
No. 2009-H20

—
In the

SUPREME COURT OF THE UNITED STATES

—
UNITED STATES OF AMERICA,

Petitioner,

v.

STARTESTS, INC. and the COLONIAL FOOTBALL LEAGUE,

Respondents.

—
ON WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

—
BRIEF FOR PETITIONER

Team 23

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Should standing to demand the return of property and electronic information seized pursuant to the execution of a validly issued search warrant be denied to the Colonial Football League where the premises searched belonged to a third party, neither the League nor its members asserted a property interest in the objects searched or seized, and the search was directed at and limited to information pertaining to illegal steroid use by five named players?

2. May federal magistrates, in the exercise of their neutral and detached judgment, apply this Court's precedent on Fourth Amendment reasonableness to searches for digital evidence and thereby issue a warrant permitting equipment seizure for an offsite search where an onsite search is deemed impracticable to discover information on a specified crime committed by five named players?

3. Should government officials be allowed to seize clear evidence of illegal drug use under the specifically established and well-delineated plain view exception when they view the evidence in the course of digital search within a drug testing database pursuant to a valid search warrant?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
I. FOURTH AMENDMENT.....	2
II. FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 41(g).....	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	6
ARGUMENT	9
I. THE CFL LACKS STANDING TO BRING A RULE 41(g) MOTION TO RETURN PROPERTY AS IT WAS NEITHER ITSELF, NOR AS AN ASSOCIATION, A PARTY AGGRIEVED BY THE FBI SEARCH OF THE STARTESTS FACILITY.....	9
A. The CFL Itself Did Not Have an Interest Protected by the Fourth Amendment on Which to Predicate Individual Standing to Challenge the FBI’s Search of the StarTests Facility.....	9
B. The CFL Does Not Have Associational Standing Because the CFL’s Members Would Not Have Individual Standing and the Motion is Not Germane to the CFL’s Organizational Purpose.....	12
II. THE FBI’S SEARCH MEETS THE CONSTITUTIONAL TEST OF REASONABLENESS AS IT WAS CONDUCTED PURSUANT TO A VALIDLY ISSUED WARRANT THAT WAS NOT OVERBROAD AND PARTICULARLY DESCRIBED THE INFORMATION SOUGHT.....	16
A. As Evinced by StarTests’ Intentionally Complex and Deceptive Digital Storage Scheme, the FBI’s Warrant was Not Overly Broad in Allowing Seizure of Any Computer Equipment that Trained Personnel Deemed Necessary.....	17

B.	The Search Warrant Met the Particularity Requirement as it Restricted the FBI to Searching for Information “Reasonably Related” to Steroid Usage by Five Named Players.....	19
C.	The Ninth and Fourteenth Circuits Should Not Have Attempted to Establish Separate Constitutional Requirements for the Search and Seizure of Digital Evidence.....	21
III.	THE DISTRICT COURT CORRECTLY APPLIED THE PLAIN VIEW EXCEPTION TO ALLOW LAW ENFORCEMENT AGENTS TO SEIZE CLEAR EVIDENCE OF ILLEGAL DRUG USE SEEN IN A DATABASE DURING A SEARCH FOR THE DRUG TEST RESULTS OF FIVE NAMED INDIVIDUALS.....	22
A.	Law Enforcement Officials Were Lawfully Present to View the Drug Test Results Because They Discovered the Results While Searching StarTests’ Computers Subject to a Valid Search Warrant that Allowed Access to the Database with These Results.....	23
B.	Government Officials had a Lawful Right of Access to the Test Results on Other Players Because They Were Part of the Same File as the Results of the Five Named Players.....	24
C.	The Incriminating Nature of the Test Results Was Immediately Apparent Because Mere Inspection Indicated the Use of Illegal Substances.....	27
IV.	THE PLAIN VIEW EXCEPTION IS A NECESSARY AND APPROPRIATE TOOL FOR LAW ENFORCEMENT OFFICIALS CONDUCTING DIGITAL SEARCHES.....	31
A.	The Plain View Exception is an Important and Well-Established Method for Balancing Individual Privacy Concerns with the Needs of Public Safety and Law Enforcement.....	31
B.	The Plain View Exception Should Apply to Digital Searches Because the Same Potential Benefits to Law Enforcement Arise in Digital as in Traditional Searches and Courts Can Limit the Use of the Exception in Digital Searches Appropriately.....	33
V.	STARTESTS AND THE CFL ARE NOT ENTITLED TO THE RETURN OF ALL COMPUTER DATA UNDER RULE 41(g) BECAUSE GOVERNMENT OFFICIALS LEGALLY SEIZED THE DATA AND THIS SEIZURE DID NOT UNREASONABLY DEPRIVE STARTESTS AND THE CFL.....	36
	CONCLUSION.....	39

TABLE OF AUTHORITIES

CASES

<i>Alderman v. United States</i> , 394 U.S. 165 (1969).....	9
<i>Arizona v. Hicks</i> , 480 U.S. 321 (1987).....	17, 27
<i>Blair v. United States</i> , 665 F.2d 500 (4th Cir. 1981).....	26
<i>Coolidge v. New Hampshire</i> , 403 U.S. 443 (1971).....	13, 22, 31, 32, 33
<i>Frazier v. Cupp</i> , 394 U.S. 731 (1969).....	30
<i>Horton v. California</i> , 496 U.S. 128 (1990).....	23, 29, 31, 33
<i>Humane Soc’y. of the U.S. v. Hodel</i> , 840 F.2d 45 (D.C. Cir. 1988).....	15
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....	17
<i>J.B. Manning Corp. v. United States</i> , 86 F.3d 926 (9th Cir. 1996).....	37
<i>Katz v. United States</i> , 389 U.S. 347 (1967).....	17
<i>Ker v. California</i> , 374 U.S. 23 (1963).....	30
<i>Kitty’s East v. United States</i> , 905 F.2d 1367 (10th Cir. 1990).....	17, 20, 37
<i>Kyllo v. United States</i> , 533 U.S. 27 (2001).....	13, 22
<i>Maryland v. Garrison</i> , 480 U.S. 79 (1987).....	17, 18
<i>Medical Ass’n of Ala. v. Schweiker</i> , 554 F.Supp. 955 (M.D.Ala. 1983).....	16
<i>Pennell v. City of San Jose</i> , 485 U.S. 1 (1988).....	9, 11, 12
<i>Rakas v. Illinois</i> , 439 U.S. 128 (1978).....	9, 10, 11, 12, 13
<i>Ramsden v. United States</i> , 2 F.3d 322 (9th Cir. 1993).....	37, 38
<i>Silverman v. United States</i> , 365 U.S. 505 (1961).....	21
<i>Skinner v. Ry. Labor Executives’ Ass’n</i> , 489 U.S. 602 (1989).....	13
<i>Smith v. Maryland</i> , 442 U.S. 735 (1979).....	14, 15

<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969).....	28
<i>Trupiano v. United States</i> , 334 U.S. 699 (1948).....	31
<i>United States v. Adjani</i> , 452 F.3d 1140 (9th Cir. 2006).....	19, 21, 26
<i>United States v. Alexander</i> , 574 F.3d 484 (8th Cir. 2009).....	23
<i>United States v. Beusch</i> , 596 F.2d 871 (9th Cir. 1979).....	26
<i>United States v. Bruce</i> , 109 F.3d 323 (7th Cir. 1997).....	28
<i>United States v. Carey</i> , 172 F.3d 1268 (10th Cir. 1999).....	25, 33, 34, 35
<i>United States v. Comprehensive Drug Testing, Inc.</i> , 579 F.3d 989 (9th Cir. 2009).....	9, 20, 22, 35, 36
<i>United States v. Comprehensive Drug Testing, Inc.</i> , 513 F.3d 1085 (9th Cir. 2008).....	36
<i>United States v. Dichiarinte</i> , 445 F.2d 126 (7th Cir. 1971).....	28, 33
<i>United States v. Giberson</i> , 527 F.3d 882 (9th Cir. 2008).....	21, 24, 28, 34, 35
<i>United States v. Hill</i> , 459 F.3d 966 (9th Cir. 2006).....	20
<i>United States v. Horn</i> , 187 F.3d 781 (8th Cir. 1999).....	18
<i>United States v. Miller</i> , 425 U.S. 435 (1976).....	15
<i>United States v. Miranda</i> , 325 F. App'x 858 (11th Cir. 2009).....	25, 34
<i>United States v. Raney</i> , 342 F.3d 551 (7th Cir. 2003).....	29
<i>United States v. Ross</i> , 456 U.S. 798 (1982).....	21
<i>United States v. Runyan</i> , 275 F.3d 449 (5th Cir. 2001).....	26
<i>United States v. Salvucci</i> , 448 U.S. 83 (1980).....	10
<i>United States v. Taketa</i> , 923 F.2d 665 (9th Cir. 1991).....	14
<i>United States v. Tamura</i> , 694 F.2d 591 (9th Cir. 1982).....	18, 19, 20
<i>United States v. Turner</i> , 169 F.3d 84 (1st Cir. 1999).....	23
<i>United States v. Walser</i> , 275 F.3d 981 (10th Cir. 2001).....	27, 34

