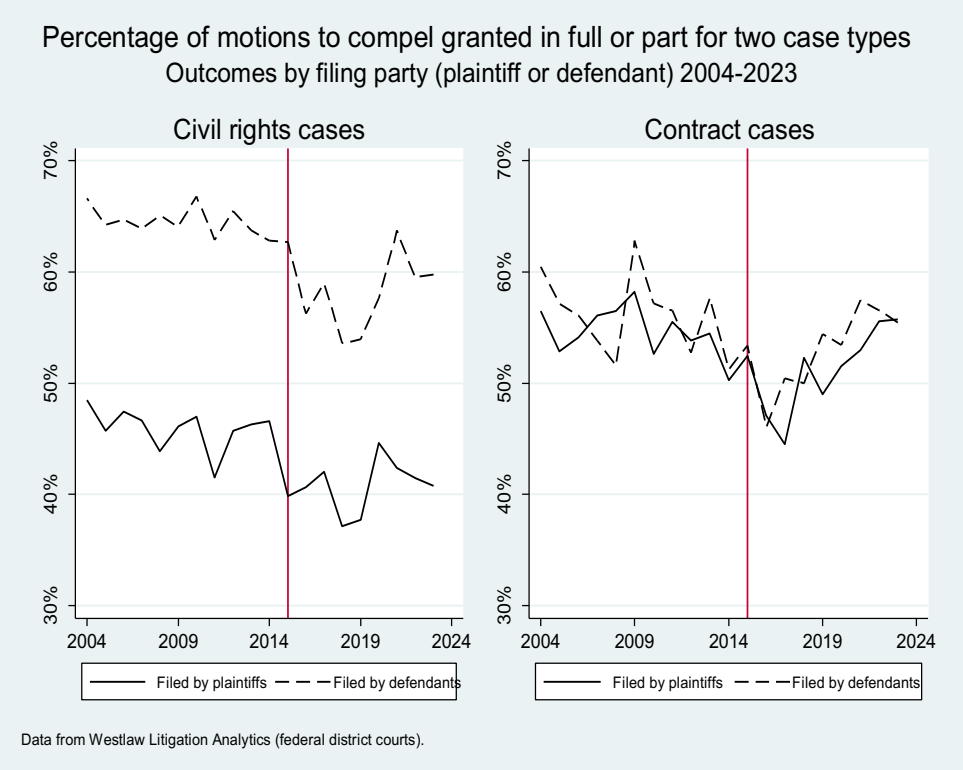


Figure 6 compares the percentages of MTCs granted (in full and in part) between plaintiff and defendant filers in civil rights cases and contracts cases. The percentage of MTCs granted fell post-amendments in both civil rights and contracts cases, whether the MTC was filed by plaintiff or defendant. In addition, defendants' MTCs were granted more frequently than plaintiffs' MTCs in both case types, pre-and post-amendments, but the difference between the grant rate for plaintiffs and defendants is not significant in contracts cases.[149] In contracts cases, the mean percentage of plaintiffs' MTCs granted before 2015 was 54.63%, which fell to 51.09% of MTCs granted post-2015. The mean percentage of defendants' MTCs granted in contracts cases before 2015 was 56.12%, which fell to 52.99% of MTCs granted post-2015.

In civil rights cases, plaintiffs' MTCs were granted far less – roughly 18 percentage points less – than defendants' MTCs both pre- and post-amendments. The mean percentage of plaintiffs' MTCs granted in civil rights cases before 2015 was 45.9%, which fell to 40.7% of MTCs granted in the post-amendment period, 2015 to 2023. The mean percentage of defendants'

[149] Using two-sample t-tests, the difference in mean percentage of MTC granted between plaintiffs and defendants in contracts cases is not statistically significant either pre-amendments (t = -1.1691, DF = 20, P = 0.1281) or post-amendments (t = -1.0311, DF = 16, P = 0.1589).

MTCs granted in civil rights cases before 2015 was 64.6%, which fell to 58.5% of MTCs granted post-amendments.[150]

Figures 7A and 7B use the same data as used for Figure 6, but after performing an ITS analysis in Stata. Figure 7A and 7B present the results of ITSA to estimate the effect of the 2015 amendments in civil rights and contracts cases for plaintiff and defendant filers of MTCs.

Figure 7A: Civil Rights

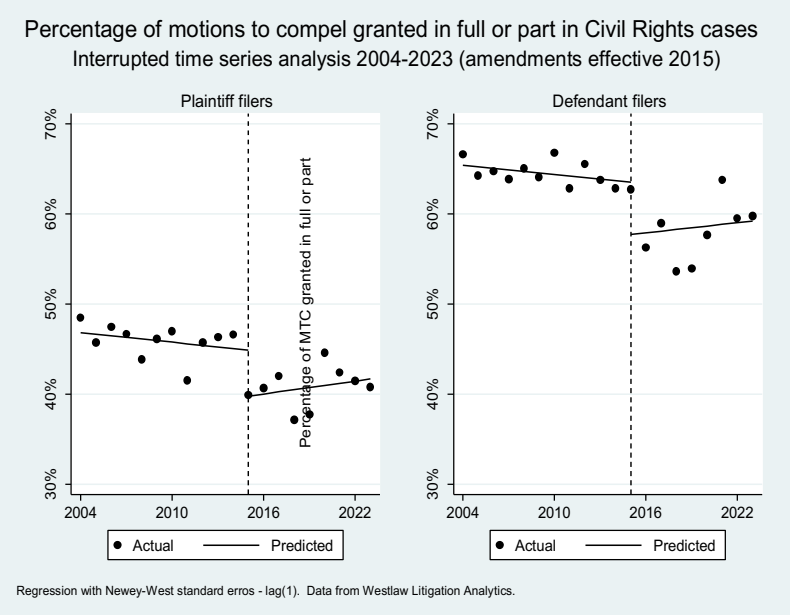
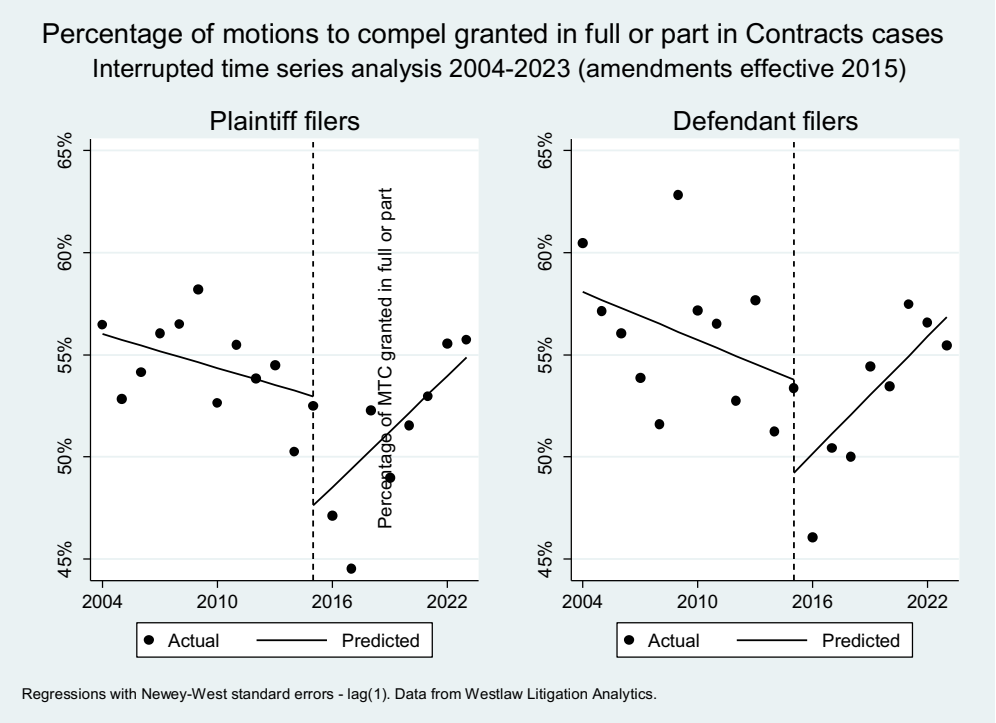


Figure 7A illustrates again how much more frequently defendants' MTCs were granted than plaintiffs' MTCs in civil rights cases, both pre- and post-amendments. For plaintiffs, the starting level of MTCs granted in civil rights cases is estimated at 46.8%, and the grant rate is estimated to have decreased by 0.18% annually until 2015, although this decrease was not significant (t = -1.17, P = 0.259, CI = [-.0049489, .0014268]). In the first year of the amendments, there appeared to be a significant decrease (about 5.10%) in the percentage of MTCs granted for plaintiffs

[150] Using two-sample t-tests, the difference in mean percentage of MTC granted between plaintiffs and defendants in civil rights cases is significant in both pre-amendments (t = -27.0045, DF = 20, P < 0.0001) and post-amendments (t = -12.6753, DF = 14, P < 0.0001).

Figure 7B: Contracts



(t = -3.31, P = 0.004, CI = [-.0836002, -.0183124].[151] In other words, the immediate effect of the 2015 amendments could have been to reduce the percentage of MTCs granted for plaintiffs in civil rights cases by over 5%.

After this immediate drop, the grant rate for plaintiffs in civil rights cases after the 2015 amendments is estimated to have increased by about 0.24% annually, but this increase is not significant (t = 1.60, P = 0.129). At the estimated rate of increase, it would take at least 20 years for the grant rate for MTCs for plaintiffs in civil rights cases to recover to the pre-amendments level.

For defendants, as shown in Figure 7A, the starting level of MTCs granted in civil rights cases is estimated at 65.4%. Like plaintiffs, the grant rate for defendants is also estimated to have decreased until 2015 by about 0.17% annually; but again, this decrease was not significant (t = 1.98, P = 0.065, CI = [-.0035498, .0001202]). In the first year of the amendments, there appeared to be a significant drop (about 5.84%) in the percentage of MTCs granted for defendants (t = -2.35, P = 0.032, CI = [-.1111484, -.0056702]).[152] Thereafter, the grant rate for defendants after the 2015 amendments is estimated to have increased by about 0.19% annually, but again, the increase

[151] The confidence interval (CI) indicates that the immediate drop in the grant rate for plaintiffs' MTC around the effective date of the amendments could have been as low as 1.83% or as high as 8.36%, at the 95% confidence level.