United States v. Wong, 334 F.3d 831 (9th Cir. 2003).....23, 24, 25, 28, 34

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967).....32

CONSTITUTIONAL AMENDMENTS and COURT RULES

U.S. Const. amend. IV.....17, 19, 22

Fed. R. Crim. P. 41(g).....9, 36

OTHER AUTHORITIES

Erin E. Floyd, *The Modern Athlete: Natural Athletic Ability or Technology at its Best*, 9 Vill. Sports & Ent. L.J. 155 (2002).....15

H. Marshall Jarrett et al., *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, (Office of Legal Education 2009), <http://www.cybercrime.gov/ssmanual/ssmanual2009.pdf>.....33

Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 567 (2005).....32, 34

Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 Harv. J.L. & Tech. 75 (1994).....17

Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257 (1984).....16

OPINIONS BELOW

The Opinion of the United States District Court for the District of Wythe is unpublished, but it can be found in the Record on Appeal at pages 1 – 6. The Opinion of the United States Circuit Court of Appeals for the Fourteenth Circuit is also unpublished but can be found in the Record on Appeal at pages 7 – 19.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. FOURTH AMENDMENT

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV.

II. FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 41(g)

Motion to Return Property – “A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return.” Fed. R. Crim. P. 41(g).

STATEMENT OF THE CASE

To ensure compliance with its own athletic performance standards, as well as federal and state laws, the Colonial Football League (CFL) implemented a drug testing program in 2005, hiring StarTests, Inc. (StarTests), an independent drug testing business, to administer it. (R. at 1.) As an incentive for players to submit urine samples, StarTests and the CFL assured players that they would release to the CFL and the public only the percentage of positive steroid results, with the actual test results stored confidentially at the StarTests facility. *Id.* Beyond these assurances by the CFL and StarTests, the record gives no indication of any written or oral agreement specifying the ownership of the results or the treatment and handling of the results to ensure their confidentiality.

When the glare of media scrutiny illuminated the need for investigation into illegal steroid distribution and use in professional sports, the Federal Bureau of Investigation (FBI) began collecting evidence of significant illegal steroid traffic between distributors and professional football franchises. (R. at 7.) Through months of investigation, the FBI amassed evidence implicating five football players as major distributors and users of illegal steroids. (R. at 1, 7-8.) The FBI's evidence against these five players included numerous eyewitness reports and taped conversations where these five players discussed procuring steroids to "keep the rivalry interesting" and advance their individual careers as professional athletes. (R. at 7-8.) To conclusively prove that the players had used illegal steroids, the FBI sought and received a warrant from a neutral magistrate judge allowing the search and seizure of information from StarTests' facility "reasonably related to the investigation into the five named players' illegal steroid use." (R. at 8.)

The FBI's warrant application included a supporting affidavit requesting permission to seize "all computer records, files, and equipment" related to the CFL drug testing program. (R. at 1-2.) The affidavit explained that on-site sorting would be infeasible because 1) a search of the massive quantity of data at the StarTests facility would be too time-intensive to conduct on-site; 2) files may be hidden or file names may be deceptively labeled for confidentiality purposes; and 3) de-encryption software needed to view files may not be available on the StarTests computers. (R. at 2, 8.) Finding this affidavit sufficient to authorize the FBI to "search computer equipment, storage devices, and – where an on-site search would be impracticable – seize either a copy of all data or the computer equipment itself," the magistrate issued the warrant. (R. at 8.) The magistrate limited the warrant's scope, however, by requiring that "law enforcement personnel trained in searching and seizing computer data" determine whether a computer needed to be seized. (R. at 2.) Also, if law enforcement personnel decided that a comprehensive search necessitated equipment seizure, the warrant provided that appropriately trained personnel should review the data to retain information authorized by the warrant and return the remainder. *Id.*

When the FBI agents arrived at StarTests to execute the search warrant, they asked StarTests employees to direct them to the CFL drug test results. *Id.* The employees informed them that most of the computers in the facility included at least one database on the CFL drug test, with each database saved under a different name. (R. at 2, 8 n.3.) The results from each drug test were split into three databases: one database contained the test results with ID numbers for each participant, one matched the ID numbers to individual players, and one contained the personal health information and name of each player. (R. at 8 n.3.) No single computer at the facility had two databases from any one test. *Id.* Additionally, many of the files were encrypted

or hidden in various H- or S-drives. (R. at 2.) Faced with this complicated data storage scheme, the computer forensics agent decided to seize or copy the hard drives of all of the computer equipment to conduct a further review at the FBI's computer forensics laboratory; this review took the FBI several weeks. (R. at 8-9.)

While matching names to identification numbers in the results database to find the five players named in the search warrant, the personnel also saw "positive test results and matching names" from other CFL players indicating the use of steroids and various other illegal drugs, including marijuana, cocaine, and hallucinogens. (R. at 2, 5.) Having seen these results, the FBI decided that the illegal drug use plaguing professional football required further investigation. (R. at 2.) FBI agents copied and retained all of the incriminating information and then returned the computer equipment and hard drives to StarTests. (R. at 9.)

Respondents, StarTests and the CFL, invoked the civil equitable jurisdiction of the United States District Court for the District of Wythe in order to bring this Rule 41(g) motion to return property. (R. at 1.) The motion asserts that both parties were personally "aggrieved" by the FBI's allegedly unlawful search and seizure of copies of digital evidence pertaining to illegal drug use by individual players other than those named in the warrant. (R. at 2-3.) All CFL players are members of specific franchises, which are in turn members of the CFL, (R. at 1.); the CFL asserts standing on behalf of the individual players, or, in the alternative, as an individual party with ownership over the databases searched at the StarTests facility. (R. at 10.) StarTests is an independent drug testing business and bases its claim on the premise that its business operation suffers harm from the FBI's search and seizure. (R. at 1-2, 16.) Both parties asked the court to order that the FBI return its copies of digital evidence to the StarTests facility.

In response to this motion, petitioner, the United States, filed a motion for the court to dismiss the CFL as a party for lack of standing. (R. at 3.) The district court found that the CFL did have standing to seek the return of the digital evidence copies, but held that the FBI's search and seizure of the StarTests databases was not unlawful and thus denied respondents' request for equitable relief. (R. at 3, 6.) Both StarTests and the CFL appealed the district court's decision to deny the Rule 41(g) motion to the United States Circuit Court of Appeals for the Fourteenth Circuit. (R. at 7.) The Fourteenth Circuit adopted the reasoning of the district court to affirm that the CFL had associational standing; it also reasoned that the CFL had individual standing based upon its asserted ownership of the databases. (R. at 10.) The Fourteenth Circuit reversed the district court's denial of the Rule 41(g) motion and promulgated a list of heightened warrant requirements for cases involving digital searches. The court ordered that the FBI return all property to the StarTests facility. (R. at 16.)

The United States appealed and this Court granted certiorari. (R. at 20.)

SUMMARY OF THE ARGUMENT

From the single sentence of the Fourth Amendment, courts have produced thousands of pages of legal analysis aiming to strike an appropriate balance between individual privacy interests and the public interest in criminal prosecution. Courts must carefully consider both sides of the balance in the context of this venerable body of law to determine the scope of Fourth Amendment protections, including standing to challenge searches and the appropriate scope of available remedies. In this case, the Fourteenth Circuit's decision to strike out on its own rather than apply settled Fourth Amendment principles to digital searches and seizures undermines the public interest in ensuring that law enforcement officials discover and address criminal activity and unjustifiably accords special constitutional protection to digital evidence alone.

As an initial matter, the CFL fails the prudential individual standing requirement to bring this Rule 41(g) motion on its own behalf, because it cannot show a personnel interest protected by the Fourth Amendment that was infringed upon by the government search and seizure. The search took place at a facility owned by StarTests, the objects and information searched most likely belonged to StarTests, and the search was conducted to gather information pertaining to five named individuals; since Fourth Amendment rights are personal, the CFL cannot allege violations of the rights of StarTests or the named players to support its individual standing.