[152] Again, the confidence interval indicates that the immediate drop in the grant rate for defendants' MTC around the effective date of the amendments could have been as low as .057% or as high as 11.11%, at the 95% confidence level.

in the grant rate for defendants' MTCs post-amendments is not significant (t = 0.49, P = 0.634, CI = [-.0064464, 1.0273]).

Figure 7B shows a markedly different pattern for contracts than was seen for civil rights. Courts granted MTCs in contracts cases at similar levels for plaintiffs and defendants, both pre- and post-amendments. The starting level of MTCs granted in contracts cases is estimated at 56.0% and 58.1% for plaintiffs and defendants, respectively. In the years leading up to the 2015 amendments, both parties seem to have experienced a gradually decreasing grant rate – plaintiffs by about 0.28% and defendants by about 0.39% annually. However, the decreases in the grant rate before 2015 are not significant at the 95% level.[153]

In the first year of the amendments, the percentage of MTCs granted for plaintiffs and defendants in contracts cases is estimated to have dropped by 5.36% and 4.56%, respectively, but neither estimate is significant.[154] Interestingly, the grant rate for MTCs in contracts cases in the years after the 2015 amendments is estimated to have increased by about 0.91% annually for plaintiffs and 0.96% annually for defendants, and these increases are significant at 95%.[155] Thus, in contracts cases, after an initial crash of the grant rate around the effective date of the amendments, the grant rate rebounded to its pre-amendments level within five or six years.

In both kinds of cases and for both plaintiffs and defendants, the rate at which courts were granting MTCs in the years leading up to 2015 was declining. Courts appear to have been granting fewer and fewer MTCs before the amendments, although these results are not significant at 95%. The reasons for this possible decline could include earlier amendments to the discovery rules, as well as the years-long anticipation of the passage of the 2015 amendments.

To summarize, in the immediate aftermath of the 2015 amendments, the rate at which courts granted MTCs in both kinds of cases and for both plaintiffs and defendants fell by about 5%, but the drop was only statistically significant in civil rights cases, for both plaintiffs and defendants. Moreover, in contracts cases, for both parties, the grant rate appeared to have recovered to pre-amendments levels after about five or six years. In civil rights cases, the grant rate has not recovered to pre-amendments levels for either party, but defendants still enjoy a grant rate that is about eighteen percentage points higher than plaintiffs' grant rate, on average, and this gap has not materially lessened post-amendments. So far, the results seem consistent with the theoretical prediction of plaintiffs' attorneys and academics that the 2015 amendments would contract

[153] For plaintiffs, t = -1.42, P = 0.174, CI = [-.0068763, .0013545]. For defendants, t = -1.92, P = 0.072, CI = [-.0082421, .0004007].
[154] For plaintiffs, t = -1.73, P = 0.103, CI = [.1194011, .0121863]. For defendants, t = -1.72, P = 0.105, CI = [-.1019746, .0106999].
[155] For plaintiffs, t = 2.21, P = 0.042, CI = [.0003611, .0178021]. For defendants, t = 2.93, P = 0.010, CI = [.0026475, .0164853].

discovery in civil rights cases (if one measures the "contraction of discovery" by a drop in the rate at which MTCs are granted).

IV. DISCUSSION

WLA makes it easy to generate databases that report results by year, which can then be analyzed using ITSA (or other tests or descriptive statistics) to investigate the effect of an intervention like the 2015 amendments. Because the time required to build a database from WLA is negligible, it could present a promising avenue for empirical research into the effect of all kinds of procedural changes, whether wrought by rules, statutes, or Supreme Court opinions.

Alas, there are many potential biases[156] and confounders[157] in the model used here. Some of these biases inhere in WLA itself or from changes in the mix of cases and judges that underlie the orders collected in WLA. Some confounders here are due to external factors not specific to discovery, and others are due to changes to discovery procedures that were not the direct result of the 2015 amendments.

In Part III(A) above, I already alluded to some of the potential sampling errors that inhere in the WLA database itself and might therefore affect statistical studies using that data. First, the manner in which the WLA database is constructed is prone to a type of cluster sampling bias, with a single case being envisioned as a "cluster" generating multiple orders. The rulings on different MTCs in the same case–and even different MTCs treated together in the same ruling–are each coded individually in WLA. It is likely that such orders may not be independent. For example, the rulings from one judge within one case probably influence simultaneous or future rulings in the same case, due to the judge's interpretation of the law and facts particular to that case.

Second, because the outcome of each MTC is separately coded in WLA, orders within a single case could be entered both before and after the

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[156] Bias in a study occurs where there is systematic error, or favoritism, in selection of the observations in the sample; in other words, constructing a sample whereby each observation did not have an equal chance of being included. *See generally* David S. Moore, THE BASIC PRACTICE OF STATISTICS 180-181, 203 (1995). *See also*, *e.g.*, Engstrom, *supra* note 20, at 1213-15 (some empirical studies of the effect of Supreme Court pleading cases on motions to dismiss the complaint were subject to sampling bias because the studies were drawn from judicial opinions on Westlaw or Lexis, which contain more published than unpublished opinions, and published opinions may not be representative of all opinions on the topic).

[157] Confounders (also called confounding variables or lurking variables) are other influencers on the studied outcome that cannot be distinguished from the influence of the explanatory variable being studied. Moore, *supra* note 156, at 179. *See also*, *e.g.*, Lance L. Shea, *Cause and Effect? Assessing Postmarketing Safety Studies as Evidence of Causation in Products Liability Cases*, 62 FOOD & DRUG L.J. 445, 471 (2007) ("On the simplest level, confounding may be considered a confusion of effects. Specifically, the apparent effect of the exposure of interest is distorted because the effect of an extraneous factor is mistaken for or mixed with the actual exposure effect (which may be null).").

effective date of the 2015 amendments. In other words, a case could have been filed before December 1, 2015 and not resolved until after December 1, 2015, and MTCs could have been resolved in both time periods. There are undoubtedly many such cases (if not thousands), and thus the pre-amendments and post-amendments cohorts overlap to some degree. This makes it challenging to cleanly separate the effects of the 2015 amendments from the influence of pre-existing events in those cases. One solution would be to eliminate such overlapping cases, but this cannot easily be accomplished in the aggregate on WLA without also eliminating other cases that did not span the time period.

Third, WLA purports to include all orders from all district courts available on PACER going back to 2004. I am not aware of any easy means to test this, but I am also not aware of any reason to doubt WLA's assertion. However, it is unclear whether all district courts have followed the same practices over time in docketing orders that are then available on PACER, from which WLA draws its data.[158] In particular, given the widespread practice requiring a conference with the judge before a party is even allowed to file a MTC,[159] the judge's "ruling" at this conference may not be reflected in an order and therefore would not be included in PACER or WLA.

Fourth, the attempt to study particular types of cases, such as civil rights and contracts cases, may be affected by the murky categorizations of these case types, both by the federal Nature of Suit (in PACER, then reflected in WLA) and by Westlaw Key Nature of Suit numbers (by WLA).[160] Moreover, the mix or proportion of subcategories of cases within the overall classification of "civil rights" or "contracts" may have changed over time.[161]

However, the decline in the number of MTCs filed since 2016 cannot be attributed to a decline in the total number of civil cases filed in federal district court, as that number has remained fairly flat since 2015 (if not actually larger due to recent filings of large numbers of cases consolidated in a few MDLs).[162] In addition, the total number of civil rights cases filed in

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[158] *See supra* note 114 and accompanying text.
[159] *See infra* notes 182-87 and accompanying text.
[160] *See supra* note 125 and accompanying text.
[161] For example, the percentage of civil rights cases classified in the NOS as "Employment" has decreased from over 50% of civil rights cases in 2003 to 27% in 2021. ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2021, at tbl.C-2 (2022); ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: DECEMBER 31, 2003, at tbl.C-2 (2004).
[162] *See* Table C2, Admin. Office of the Courts, for fiscal years 2015 (279,036 civil cases filed), 2016 (291,851 cases), 2017 (267,769 cases), 2018 (282,936 cases), 2019 (297,877 cases), 2020 (470,581 cases, including approximately 200,000 cases consolidated into MDLs), 2021 (344,567 cases), and 2022 (274,771 cases).

federal district court has increased since 2015,[163] while the number of MTCs filed in civil rights cases has decreased. Similarly, the total number of contracts cases filed in federal district court has remained largely unchanged since 2015,[164] while the number of MTCs filed in contracts cases has decreased.

Fifth, potential sampling biases may inhere in WLA's less-than-transparent filing party and motion outcomes categorization methodology of machine learning and attorney review.[165]

The possible confounders here are as troublesome as the possible sampling biases. One of the assumptions for an ITSA is that the "intervention" being studied (here, the 2015 amendments) is independent of other changes occurring over time; there are no other events that coincide with the intervention that could also affect the outcomes.[166] That assumption is not met here.

First, the COVID-19 pandemic slowed the pace of federal litigation in 2020 and 2021, which may have affected the frequency of filing MTCs and may also have influenced the outcomes of MTCs. Second, there have been significant advances in technology-assisted review (TAR) since 2015.[167] Judges are increasingly encouraging parties to consider using TAR

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[163] *See* Table C2, Admin. Office of the Courts, for fiscal years 2015 (37,384 civil rights cases filed), 2016 (38,002 civil rights cases filed), 2017 (38,925 civil rights cases filed), 2018 (41,741 civil rights cases filed), 2019 (43,155 civil rights cases filed), 2020 (41,044 civil rights cases filed), 2021 (43,333 civil rights cases filed), and 2022 (39,126 civil rights cases filed).

[164] *See* Table C2, ADMIN. OFFICE OF THE COURTS, for fiscal years 2015 (26,068 contract cases filed), 2016 (24,486 contract cases filed), 2017 (23,523 contract cases filed), 2018 (26,768 contract cases filed), 2019 (25,264 contract cases filed), 2020 (26,592 contract cases filed), 2021 (26,455 contract cases filed), and 2022 (29,134 contract cases filed).