The CFL also lacks associational standing to bring the motion on behalf of its members, because it cannot meet any of the three common law requirements. First, its members would not have individual standing to support the organization's standing. The players' Fourth Amendment rights were not violated by the government's search and seizure, because they lacked an objectively reasonable expectation of privacy after voluntarily submitting samples to a third party for drug testing. Even if the players were found to have individual standing, the CFL cannot assert this claim on their behalf because they would need to participate in the lawsuit in order to demonstrate their subjective expectations of privacy. Finally, the CFL's motion to defeat the government's efforts to curb dangerous and unlawful drug use by the players contradicts the CFL's organizational purpose and thus precludes associational standing. Accordingly, this Court should dismiss the CFL as a party for lack of standing.

As to the merits of the Rule 41(g) motion, the FBI's warrant to search StarTests' facility was neither overbroad nor overly general. Because the FBI had probable cause to find information on the named players' steroid use on all of the computer equipment, the FBI legitimately seized StarTests' computers pursuant to its warrant to search for targeted information on illegal steroid usage by five named players. Furthermore, in determining whether

this search and seizure was reasonable under the Fourth Amendment, the Fourteenth Circuit should have analyzed the FBI's warrant using the traditional rubrics of the overbreadth doctrine and the particularity requirement. These warrant requirements provide adequate protection for digital evidence, and it is unnecessary and unwise for courts to deviate from them by proposing heightened warrant requirements that will serve as non-responsive, bright-line rules for rapidly changing technologies.

Government officials lawfully seized the positive drug test results under the plain view exception to the Fourth Amendment's warrant requirement. First, the officials were lawfully present in the place where they were conducting the search, because the warrant entitled them to search the computer and access the particular database where information on the five named players could be found. Second, officials had a right to access to the drug test results because, to view the incriminating evidence, they did not need to open any files beyond those they were authorized by the warrant to open; they also has a right to access the results because when files have been opened, officials may access all information from those open documents. Finally, the incriminating nature of the drug test results was immediately apparent from mere inspection.

The plain view exception is a necessary and appropriate tool of law enforcement in all cases, including those with digital searches. The plain view exception allows officials to take action against criminal activity upon seeing clear evidence of such activity, providing great security benefits with minimal costs to privacy. Given the court-imposed limits on the application of the plain view exception, the costs to privacy are especially low. Rather than eliminating the plain view exception in cases involving digital searches, courts should continue to apply traditional Fourth Amendment doctrine to such searches, thereby shaping and limiting the use of the plain view exception as appropriate given the particularities of each case.

For these reasons, this Court should reverse the Fourteenth Circuit’s sweeping attempts to both impose heightened warrant requirements for digital evidence and enact a flat prohibition against the plain view exception in digital searches.

ARGUMENT

I. THE CFL LACKS STANDING TO BRING A RULE 41(g) MOTION TO RETURN PROPERTY AS IT WAS NEITHER ITSELF, NOR AS AN ASSOCIATION, A PARTY AGGRIEVED BY THE FBI SEARCH OF THE STARTESTS FACILITY.

The CFL lacks both individual and associational standing to contest the search of StarTests’ facility. A party may assert standing either as an individual or as an association. *See Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988). To assert standing in either capacity, the CFL must show that it is a party “aggrieved by an unlawful search and seizure of property” and is thus entitled to invoke the court’s civil equitable jurisdiction for this Rule 41(g) motion to return property. Fed. R. Crim. P. 41(g); *see United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1001 (9th Cir. 2009) [hereinafter *Comprehensive En Banc*].

A. *The CFL Itself Did Not Have an Interest Protected by the Fourth Amendment on Which to Predicate Individual Standing to Challenge the FBI’s Search of the StarTests Facility.*

The CFL lacks individual standing to bring a 41(g) motion to return property because it did not have a personal interest protected by the Fourth Amendment that was infringed upon by the FBI’s allegedly unlawful search and seizure. Individual standing as a party “aggrieved by an unlawful search and seizure” under Rule 41(g) focuses on “the extent of a particular defendant’s rights under the Fourth Amendment.” *Rakas v. Illinois*, 439 U.S. 128, 139 (1978). “Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.” *Alderman v. United States*, 394 U.S. 165, 174 (1969). The CFL must establish that it had a legitimate expectation of privacy in the places or files searched in order to show infringement on a personal

interest which the Fourth Amendment was designed to protect; property ownership is one factor that can help establish a legitimate expectation of privacy. *See Rakas*, 439 U.S. at 143; *United States v. Salvucci*, 448 U.S. 83, 91 (1980).

Although the CFL paid StarTests to administer the tests and store the results, this does not necessarily mean that the databases are merely stored at the StarTests facility and actually belong to the CFL. On the contrary, assurances given to the players that only the percentage of positive results would be released to “the CFL *and* the public” strongly suggest that the records are not the property of the CFL. (R. at 1.) (emphasis added). If the CFL cannot show that it owns the databases, it is difficult to see how the CFL itself had a legitimate expectation of privacy that the FBI undermined by its search of databases at a third party facility. (R. at 2.)

The CFL does not allege ownership of the databases, but instead asserts that it has standing to file this motion for the return of StarTests’ records based on the need to preserve the integrity of its organization and the privacy guarantee it gave to the players, coupled with the CFL’s contractual obligation to represent the interests of the tested players as professional athletes. (R. at 9-10.) Any incidental interference with the operation of the CFL’s business or resulting breach of the confidentiality agreement between the CFL and the players is exactly the type of prejudice that arises “through the use of evidence gathered as a consequence of a search or seizure directed at someone else” and insufficient to support standing in Fourth Amendment cases. *See Rakas*, 439 U.S. at 134-35 (internal quotation marks omitted) (quoting *Jones v. United States*, 362 U.S. 257, 261 (1960), *overruled on other grounds by United States v. Salvucci*, 448 U.S. 83 (1980)). The mere fact that the CFL does not like the FBI’s search and may experience some secondary effects resulting from the FBI’s search and seizure of material at

StarTests' facility does not mean that its Fourth Amendment rights were violated or that it is an "aggrieved" party with standing separate and apart from its individual members.

The Fourteenth Circuit and the District of Wythe erred in finding that the CFL has standing to bring this motion to return property. The District of Wythe's analysis of standing misunderstood the test for individual standing and improperly rested on the assertion that a party is "aggrieved" when it is "*either a 'victim [or] one against whom the search was directed.'*" (R. at 3.) (first emphasis added) (alteration in original) (quoting *Rakas*, 439 U.S. at 134-35). This Court explicitly stated in *Rakas* that "'one against whom the search was directed'" was "meant merely as a parenthetical equivalent of the previous phrase 'a victim of a search or seizure'" and was not meant to broaden the basis for standing. 439 U.S. at 134-35 (quoting *Jones*, 362 U.S. at 261). Furthermore, this Court explicitly dispensed with the *Jones* rubric of standing quoted by the District of Wythe and adopted the above-applied inquiry into whether the search and seizure infringed upon "an interest of the defendant which the Fourth Amendment was designed to protect." *Id.* at 140. Since Fourth Amendment rights are personal rights, the district court erred in holding that the CFL has standing based on the search being "directed against the CFL ... due to its capacity as a protector of players' interests." (R. at 3.) The district court's analysis confuses the standard for the CFL to have standing as an individual party itself under *Rakas* with the test for associational standing described in *Pennell*, 485 U.S. at 7 n.3. Because the Fourteenth Circuit "fully adopt[ed]" the district court's reasoning on this issue, (R. at 10.) it also erred in granting standing to the CFL. By misapplication of the *Rakas* formulation for individual standing, both the Fourteenth Circuit and the District of Wythe erroneously concluded that the CFL has standing to bring this Rule 41(g) motion.

This Court should not expand the scope of interests protected by the Fourth Amendment in order to accord standing to the CFL. When considering expansions to standing for Fourth Amendment violations, courts should consider whether the benefits of extending standing would justify further restrictions upon the government's ability to prosecute crimes on the basis of all evidence. *See Rakas*, 439 U.S. at 137-38. Because of its sweeping nature, the district court's extension of standing to the CFL "due to its capacity as a protector of players' interests" is difficult to justify. (R. at 3.) Were standing conferred on a party merely because that party has a contractual obligation to represent another party, courts would need to grant law firms standing in their own right apart from their clients. Since conventional standing doctrine under *Rakas* would not recognize standing for the CFL and the CFL has not made a case for any societal benefit that would outweigh the additional legal and evidentiary costs of recognizing an extension of Fourth Amendment protection, this Court should not find that the CFL has standing as an individual party apart from its members.

B. *The CFL Does Not Have Associational Standing Because the CFL's Members Would Not Have Individual Standing and the Motion is Not Germane to the CFL's Organizational Purpose.*

The CFL fails to meet any of the three requirements needed to have associational standing for this Rule 41(g) motion. An association has standing on behalf of its members when 1) its members would otherwise have individual standing; 2) "neither the asserted claim nor the requested relief require the participation of individual members in the lawsuit"; and 3) the interests the organization seeks to protect are "germane with the organization's purpose." *Pennell*, 485 U.S. at 7 & n.3.