[165] The four major motion outcomes on a MTC are granted, granted in part, denied, and denied as moot. I have concentrated here on the motion outcomes "granted" and "granted in part." Looking at more finely-grained results, the "deny as moot" category increased noticeably for a few years after the 2015 amendments, for both plaintiffs and defendants. A cursory review of some of the underlying orders classified as "denied as moot" revealed that this was, indeed, the language used in the electronic docket. But the reason any given court might classify a MTC as "denied as moot" varied widely, including a motion to dismiss or for summary judgment being granted and the case being dismissed, the case settling and being dismissed, the responding party not opposing the motion, or the responding party belatedly responding to the discovery request. The latter two reasons conceptually might be characterized as a win for the plaintiff even though the MTC is not categorized as "granted" or "granted in part."

[166] *See*, *e.g.*, Ariel Linden, *Conducting Interrupted Time-Series Analysis With Panel Data: The xtitsa Command*, LINDEN CONSULTING GROUP 3 (Feb. 15, 2024), http://lindenconsulting.org/documents/XTITSA_Stata.pdf (underscoring "the need for caution with these methods if there are multiple policy shifts occurring in the time window around the implementation of the intervention") [https://perma.cc/K8ZY-39MN].

[167] *See*, *e.g.*, Neel Guha, Peter Henderson & Diego A. Zambrano, *Vulnerabilities in Discovery Tech*, 35 HARV. J.L. & TECH. 581, 591-95 (2022); Engstrom & Gelbach, *supra* note 110, at 1046 ("TAR . . . involves an array of methodological choices, as evidenced by

and to enter into agreed orders regarding TAR in the discovery process.[168] It seems reasonable to assume that the necessity for the parties' cooperation in this process may have contributed to the reduction of the number of MTCs filed.[169] Further, Professors Engstrom and Gelbach postulate that TAR may "shift the ground out from under proportionality constraints," citing overblown claims of "infinite" ESI and the likely reduction in discovery costs due to TAR's growing efficiency and accuracy.[170] These factors, as well as some counsel's lack of expertise in recognizing issues with ESI production, may also have contributed to the decline in the number of MTCs filed.

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a growing literature evaluating seed set selection strategies, choices among 'learning protocols' at the more iterative stage of model training, and performance metrics, that sit far beyond the average lawyer's ken.") (citations omitted); The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 156 (2018) ("Parties should consider using search terms and technology assisted review (TAR) for privilege reviews, along with other alternatives that may reduce privilege review burdens."); *See generally* Timothy T. Lau & Emery G. Lee III, *Technology-Assisted Review for Discovery Requests: A Pocket Guide for Judges*, THE FED. JUD. CENTER (2017), https://judicialstudies.duke.edu /sites/default/files/centers/judicialstudies/panel-1_technology assisted_review_for_ disco very_requests.pdf [https://perma.cc/TJD5-CCZW].

[168] *See*, *e.g.*, Guha et al., *supra* note 167, at 655-58 (appendix of TAR protocols in numerous cases); W.D. WASH. LOCAL R. 26 (updated Feb. 1, 2023) (requiring parties to discuss the use of TAR, among many other things, at their initial meeting under Fed. R. Civ. P. 26(f)); D. ORE. LOCAL R. 26-1 (parties to discuss at 26(f) conference "[w]hether some other method, such as technology-assisted review, may be the most appropriate and least expensive method under each party's circumstances"). The Bolch Judicial Institute at Duke Law School has drafted a model agreed order for using TAR, which is intended to be used with the Institute's TAR Guidelines. *See Protocol (Exemplar) Governing Production of Relevant Information Using Technology Assisted Review*, DUKE L. BOLCH JUD. INST. (Mar. 2019), https://judicialstudies.duke.edu/wp-content/uploads/2019/04/Draft-Protocol-Exemplar-Governing-Production-of-Relevant-Information-Using-Technology-Assisted-Review-Bolch-Judicial-Institute-Duke-Law-School-March-2019.pdf [https://perma.cc/9GQ2-FFBC]. Similar agreed orders are becoming increasingly common. *E.g.*, In re Valsartan, Losartan, & Irbesartan Prod. Liab. Litig., 337 F.R.D. 610, 613 (D.N.J. 2020) (parties stipulated to "Electronic Discovery Protocol" that required them to "cooperate in good faith regarding the disclosure and formulation of appropriate search methodology, search terms and protocols, and any TAR/predictive coding prior to using any such technology to narrow the pool of collected documents to a set to undergo review for possible production").

[169] In addition, commentators have noted that the expertise required to navigate TAR is beyond some attorneys' ability, possibly allowing discovery abuse by better-versed opponents. *See* Engstrom & Gelbach, *supra* note 111. Some plaintiffs' attorneys may be unjustifiably satisfied that their discovery requests have been adequately answered, foregoing any MTC. *See* Guha et al., *supra* note 166, at 647 ("It seems likely that errors in the TAR process predominantly work in favor of producing parties . . . [I]t is much harder for a requesting party to game the system because they have no control over TAR.").

[170] Engstrom & Gelbach, *supra* note 111, at 1052. However, the authors also note that the need for "software, technologists, and litigation experts" in the use of TAR could increase discovery costs, at least in "smaller-scale productions." *Id*. at 1054. *See also* Guha et al., *supra* note 166, at 649 ("Law firms are increasingly arguing that costly ex ante negotiations and transparency obligations are extinguishing the benefits of TAR.").

However, the direction of TAR's influence on MTC outcomes (rather than number filed) is less clear. For example, if a party attempts discovery in addition to or in lieu of what was negotiated for TAR, a presumption against the grant of a MTC may arise when that attempt is refused. On the other hand, if a party violates an agreed protocol for TAR, a presumption in favor of granting a resulting MTC may arise.

Third, the 2015 amendments had their genesis five years earlier, at the Duke Conference in 2010. Because the amendments were controversial and well-publicized, it is possible that district court judges and magistrate judges started to apply the amended proportionality rule (or their understanding of that rule) well before the actual effective date. This might provide some of the explanation for the gradual (although not statistically significant) decrease of the MTC grant rate prior to 2015.

Fourth, because discovery needs to be relevant to the parties' claims and defenses, it is bound to the substantive law governing the case. That law may change over time, affecting the availability of discovery.[171] Or the standard for assessing the legal sufficiency of a complaint may tighten over time; granting a motion to dismiss the complaint usually pretermits any discovery at all.[172]

I have left the final group of confounding factors to the end of this section, because these confounders may have the most troubling effect on the data gleaned from WLA. Recall that ITSA assumes that there were no external factors other than the 2015 amendments to influence the grant rate on MTCs. But in fact, local district court rules, individual district court judges' and magistrate judges' standing orders, continuing study and recommendations by prestigious organizations,[173] and even the continuing training of federal judges by the FJC[174] present a dazzling array of

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[171] *Cf*. Edward A. Purcell, Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 169 U. PA. L. REV. 2583, 2599-2609 (2021) (describing how the law of qualified immunity in police excessive force cases itself limits discovery, even while "[t]he widespread and systemic operation of racial bias–implicit and institutional as well as express and overt –shows that expanded discovery is essential . . ."); Breiterman v. United States Capitol Police, 324 F.R.D. 24, 30 (D.D.C. 2018) (denying plaintiff's MTC answer to interrogatory intended to identify "comparators" in a Title VII action, based on court's review of "whether someone is an appropriate comparator").

[172] *See*, *e.g*., Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2277 (2012) ("switching to heightened pleading" can eliminate cases "that would reach discovery under *Conley* but do not as a result of switching to *Twombly*/*Iqbal*"; "[m]y results suggest that switching pleading standards affected plaintiffs negatively in a sizable share of those cases that faced MTDs in the *Iqbal* period.").

[173] *E.g.*, The Sedona Conference, *supra* note 167; Duke Guidelines and Practices, *supra* note 53.

[174] Paul W. Grimm, *Introduction: Reflections on the Future of Discovery in Civil Cases*, 71 VANDERBILT L. REV. 1775, (2018) ("the educational programs [of the Federal Judicial Center] for new and experienced judges alike now include special emphasis on management of the discovery process and the proportionality requirement.").

interventions that have occurred side-by-side the 2015 amendments.[175] This individuated tinkering with discovery procedures makes it extremely difficult, if not impossible, to measure the effect of the 2015 amendments on their own.[176]

As Professor David Marcus has observed, the Advisory Committee on Civil Rules has, in effect, delegated the interpretation of proportionality to individual judges.[177] The FRCP themselves allow individual judges and district courts to override many of the discovery rules.[178] The Civil Justice Reform Act of 1990 required each of the 94 district courts to study the "cost and delay" of civil litigation and propose its own solutions.[179]

Accordingly, many federal judges have their own standing orders changing the manner in which parties bring discovery disputes to the court.[180] For instance, some judges require counsel to engage in two good faith attempts to resolve discovery disputes, rather than the one required by Rule 37(a), before filing a MTC.[181] Even detailed instructions in individual orders about what is required for *one* "meet and confer" can incentivize the party with greater access to information to resist discovery requests;[182] the effect on the party who lacks information could be doubled with two such conferences required.

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[175] I am far from the first observer to be bewildered and mildly offended by the profusion of local rules and standing orders amongst federal courts and judges. *See*, *e.g.*, Reinert, *supra* note 9, at 196 & *supra* nn.7-9 (collecting studies of local rules). *But see* Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415 (2010) (defending some aspects of local rules).

[176] Professor Reinert calls this "bottom-up" case management. Reinert, *supra* note 29, at 204.

[177] Marcus, *supra* note 7, at 2499 ("Whether the post-2015 proportionality requirement will explode as a 'bomb' and limit discovery significantly will depend not on any direct choice the [advisory] committee made for discovery governance but on what judges decide to do with it."). Another perspective, theorized by Professor Effron, is that the discovery rules are "co-interpretive," meaning that the rulemakers have structured the rules so that litigants as well as judges are expected to interpret them. Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 127, 176 (2018). For example, "[l]itigants reveal their interpretations [of the proportionality rules] through the discovery requests they make to other parties and through their decisions about what material to disclose to their adversaries." *Id*.