The CFL fails the first requirement of associational standing since none of its members would have independent standing to bring the motion. To meet this requirement, the individual

franchises, which are members of the CFL, would need to have standing to bring this motion; the standing of these franchises in turn hinges on whether their members, the individual players, would have standing. Standing of the CFL's individual members hinges on their ability to show that the government infringed upon a personal interest that the Fourth Amendment was designed to protect. *See supra* p. 8. A Fourth Amendment search occurs when the government violates an individual's subjective expectation of privacy and that expectation is one that society is willing to recognize as reasonable. *See Kyllo v. United States*, 533 U.S. 27, 33 (2001).

All tested players had a reasonable expectation of privacy in their urine samples which was invaded when StarTests conducted the drug tests. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). However, any "search" constituted by the drug tests and StarTests' subsequent handling of the results is not protected by the Fourth Amendment, as the Fourth Amendment only protects against unreasonable searches and seizures by the government, and there is no evidence in the record that StarTests acted as an "instrument" of the government when it conducted the tests. *See Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). Thus, in order to qualify as a "person aggrieved" by the allegedly unlawful search and seizure, the CFL must show not that the players would have a legitimate expectation of privacy in urine samples taken for government testing, but that the players retained a legitimate expectation of privacy in the objects of the FBI's search, which were the results held by StarTests at its facility. *See Rakas*, 439 U.S. at 143.

Nothing in the record suggests that the test results stored at the StarTests facility were the property of the players. As discussed above, the results were most likely the property of StarTests in light of the assurances made to players regarding the limitations on information that would be disclosed to the CFL and the lack of any provision for the players to retrieve their

results from storage at StarTests. The mere fact that a player's test results were stored at the StarTests facility does not mean that the players had an "objectively reasonable expectation of privacy." *Cf. United States v. Taketa*, 923 F.2d 665, 671 (9th Cir. 1991) (holding that an individual could not challenge evidence of his illegal activities obtained from search of a third party's private office since the individual did not have an objectively reasonable expectation of privacy in the office). A "formal arrangement" could contribute to a reasonable expectation of privacy in StarTests' property on the part of the players. *See id.* at 671. However, the results were largely handled without formal procedures; no evidence suggests that any written agreements describe storage or confidentiality procedures for the results, and oral representations by StarTests and the CFL merely stated that the purpose of the tests was to determine prevalence of steroid usage, with individual results remaining "confidential and stored in [sic] at the StarTests facility." (R. at 1.)

The limited scope of these verbal assurances, together with the lack of possessory interest in either the object or the location of the search, defeats the objective reasonableness of any subjective expectation of privacy held by the players even if the government has matched the test results to the names of the individual players. The players realized that they were submitting their urine to StarTests for drug testing; therefore, they did not have a legitimate expectation of privacy with respect to the drug test results. *Cf. Smith v. Maryland*, 442 U.S. 735, 742 (1979) (holding that individuals do not have a legitimate expectation of privacy in the phone numbers that they dial on their phones since they realize that they must convey the number to the phone company in order to place a call). Even if the players maintained some subjective expectation of privacy in their results, that expectation was not legitimate, since they voluntarily turned the samples over to StarTests, a third party. *See id.* at 743-44. The players assumed the risk of

disclosure when they submitted their samples to StarTests. *See United States v. Miller*, 425 U.S. 435, 443 (1976). Since the players did not have an objectively reasonable expectation of privacy that would entitle their interest to Fourth Amendment protection, they are not entitled to individual standing to contest the search of the StarTests facility.

Even if the players could show individual standing to bring this motion, they would need to participate to establish that standing for this motion, and thus the CFL would fail the second requirement for associational standing. Individual standing for Fourth Amendment violations is based on the presence of a particular individual's subjective expectation of privacy that society is willing to accept as objectively reasonable. *See Smith*, 442 U.S. at 743. Each individual player would need to participate in the lawsuit in order to show his individual subjective expectation of privacy to support his standing. Without participation of its individual members, the CFL would not be able to show that any of its members had standing and therefore would not be able to support its own standing as an association representing those members.

Protecting the confidentiality of the players' positive drug test results is arguably inapposite to the CFL's organizational purpose, so the CFL does not meet the third requirement for associational standing. While the germaneness requirement is generally "undemanding," it does mandate "pertinence" between the interest sought to be advanced and the organization's purpose. *See Humane Soc'y. of the U.S. v. Hodel*, 840 F.2d 45, 58 (D.C. Cir. 1988). The CFL initiated this testing program in order to comply with federal and state laws, as well as its own "athletic performance standards." (R. at 1.) Drug use by athletes can threaten the health and welfare of athletes and undermine the integrity of professional football and the CFL. *See Erin E. Floyd, The Modern Athlete: Natural Athletic Ability or Technology at its Best*, 9 Vill. Sports & Ent. L.J. 155, 159 (2002). The CFL may well be harming the long-term interests of the players

as professional athletes and the integrity of the league and undermining compliance with its own “athletic performance standards” by seeking to defeat the government’s efforts to curb unlawful drug use.

In *Medical Association of Alabama v. Schweiker*, a medical association did not have standing to represent its members as taxpayers since economic injury from taxation lacked a reasonable connection with the association’s objectives and the reasons for which physicians joined the organization. 554 F.Supp. 955, 965 (M.D.Ala. 1983). The medical association’s ability to represent its members as physicians for economic injuries would not support representation of its members’ economic interests as taxpayers. Similarly, the CFL’s right to represent the players’ interests as professional athletes does not extend to representing their interest in protecting their privacy so that they might continue dangerous and illegal steroid use to advance their statuses and increase their salaries within the league. (R. at 3, 8.) The CFL thus fails to meet any of the three prongs of the test for associational standing on behalf of its members and merits standing neither as an individual party apart from its members nor as an association.

II. THE FBI’S SEARCH MEETS THE CONSTITUTIONAL TEST OF REASONABLENESS AS IT WAS CONDUCTED PURSUANT TO A VALIDLY ISSUED WARRANT THAT WAS NOT OVERBROAD AND PARTICULARLY DESCRIBED THE INFORMATION SOUGHT.

A search pursuant to a warrant that is not overbroad and meets the particularity requirement does not become unreasonable and thus unconstitutional simply because the object of the search is digital evidence. The Fourth Amendment was drafted and adopted in order to eliminate the threat of wholesale privacy invasions posed by the use of general warrants and writs of assistance in colonial times. See Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257, 283-85 (1984). The constitutionality of a search hinges

on whether a search was “reasonable” under the Fourth Amendment. *Arizona v. Hicks*, 480 U.S. 321, 325 (1987). Fourth Amendment searches and seizures are presumptively unreasonable only when not authorized by a warrant or one of the “specifically established and well-delineated” warrant exceptions. *See Katz v. United States*, 389 U.S. 347, 357 (1967). Since here the challenged search was conducted pursuant to a warrant supported by probable cause and issued by a neutral, detached magistrate, the respondents may only challenge the scope of the search under 1) the overbreadth doctrine or 2) the particularity requirement. *See Maryland v. Garrison*, 480 U.S. 79, 84-85 (1987); *see also* Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 Harv. J.L. & Tech. 75, 85-86 (1994). Neither challenge should succeed.

A. *As Evinced by StarTests’ Intentionally Complex and Deceptive Digital Storage Scheme, the FBI’s Warrant was Not Overly Broad in Allowing Seizure of Any Computer Equipment that Trained Personnel Deemed Necessary.*

The FBI’s search warrant, issued by a neutral federal magistrate, was not overly broad, as it contained adequate scope restrictions under the circumstances. The Fourth Amendment requires that a warrant “particularly describe[e] the place to be searched.” U.S. Const. amend. IV. “[T]he scope of a lawful search is defined by the object of the search and the places in which there is probable cause to believe that it may be found.” *Garrison*, 480 U.S. at 84 (internal quotations omitted). A magistrate’s finding of probable cause is owed substantial deference. *See Illinois v. Gates*, 462 U.S. 213, 236 (1983). While specifically identifying the items to be seized under the warrant by name and content is preferable, the failure to do so may not be constitutionally fatal where circumstances do not allow such specific identification. *See Kitty’s East v. United States*, 905 F.2d 1367, 1373 (10th Cir. 1990). Additionally, this Court has recognized “the need to allow some latitude for honest mistakes” made by officers in the execution of search warrants. *Garrison*, 480 U.S. at 87. The reasonableness of a search’s scope

must be evaluated in light of information available to officers at the time of the search; hindsight may not be used to invalidate a warrant. *See id.* at 85.

In *United States v. Horn*, the seizure of more than 300 videos was permissible under the circumstances since an onsite search was known by the officers to be impracticable as 1) the officers had probable cause to search all of the videos because the object of the search, child pornography, is sometimes spliced into commercial tapes, and 2) over 300 videos could not practically be viewed onsite. 187 F.3d 781, 788 (8th Cir. 1999). Similarly, in this case, when the FBI executed the warrant, StarTests personnel told agents that most of the computers in the facility included at least one database on the CFL drug test and the computer forensics agent subsequently determined that the search for the five players' information could take a few days given the intentional measures taken by StarTests to make the results difficult to retrieve. (R. at 2, 8.) Even if the agent's decision to seize or copy all computer equipment led to the seizure of some equipment that did not contain files on the CFL steroid tests of the five named players, the seizure was reasonable and permissible in light of information available at the time of the decision. *Cf. Garrison*, 480 U.S. at 85 (searching two dwellings on a single floor was permissible when officers had a warrant to search an entire floor of a building, so long as the officers did not know or have reason to know at the time that the warrant was unnecessarily broad). As in *Horn*, at the time the agent decided to seize or copy all of the computer equipment at StarTests, there was probable cause to find records for the five players on all of the computer equipment, so the seizure was not unconstitutional.

As with any other Fourth Amendment search, the primary safeguard of documents or electronic material against wholesale removal and general, unrestrained review is the judgment of a neutral, detached magistrate. *See United States v. Tamura*, 694 F.2d 591, 596 (9th Cir.

1982). The Ninth Circuit has held that where documents are “so intermingled that they cannot feasibly be sorted on site,” the government generally must seal and hold documents pending magistrate approval of a further search; however, officers may apply for authorization of large-scale removal of material if they know prior to the search that they will have such need. *Id.* at 595-96. StarTests is a private contractor for drug testing whose business reputation hinges on its respect for and protection of the privacy of its clients. (R. at 8.) FBI agents could have reasonably concluded prior to the search that the StarTests data storage procedures would be complex and that it would most likely be infeasible to conduct the search for the named players’ test results onsite; however, the FBI’s lack of familiarity with StarTests’ particular systems precluded a description of the barriers to the onsite search beyond those difficulties common to computer searches. *Id.* The magistrate adequately protected StarTests’ databases from unnecessary, general searches by requiring that “law enforcement personnel trained in searching and seizing computer data” decide whether seizure and removal of computer equipment was necessary. *Id.*

B. The Search Warrant Met the Particularity Requirement as it Restricted the FBI to Searching for Information “Reasonably Related” to Steroid Usage by Five Named Players.

The FBI’s warrant for a digital search at the StarTests facility for information reasonably related to illegal steroid use by five named players met the particularity requirement of the Fourth Amendment. The Fourth Amendment provides that warrants must “particularly describe[e] ... the things to be seized.” U.S. Const. amend. IV. A warrant meets the particularity requirement if the specificity and limitations provided therein are reasonable; further particularity about the material sought or the search procedure to be followed may not be required when it would likely render the search ineffective. *See United States v. Adjani*, 452

F.3d 1140, 1149-50 (9th Cir. 2006). The degree of particularity required in the description of material to be seized will necessarily vary according to the circumstances and the type of evidence sought. *See Kitty's East*, 905 F.2d at 1374 (upholding a warrant that authorized broad search and seizure of “virtually every kind” of business document because evidence of a conspiracy is “often hidden” in day-to-day business transactions). In *Kitty's East*, the warrant’s restrictions on search and seizure of virtually every kind of business document to only those documents referencing specified companies provided adequate guidance to executing officers and prevented the warrant from being facially invalid. *Id.* Similarly, in this case, the magistrate judge’s instruction that only information “reasonably related to the investigation into the five named players’ illegal steroid use” be subject to search and seizure was adequately particular in defining the object of the authorized search.

Where a search warrant provides sufficiently particular guidelines for identifying the documents sought, all items in a set of files may be searched for those documents. *See Tamura*, 694 F.2d at 595. The particularity requirement adequately protects electronic data from general searches, even though a search protocol need not be developed in advance or specified to the magistrate to support a warrant. *See United States v. Hill*, 459 F.3d 966 (9th Cir. 2006) (noting that the reasonableness of an officer’s acts in performing searches of seized materials remains subject to judicial review). The government here would not have been permitted to run a search specifically designed to find child pornography on a set of files merely because it had probable cause to find information pertaining to the five players in those files. *See Comprehensive En Banc*, 579 F.3d at 999. The warrant particularly authorized a search only for information reasonably related to steroid use by the five named players; thus, any searches of the seized databases had to be designed and executed in a manner that officers could reasonably believe

would find such information. *See United States v. Giberson*, 527 F.3d 882, 888 (9th Cir. 2008). However, the FBI had no obligation to segregate the results implicating other players from the files and ledgers containing information on the five named players, which were subject to search and seizure under the warrant. *See Adjani*, 452 F.3d at 1151. The warrant thus permitted the FBI to access the entirety of any files found to contain information regarding steroid use by the five named players and to determine the steroid drug results for those players without first finding and removing all unrelated test results in the database.

C. The Ninth and Fourteenth Circuits Should Not Have Attempted to Establish Separate Constitutional Requirements for the Search and Seizure of Digital Evidence.

Although digital searches may access tremendous amounts of private data that is unrelated to the information sought under a warrant, it was inconsistent with Fourth Amendment principles for the Ninth Circuit to decide that this concern creates a constitutional mandate that independent computer personnel segregate and redact any information not targeted by the search. *See Giberson*, 527 F.3d at 888 (“neither the quantity of information, nor the form in which it is stored, is legally relevant in the Fourth Amendment context”). This decision is even more anomalous because no parallel rule exists to protect searches of private homes, which invariably contain vast quantities of the most private information and objects. At the “very core” of Fourth Amendment protection is the right to be free from unreasonable governmental intrusion in the home, *see Silverman v. United States*, 365 U.S. 505, 511 (1961), yet a lawful search of a residence generally extends to any area therein where officers have probable cause to find the object of the search. *See United States v. Ross*, 456 U.S. 798, 820-21 (1982). It is difficult to assert that an individual in our society has a greater subjective expectation of privacy in electronic files than in his home or that society is more willing to recognize privacy in electronic

files as legitimate and objectively reasonable; thus, the Ninth and Fourteenth Circuits' attempt to accord additional constitutional protections to digital evidence alone is unjustified.

The procedures described by the Ninth and Fourteenth Circuits for digital evidence ought to be viewed as “best practices” under certain circumstances and not as Fourth Amendment requirements. *See Comprehensive En Banc*, 579 F.3d at 1012-13 (Callahan, J., concurring in part and dissenting in part). Rapid developments in digital data storage are not a reason for the courts to brashly announce a new bright-line rule for determining constitutional mandates, but rather counsel that the court remain true to the common law method, which permits evaluation of cases over time in order to continue evolving the rules to be responsive to unpredictable technology developments. *See id.* at 1016 (Bea, J., concurring in part and dissenting in part). As discussed above, established Fourth Amendment principles provide adequate protection for digital evidence through the overbreadth doctrine and the particularity requirement for warrants; the circuit courts should have applied existing doctrines in determining Fourth Amendment reasonableness rather than attempting to craft bright-line rules in response to technological developments. *See Kyllo*, 533 U.S. at 41 (Stevens, J., dissenting). This Court should reverse the Fourteenth Circuit's attempt to heighten warrant requirements for searches of digital evidence.

III. THE DISTRICT COURT CORRECTLY APPLIED THE PLAIN VIEW EXCEPTION TO ALLOW LAW ENFORCEMENT AGENTS TO SEIZE CLEAR EVIDENCE OF ILLEGAL DRUG USE SEEN IN A DATABASE DURING A SEARCH FOR THE DRUG TEST RESULTS OF FIVE NAMED INDIVIDUALS.

The plain view exception is one of a few “jealously and carefully drawn” exceptions, *Coolidge*, 403 U.S. at 455, to the Fourth Amendment requirement that warrants must “particularly describ[e] the place to be searched, and the person or things to be seized.” U.S. Const. amend. IV. The plain view exception has three parts: A) the police officer who seizes the

evidence must be lawfully present in the place where the evidence can be plainly viewed; B) the officer must have a lawful right of access to the object itself; and C) the incriminating nature of the object must be “immediately apparent.” *Horton v. California*, 496 U.S. 128, 135-37 (1990). Because all three elements apply in this case, FBI agents lawfully seized the positive drug test results they viewed in StarTests’ database under the plain view exception.