[178] *See*, *e.g.*, FED. R. CIV. P. 26(a)(1)(A) (initial disclosures); Hon. Charles R. Eskridge III, *Court Procedures* 10, S.D. TEX. ("Commence initial disclosures immediately. Include production of copies of all documents responsive to the categories listed in Rule 26(a)."); FED. R. CIV. P. 26(b)(2)(A) (number of depositions, interrogatories, and requests to admit); FED. R. CIV. P. 26(d)(1) (timing and sequence of discovery).

[179] 28 U.S.C. §475.

[180] The adoption of standing orders relating to discovery began to occur long before 2015. *See*, *e.g.*, Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 RICH. J.L. & TECH. 8, 1 (2013).

[181] *See*, *e.g.*, Hon. Maria A. Audero *Judge's Procedures*, C.D. CAL. RULE 4, https://www.cacd.uscourts.gov/honorable-maria-audero [https://perma.cc/MJV5-SJ2G]; Hon. Steve Kim, *Judge's Procedures*, C.D. CAL., https://www.cacd.uscourts.gov/honorable-steve-kim [https://perma.cc/Y94S-RGKH].

[182] *See* Reinert, *supra* note 28, at 214.

Moreover, after those two meet-and-confers among counsel fail, many courts still forbid parties from filing a MTC before the judge holds an informal pre-motion conference with them to discuss the dispute and to attempt to resolve it.[183] Professor Reinert describes the pre-motion conference requirement as "an opportunity for the court to 'rule' on a disputed matter without actually entering a ruling that could be appealed."[184] Chief Justice Roberts praised the pre-motion conference because it "can often obviate the need for a formal motion—a well-timed scowl from a trial judge can go a long way in moving things along crisply."[185]

Variations on the mechanics of the pre-motion conference abound. In one variation, the court requires the parties to submit one document jointly for the pre-motion submission.[186] Another variation is a strict page limit on the request for the pre-motion conference. This page limit "can implicitly force parties to abandon claims for particular material."[187] A strict page limit

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[183] *See*, *e.g.*, C.D. CAL. LOCAL R. 37-2 (2023). Approximately twelve of the twenty-six U.S. magistrate judges in the Central District of California have some variation of this requirement. *E.g.*, Hon. Edward M. Chen, *Civil Standing Order on Discovery* 2, C.D. CAL., https://cand.uscourts.gov/wp-content/uploads/judges/chen-emc/EMC-Standing-Order-Civil-Discovery.pdf [https://perma.cc/TNH7-LK3C]; Hon. Vince Chhabria, *Standing Order for Civil Cases* 6, N.D. CAL., https://www.actl.com/docs/default-source/default-document-library/task-force-on-mentoring/us-district-court-northern-cal---jude-chhabria-standing-order-civil-case-rev-d-2018-11-27.pdf?sfvrsn=22736969_2 [https://perma.cc/4RZF-ZRFY]. *See also* Hon. Paul W. Grimm (ret.), *Discovery Order* 2, D. MD., https://e-discoveryteam.com/wp-content/uploads/2013/10/grimm_standard_discovery_order.pdf [https://perma.cc/G3XQ-THC6].

[184] Reinert, *supra* note 28, at 214 (estimating that 31% of judges with individual rules require a premotion conference, although that number may include motions other than discovery motions).

[185] Roberts, *supra* note 9, at 7.

[186] *See* Audero*, supra* note 181. (For example, the procedures for Judge Auderorequire the parties to jointly file a Request for Informal Telephonic Discovery Conference, a form that can be downloaded at https://www.cacd.uscourts.gov/sites/default/files/documents/MAA/AD/Request%20for%20Informal%20Discovery%20Conference_0.pdf. Onscreen the form is one page long, with about a two-inch tall box for each party's contention. It was not clear whether this box could be expanded. A similar requirement of joint submissions was criticized in a study of social security litigation conducted for the Administrative Office of the Courts. Jonah B. Gelbach & David Marcus, *A Study of Social Security Disability Litigation in the Federal Courts*, ADMIN. CONF. OF THE U.S. 129, 133 (2016), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2669&context=faculty_scholarship. The authors describe the requirement by some judges that the parties "write and file a single document containing both of their arguments" as "neither joint nor stipulated." *Id*. at 136-137. The "remarkably cumbersome" process requires counsel to argue about minutiae such as each side's page allocation and to enforce deadlines against each other without the judge's involvement. *Id*. at 138.

[187] *See* Reinert, *supra* note 28, at 215 & n.71. It should be noted that not every court with a pre-filing conference requirement sets a page limitation on the submission. *See*, *e.g.*, C.D. CAL. LOCAL R. 37-2.1 (no page limit on joint stipulation, but stipulations longer than ten pages must be indexed).

may also be imposed on discovery motions even if no pre-motion conference is required.[188]

Such barriers to the filing of MTCs probably contribute to the marked decrease in the number of MTCs filed overall since 2016, as shown in Figures 3, 4, and 5 above. How that decrease in the number of MTCs filed may have affected the outcomes on those MTCs that did get filed is unclear.