A. *Law Enforcement Officials Were Lawfully Present to View the Drug Test Results Because They Discovered the Results While Searching StarTests’ Computers Subject to a Valid Search Warrant that Allowed Access to the Database with These Results.*

Since the agents searching the computer had a valid warrant to conduct a search of the computer for information “reasonably related to the investigation into the five named players’ illegal steroid use,” they were lawfully present in the computer and could access the database file where they viewed the positive test results. (R. at 2.) First, to be lawfully present in a digital search, law enforcement agents must have a legal basis to search the computer, as by a search warrant permitting inspection of digital devices or computers. *See, e.g., United States v. Wong*, 334 F.3d 831, 836 (9th Cir. 2003). Thus, evidence of child pornography found on a computer could not be used against a suspect who consented to a search of all his personal property for any evidence of a break-in or assault, since this consent did not extend to a search of the computer, where such evidence was unlikely to be found. *United States v. Turner*, 169 F.3d 84, 88-89 (1st Cir. 1999). On the other hand, when a search warrant authorizes the search of “[d]igital storage devices,” *United States v. Alexander*, 574 F.3d 484, 487 (8th Cir. 2009), or “computers, their components, and disks,” *Wong*, 334 F.3d at 834, then officers may lawfully access files on the computer. *See id.* at 836; *Alexander*, 574 F.3d at 490. Since the search warrant in this case authorized the FBI to search “computer equipment [and] storage devices,” agents unquestionably had legal access to search computer files. (R. at 2.)

In addition, if law enforcement agents possess a search warrant that allows access to the type of digital file where the incriminating evidence is found, the agents executing the warrant are lawfully present for the purposes of the plain view exception. *See, e.g., Wong*, 334 F.3d at 838. In *Wong*, a special agent was searching a computer for evidence of a murder when he found graphics files containing child pornography. Because the information sought under the search warrant could be found in “plain text, special text, or graphic files,” he was lawfully present in the graphics files where he discovered the incriminating evidence. *Id.*; *see also Giberson*, 527 F.3d at 890 (allowing evidence of child pornography discovered by an agent authorized to search computer image files for evidence of fake I.D. documents).¹ Here, the search warrant allowed the search and seizure of information “reasonably related to the investigation into the five named players’ illegal steroid use.” (R. at 2.) Because it is eminently reasonable that a database of drug test results would contain information on the players’ illegal steroid use, the warrant allows access to the file where the incriminating evidence was found, just as the warrant in *Wong* allowed access to the pornographic images when murder evidence may have been found in graphics files. *See Wong*, 334 F.3d at 838. Therefore, the agents were lawfully present to view the drug test results under the first prong of the plain view exception.

B. Government Officials had a Lawful Right of Access to the Test Results on Other Players Because They Were Part of the Same File as the Results of the Five Named Players.

The second requirement of the plain view exception is met in this case because law enforcement officials observed the positive test results of other players than the five named in the warrant in the same database file to which they had lawful access under the search warrant;

¹ As discussed above, because of the possibility that files may be hidden, encrypted, or renamed, not every digital search warrant must describe exactly where the files ought to be found; however, in cases such as *Wong* and *Giberson* where the incriminating files were found among those specified by the warrant or by search protocol, this is certainly an indication that the agents conducting the searches to be lawfully present for plain view purposes. *See Wong*, 334 F.3d at 838; *Giberson*, 527 F.3d at 890.

therefore, the officials did not need to open any closed files to view these positive test results. Law enforcement agents have a right to access incriminating evidence found by opening files to which they have access under a search warrant. *See United States v. Miranda*, 325 F. App'x 858, 859-60 (11th Cir. 2009). In *Wong*, when agents searching computer images for evidence of a murder found images of child pornography, they had a lawful right to access those pornographic files. 334 F.3d at 838. Similarly, in *Miranda*, an officer who had a lawful right to view each computer file to determine whether it contained evidence of counterfeiting had a lawful right to access the child pornography files intermingled with the counterfeiting files. 325 F. App'x at 859-60.

On the other hand, when officers diverge from searching for files allowed by the search warrant to open previously closed files for the purpose of finding incriminating evidence, they do not have a lawful right to access the material. *See United States v. Carey*, 172 F.3d 1268, 1271 (10th Cir. 1999). In *Carey*, a single image of child pornography, found while an officer searched a computer for evidence of drug dealing, was admissible as evidence; however, the hundreds of other pornographic images the officer found after that, as he abandoned his search for drug evidence to seek more examples of child pornography, were inadmissible. *Id.* at 1271-73. In the present case, FBI agents had a lawful right to access the test results in the database containing the drug test results of the five named players. Just as in *Wong* and *Miranda*, the agents saw these results when they opened a file in the normal course of their authorized investigation. *See Wong*, 334 F.3d at 838; *Miranda*, 325 F. App'x at 859-60. Unlike in *Carey*, they did not have to open any further files in order to view the positive test results or see evidence of illegal drug use. *See* 172 F.3d at 1273.

After opening a file that is valid under a search warrant, law enforcement agents have access to the entire file. For example, in *United States v. Beusch*, agents did not need to separate the pages of a single written volume to determine which pages contained material that could or could not be seized. 596 F.2d 871, 876-77 (9th Cir. 1979). Instead, “single files” were appropriately specific units for law enforcement officials to seize in order to seek the evidence described in the search warrant. Although *Beusch* dealt with printed documents rather than electronic volumes, *id.*, there is no reason to distinguish a single file printed on paper from a single file on a computer. *Cf. Adjani*, 452 F.3d at 1151 (applying *Beusch* to justify seizure of evidence found while searching within email program).

In addition, closed computer files are analogous to closed containers, since they conceal their contents from view until actively opened. *Cf. United States v. Runyan*, 275 F.3d 449, 458 (5th Cir. 2001) (analogizing computer disks to “containers”). Established law on container searches dictates that “if the container is open and its contents exposed, its contents can be said to be in plain view.” *Blair v. United States*, 665 F.2d 500, 507 (4th Cir. 1981) (citing *Robbins v. California*, 453 U.S. 420, 427 (1981), *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982)). Thus, once a computer file is open, the contents of that file are exposed to plain view, and law enforcement officials have a lawful right to access any data contained therein. In this case, once the agents opened the drug testing database as allowed by the warrant, they had a right to access any of the information contained in this single file, just as the officials in *Beusch* could seize and search an entire ledger rather than excising particular pages. *See* 596 F.2d at 876-77.

Even if the drug testing database needed to be manipulated in some way to make the drug test results visible to officers, this viewing would still fall within the plain view exception since

the agents have access to all material in a single file. *See id.* When a police officer moved a suspicious object during a physical search in order to examine a part of it that had been covered, and thereby “exposed to view concealed portions of” it, this constituted a separate search beyond that authorized by the initial search warrant. *Hicks*, 480 U.S. at 325. On the other hand, when an agent found thumbnail images that appeared to contain child pornography during a computer search for drug trafficking evidence, the images constituted plain view evidence even though the agent had to “enlarge[] the images to confirm” their content. *United States v. Walser*, 275 F.3d 981, 986-87 (10th Cir. 2001). In this case, there is no evidence in the record that the agents needed to zoom in or out to enlarge or compress the data in order to view the positive drug test results from other players. However, even if they did need to do so, their actions would still be much closer to the acceptable action in *Walser* than the unacceptable one in *Hicks*, since they involve manipulation of a computer file to make information on the screen more easily visible rather than physical movement of an object that may expose an area not covered by the search warrant. *See id.* at 986-987; *Hicks*, 480 U.S. at 325. In the end, because the FBI agents searching StarTests’ database looked only within a file that they were allowed to open under the search warrant, their seizure of information from the database fulfills the second prong of the plain view exception.

C. The Incriminating Nature of the Test Results Was Immediately Apparent Because Mere Inspection Indicated the Use of Illegal Substances.

The FBI’s search of StarTests’ database also meets the third requirement of the plain view exception because the incriminating nature of positive test results for “a myriad of other illegal substances, such as cocaine, marijuana, and various hallucinogens” was immediately apparent. (R. at 2.) If, based on mere inspection, the agent has “probable cause to believe that

an item is linked to criminal activity,” then the incriminating nature of the item is immediately apparent. *United States v. Bruce*, 109 F.3d 323, 328 (7th Cir. 1997) (citing *Hicks*, 480 U.S. at 326).

“Mere inspection” means that simply looking at items is sufficient to reveal their content, without further action. *See Stanley v. Georgia*, 394 U.S. 557, 571 (1969). Thus, in *Wong* and *Giberson*, once law enforcement officials opened image files pursuant to a search warrant, they merely had to view the images to see their incriminating nature. *Wong*, 334 F.3d at 838; *Giberson*, 527 F.3d at 885. The agents did not need to search the properties of the images to determine when or where they were produced; the images themselves were clear evidence of illegality. On the other hand, the incriminating nature of currency exchange receipts was not immediately apparent in *United States v. Dichiarinte* because they had to be “opened and read” before they could be connected with criminal activity. 445 F.2d 126, 130-31 (7th Cir. 1971). In addition, although the majority opinion did not reach this issue, Justice Stewart’s concurring opinion in *Stanley* argued that reels of film were not incriminating on mere inspection since agents only viewed the contents when they played the reels on a projector. 394 U.S. at 571. In this case, agents did not need to take any further action to see the positive test results of individuals besides the five named players. Instead, as in *Wong* and *Giberson*, the test results appeared on the screen alongside the evidence that the agents were seeking under the warrant. Because these results only had to be seen, and did not have to be separately opened like the receipts in *Dichiarinte* or played like the film reels in *Stanley*, the incriminating content immediately appeared through mere inspection.

Furthermore, this mere inspection must provide probable cause to believe that the evidence is connected to criminal activity. Items seized need not be contraband in themselves if

“in connection with the crime being investigated” they take on “a suspicious nature,” such as a large amount of money found in a car after a drug transaction or an empty ammunition box discovered while searching for drugs. *Bruce*, 109 F.3d at 328. In *United States v. Raney*, for example, the court allowed the seizure of homemade photographs of adult sexual activities because, though lawful to possess, the suspect’s expressed interest in making homemade child pornography linked the photographs to a purported crime. 342 F.3d 551, 557 (7th Cir. 2003). Similarly, the presence of positive test results in a database may not indicate criminal behavior standing alone; in fact, depending on the organization of the spreadsheet, they may consist of plus signs in an appropriate column. However, even such innocuous symbols can provide probable cause of a connection to criminal activity when found in an incriminating context, just as the legally produced photographs seized in *Raney* were suspicious because of where they were discovered. *See id.* During a search for test results on illegal drug use, any marking indicating a positive test for cocaine, marijuana, or other illegal drug is just as connected to the act of illegal drug use as any of the items seized in cases described above. In fact, as documentary evidence of criminal activity, these test results are more clearly indicative of criminal activity than the photographs found in *Raney*, which were merely similar in nature to the suspect’s purported crime. *See id.* Therefore, because the positive drug test results provided probable cause to believe that they were connected to criminal activity by mere inspection, the third prong of the plain view exception is met in this case.

The plain view exception applies in this case even though the incriminating evidence implicated individuals who were not themselves the subjects of the search warrant. *See Horton*, 496 U.S. at 135 (“the ‘plain view’ doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an

incriminating object” (quoting *Coolidge*, 403 U.S. at 466)). For instance, in *Frazier v. Cupp*, police in the process of arresting an individual sought and received his permission to seize his clothing from a duffel bag in his house. 394 U.S. 731, 740 (1969). This individual had given his cousin permission to use one compartment of the bag. During their search, agents seized the cousin’s clothing and used it as evidence against him in a trial. The court “dismissed rather quickly” the claim that the cousin’s clothing was inadmissible as evidence, refusing to “engage in metaphysical subtleties” to apply the individual’s consent only to one section of the bag and not another compartment. *Id.*; see also *Ker v. California*, 374 U.S. 23, 28-29, 43 (1963) (upholding the introduction of a brick of marijuana as plain view evidence when an officer, in following the wife of a subject into another room, viewed the marijuana and placed the wife under arrest). As in *Frazier*, the police in this case were lawfully searching for evidence against certain individuals when they came across evidence incriminating others; in this case, moreover, the evidence was far more difficult to segregate than the clothing in *Frazier*, creating a correspondingly greater chance of coming across evidence implicating someone besides a named suspect.

Additionally, while the other players did not choose to put their data in the StarTests database alongside those of the five named players, and may not have even known that their data were there, they did know that they were subject to drug testing. Having used illegal drugs, they must have known these tests would be positive. Moreover, players who submitted their drug test data to StarTests could not have an objectively reasonable expectation of privacy. *See supra* pp. 13-14. Therefore, by acceding to a drug test after using illegal drugs, the other players assumed the risk that their information would come into plain view in the course of a lawful investigation. *See Frazier*, 394 U.S. at 740. This assumption of risk and its application to the case supports the

application of the plain view exception. Overall, when a search meets the three requirements of the plain view exception, evidence can be seized in plain view even if it incriminates individuals who were not the targets of the authorized search or individuals who did not know their information was easily accessible during the search.

IV. THE PLAIN VIEW EXCEPTION IS A NECESSARY AND APPROPRIATE TOOL FOR LAW ENFORCEMENT OFFICIALS CONDUCTING DIGITAL SEARCHES.

Plain view has a long history as an exception to the Fourth Amendment’s warrant requirement. As early as 1948 the court referred to a “long line of cases recognizing that an arresting officer may look around at the time of the arrest and seize those fruits and evidences of crime . . . which are in plain sight.” *Trupiano v. United States*, 334 U.S. 699, 704 (1948), *overruled in part by U.S. v. Rabinowitz*, 339 U.S. 56 (1950). Although the requirements of the plain view exception have not been static, as when the Court eliminated the inadvertency requirement in *Horton v. California*, 496 U.S. at 138, its application has consistently been a necessary and appropriate tool of law enforcement, and it should remain a viable exception to the warrant requirement in all cases, including those involving digital searches.

A. *The Plain View Exception is an Important and Well-Established Method for Balancing Individual Privacy Concerns with the Needs of Public Safety and Law Enforcement.*

In laying out the requirements of the plain view doctrine, the Court in *Coolidge* stated, “[a]s against the minor peril to Fourth Amendment protections” from the plain view exception, “there is a major gain in effective law enforcement.” 403 U.S. at 467. Fourth Amendment jurisprudence has always involved a balancing act between privacy concerns and the needs of law enforcement, and courts have accepted the plain view exception as a valid part of this balancing act for two main reasons: first, because of the unequivocal benefit it offers police

officers in uncovering criminal behavior, and second, because it is limited by the requirements of the Fourth Amendment and subsequent judicially-imposed constraints.

First, the plain view exception by its very nature can be a powerful tool to help police officers discover evidence of criminality. The exception can only be invoked to cover materials whose incriminating nature is immediately apparent, including evidence as well as instrumentalities of a crime. *See Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 301-02 (1967). Moreover, the exception, when properly applied, involves “no added risk to privacy; after all, the police have already conducted the search. Denying the police the use of powerful evidence if they come across it legitimately during a search seems to punish them for good police work and good fortune.” Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531, 567 (2005). In this case, for instance, police officers stumbled across evidence of illegal drug use while investigating players for illegal use of steroids; because of this discovery, they can better address the scourge of illegal drug use in professional sports.

The plain view exception also avoids unduly burdening privacy concerns because of the limits on its application by the Fourth Amendment and judicial interpretation thereof. One of the main purposes behind the Fourth Amendment, especially its particularity requirement, was preventing the use of general warrants, which had allowed “a general, exploratory rummaging in a person’s belongings.” *Coolidge*, 403 U.S. at 467. Preventing a search warrant from becoming a general warrant has long been a concern of courts applying the plain view exception, with the *Coolidge* court warning that it “may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.” *Id.* at 466. To address this concern, courts have placed a series of limitations on the use of the plain view exception; for

instance, “a warrantless search [must] be circumscribed by the exigencies which justify its initiation” and be limited in “area and duration.” *Horton*, 496 U.S. at 139-40.

Furthermore, as seen in this case and numerous others where courts admitted evidence under the plain view exception, police officers or other law enforcement officials are eminently capable of working within the boundaries of the law. When they go beyond the limits of what is acceptable, whether it be during a digital search, *see Carey*, 172 F.3d at 1273, or a traditional, physical search, *see Dichiarinte*, 445 F.2d at 130, courts can determine that their behavior does not accord with the law. Law enforcement officials are trained to pursue evidence of criminal behavior as third parties are not, and learning the limits of what is acceptable under the law can help law enforcement officials become aware of what will or will not be admissible under the plain view exception. *See* H. Marshall Jarrett et al., *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, 34-37 (Office of Legal Education 2009), <http://www.cybercrime.gov/ssmanual/ssmanual2009.pdf>. Although law enforcement officials may sometimes fail to use acceptable search protocol, this is scant justification for courts to completely eliminate the ability of the police to conduct certain types of searches or to vest this power in third parties such as computer experts.

B. The Plain View Exception Should Apply to Digital Searches Because the Same Potential Benefits to Law Enforcement Arise in Digital as in Traditional Searches and Courts Can Limit the Use of the Exception in Digital Searches Appropriately.