Other interventions in the discovery process occurring alongside the 2015 FRCP amendments, and potentially affecting the frequency, filing parties, and outcomes of MTCs, are pilot projects that, like the 2015 amendments, grew out of the Duke Conference in 2010. For example, the "Pilot Program Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action" requires broader initial mandatory disclosures than those required by Rule 26(a)(1) in certain employment cases.[189] The Employment Protocol is meant to be adopted by standing order by individual judges,[190] and "has been adopted by over 50 judges and on a district-wide basis in multiple jurisdictions around the country, including the District of Connecticut and the District of Oregon."[191] Other such pilot projects that affect the timing and manner of discovery include the protocols for certain

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[188] *See*, *e.g.*, Hon. Hoffman Price, *Order on Discovery Motions* 1, M.D. Fla., https://www.flmd.uscourts.gov/sites/flmd/files/documents/flmd-hoffman-order-on-discovery-motions-february-2-2022-6-21-mc-33-orl-lrh.pdf [https://perma.cc/8U35-VYC8] (parties must file a "Short-Form Discovery Motion"; "[n]either the Motion nor any response thereto shall exceed 500 words").

[189] Hon. Gene E.K. Pratter, *Pilot Program Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action* 3-4, https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/prapol3.pdf [https://perma.cc/2VDC-7S28] (stating that the project is endorsed by the Civil Rules Advisory Committee).

[190] *Id*. *See also*, *e.g.*, Hon. Gene E.K. Pratter, *General Pretrial and Trial Procedures* 19, E.D. Pa.,https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/prapol2.pdf%20 [https://perma.cc/K4NC-AX2S].

[191] *See*, *e.g.*, Hon. Charles Eskridge, *Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions* 3, S.D. Tex., https://www.txs.uscourts.gov/sites/txs/files/Form%207_Initial%20Discovery%20Protocols%20for%20Fair%20Labor%20Standards%20Act%20Cases%20Not%20Pleaded%20as%20Collective%20Action.pdf [https://perma.cc/YVY2-L4NB].

Fair Labor Standards Act cases;[192] some insurance property damage cases;[193] certain Section 1983 cases;[194] and others.[195]

CONCLUSION

I have attempted here to study how the 2015 discovery amendments may have affected the number and outcomes of motions to compel discovery by using Westlaw Litigation Analytics. Because WLA is drawn directly from federal district court electronic dockets, and because some of the results comport with theoretical predictions, I believe that the descriptive results one can obtain from WLA have some credibility. For example, the findings here that in civil rights cases plaintiffs file many more MTCs than defendants, and are far less successful in doing so, provide empirical support for long held assumptions. Further, the finding that in contracts cases plaintiffs file only somewhat more MTCs than defendants, with about the same rate of success, should surprise no one. The steep decline in the number of MTCs filed in both civil rights and contracts cases after 2016 (after an initial surge in 2016) makes sense when one considers the widespread judicially-imposed barriers to filing MTCs. Further, there are many who may consider the decline in MTCs filed since 2016 to be a victory of sorts.

As to the outcomes of MTCs since the 2015 amendments, I have no reason to doubt WLA's data showing generally that courts grant MTCs at a lower rate, for both plaintiffs and defendants, in both civil rights and contracts cases. However, given the number of other discovery rules contemporaneously initiated at the district court and individual judge levels, I cannot confidently conclude that the decline in the grant rate is attributable to the 2015 amendments. Any such conclusion must await further research.

As for the more generalized usefulness of the methodology used in this analysis, I believe that WLA and other such commercially available databases may emerge as a pivotal tool in the realm of legal empirical research. Its comprehensive database, drawn from PACER and powered by machine learning and human interpretation, may facilitate a more accurate exploration of legal trends and patterns, surpassing older methods that relied

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[192] *Id.*

[193] *See*, *e.g.*, Hon. Charles Eskridge, *Initial Discovery Protocols for First-Party Insurance Property Damage Cases Arising from Disaster*, S.D. Tex., https://www.txs.uscourts.gov/sites/txs/files/Form%208_Initial%20Discovery%20Protocols%20for%20Post-Disaster%20First%20Party%20Property%20Insurance%20Disputes.pdf [https://perma.cc/Y2TW-MAXW].

[194] *See*, *e.g.*, S.D.N.Y. LOCAL CIVIL R. 83.10, *Plan for Certain § 1983 Cases Against the City of New York (Southern District Only)* 82-87, https://www.nysd.uscourts.gov/sites/default/files/local_rules/2021-10-15%20Joint%20Local%20Rules.pdf [https://perma.cc/F3NQ-FHNZ]. *See* Reinert, *supra* note 28, at 196-97 (describing this project).

[195] *See*, *e.g.*, *Mandatory Initial Discovery Pilot Project (MIDP),* N.D. Ill., https://www.ilnd.uscourts.gov/Pages.aspx?jYyawIFLXKMJrmXzxFk8lw== [https://perma.cc/MKT3-SBTL] (effective Jun. 1, 2017 to Jun. 1, 2020 in the Northern District of Illinois).

heavily on opinions culled from sources like the traditional versions of Westlaw and LexisNexis. However, the use of WLA in academic research necessitates a careful consideration of certain limitations and sampling biases, as well as an evaluation of the confounders that can beset any statistical model. Despite these concerns, WLA's alignment with the accuracy of electronic court dockets makes it a significant resource for legal academic researchers seeking to conduct quantitative studies.