Fourth Amendment jurisprudence has demonstrated that courts can apply search and seizure doctrines flexibly to a wide variety of situations. In the past, there has been “disagreement about the basic rules to be applied . . . [to] cases concerning automobile searches, electronic surveillance, street searches and administrative searches,” *Coolidge*, 403 U.S. at 475; digital searching is simply the next “new frontier” in Fourth Amendment conflicts. Although

some courts and commentators currently disagree over how to apply the common law of the Fourth Amendment to digital searches, the plain view exception can and ought to be applied in such searches. Just as with traditional physical searches, applying this doctrine to the digital arena can enormously benefit law enforcement efforts; furthermore, courts can determine limitations on its use so that privacy rights remain inviolate.

First, applying the plain view doctrine to digital searches can greatly assist law enforcement officials, especially given that “computers are playing an ever greater role in daily life and are recording a growing proportion of it.” Kerr, *supra*, at 569. While the increasing use of computers to record information on all aspects of life does necessitate careful monitoring of digital searches, it also leads to potentially enormous law enforcement benefits if used properly. For instance, if government officials come across digital information on a terrorist plot in plain view, retaining and analyzing this information could protect millions of lives. The fact that such information is stored on a computer rather than written in a document does not affect its evidentiary value, and should not affect its accessibility under the plain view doctrine.

In addition, courts can apply limits on the plain view exception in digital searches just as they do with all other searches. In *Carey*, for example, the court denied the admission of evidence of child pornography when an officer who accidentally discovered one image of child pornography abandoned his previous computer search to seek more such examples. 172 F.3d at 1273. In a number of later cases, when law enforcement officials saw plain view evidence of illegal activity on computers, they either halted their search to wait for an additional search warrant, *see Giberson*, 527 F.3d at 885; *Walser*, 275 F.3d at 985, or continued searching only for the material originally sought. *See Miranda*, 325 F. App’x at 860; *Wong*, 334 F.3d at 835. The

Tenth Circuit's decision in *Carey* thus led to a widely-applied limit that helps prevent digital searches from becoming general searches.

Limiting the plain view doctrine as courts have done also undercuts the fear, expressed in the majority opinion of the en banc panel in *Comprehensive En Banc*, 579 F.3d at 998, that applying the plain view exception in digital search cases “will create a powerful incentive for [government agents] to seize more rather than less . . . Why [seize] just [one] directory and not the entire hard drive? Why just this computer and not the one in the next room and the next room after that?” Regardless of whether a search is occurring on physical items or digital evidence, however, warrants will still limit searches to particular items, and courts will still have the power to determine when a search has run afoul of the Fourth Amendment. *See, e.g., Carey*, 172 F.3d at 1273. Even in *Comprehensive En Banc*, in which the Ninth Circuit ruled that police officers must forswear reliance on the plain view doctrine in digital search cases, one judge concurring in part in the judgment concluded that there may be contexts where application of the plain view exception to digital searches is appropriate, citing *Wong* as an example. 579 F.3d at 1011 n.4.

In the end, a common-law-based approach is the best way to apply the plain view exception to digital searches. Because technology changes so rapidly, “Fourth Amendment exceptions and distinctions based solely on a type of technology are ‘unwise[] and inconsistent with the Fourth Amendment.’” *Giberson*, 527 F.3d at 887 (quoting *Kyllo*, 533 U.S. at 41 (Stevens, J., dissenting)). Rather than completely casting aside the plain view exception in all digital search cases, thereby tying the hands of law enforcement officers to collect and use clearly incriminating evidence discovered during lawful computer searches, “the prudent course” is that described by Judge Bea in his dissent in *Comprehensive En Banc*: courts should “allow the contours of the plain view doctrine to develop incrementally through the normal course of

fact-based adjudication. A measured approach based on the facts of a particular case is especially warranted in the case of computer-related technology, which is constantly and quickly evolving.” 579 F.3d at 1013 (Bea, J., concurring in part and dissenting in part).

V. STARTESTS AND THE CFL ARE NOT ENTITLED TO THE RETURN OF ALL COMPUTER DATA UNDER RULE 41(g) BECAUSE GOVERNMENT OFFICIALS LEGALLY SEIZED THE DATA AND THIS SEIZURE DID NOT UNREASONABLY DEPRIVE STARTESTS AND THE CFL.

StarTests and the CFL are not entitled to the return of all computer data copied by government agents because they have not been unlawfully or unreasonably deprived of their property. Under Rule 41(g) of the Federal Rules of Criminal Procedure, “[a] person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return.” Fed. R. Crim. P. 41(g). Reviewing the lower court’s interpretation of 41(g) *de novo*, and its decision to exercise equitable jurisdiction and order the return of property for abuse of discretion, *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1103 n.40 (9th Cir. 2008), StarTests and the CFL are not entitled to the return of copied computer data. FBI agents did not seize this information illegally and the parties are not unreasonably deprived simply because the FBI has retained a copy of it.

As described above, the computer files that FBI agents copied were not seized illegally. The search warrant was sufficiently particular and the complicated distribution of files necessitated an offsite search of StarTests’ computers. In addition, the plain view exception allowed agents to seize the file containing obviously incriminating evidence about drug use by CFL players once law enforcement officials stumbled across those results within the drug testing database.

StarTests and the CFL are also not unreasonably deprived by the FBI's decision to retain a copy of the database that included the incriminating drug test results. Return of the property is not "reasonable[] under all of the circumstances," *J.B. Manning Corp. v. United States*, 86 F.3d 926, 928 (9th Cir. 1996) (quoting *Ramsden v. United States*, 2 F.3d 322, 326-27 (9th Cir. 1993)), since none of the four equitable factors from *Ramsden v. United States* are met completely: 1) the government did not display "callous disregard" for the rights of StarTests and the CFL; 2) those parties did not have a "need for" the information, even if they had an individual "interest in" it; 3) neither party would suffer "irreparable injury" if deprived of the governments' copied information; and 4) the CFL has adequate alternative remedies available to address its concerns, even if StarTests does not. 2 F.3d 322, 325-26 (9th Cir. 1993).

First, the government did not demonstrate "callous disregard" for the rights of StarTests and the CFL. In *Ramsden*, the court found the actions of the police to callously disregard Ramsden's rights when they proceeded without a warrant and pursuant to no applicable warrant exception, despite having had time to obtain a warrant. *Id.* In contrast, the FBI in this case not only had a warrant, it also proceeded by a court-approved search protocol. (R. at 2.) Therefore, the government acted according to the general requirements of the Fourth Amendment and the particular requirements of the magistrate; such obedience to legal process does not demonstrate callous disregard for the rights of StarTests and the CFL.

Second, StarTests and the CFL have neither a "need for" the documents under the second *Ramsden* factor, nor will they suffer "irreparable injury" if the documents are not returned, as required by the third *Ramsden* factor. 2 F.3d at 325-26. Because StarTests has retained all its data, the government seizure of a copy of the data does not preclude the lab's ability to operate effectively. *Cf. Kitty's East*, 905 F.2d at 1376 (seizing obscene videotapes did not unreasonably

aggrieve a store because it did not preclude “exhibition or rental” of other copies of the videotapes). Furthermore, the Circuit Court’s fear that the release of the information from the databases could cause irreparable injury is misplaced, since the release is purely speculative and therefore constitutes no injury at this time. (R. at 16.) On the other hand, StarTests and the CFL would fulfill part of the second *Ramsden* factor, since they have “an individual interest in” the information, *see* 2 F.3d at 325; for instance, StarTests has an interest in protecting its reputation. *See Comprehensive En Banc*, 579 F.3d at 1002 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958)). Nonetheless, the lack of grave and irreparable injury to StarTests and the CFL means that the second equitable factor for return of property is only partially met in this case and the third factor is entirely unmet. *Ramsden*, 2 F.3d at 325.

Finally, the CFL has an adequate alternative “remedy at law” to seek the return of the government’s copy of the database, even though StarTests does not. *Id.* at 326. In *Ramsden*, the plaintiff lacked an alternative remedy when U.S. marshals seized documents in his hotel room as potential evidence for a British lawsuit, with no plan to institute prosecution or allow him to challenge the deprivation of documents in this country. *Id.* at 324, 326. On the other hand, any CFL players who may eventually face prosecution on drug charges can move to suppress the evidence. (R. at 16.) Such a remedy alleviates the CFL’s concerns that the results will become public. *Id.* Even though StarTests does not have an adequate alternative remedy at law to seek the return of all its data, the fourth equitable factor is still only partially met in this case. Overall, since government legally seized a copy of StarTests’ databases, and this case does not entirely meet any of the four factors that determine the reasonableness of the property deprivation, the Fourteenth Circuit abused its discretion in ordering the return of property under rule 41(g).

CONCLUSION

The warrant requirement and its limited exceptions have been developed through a case-by-case, fact-specific inquiry by the courts in order to preserve the Fourth Amendment's protection against "unreasonable searches and seizures." The sphere of Fourth Amendment protection, including standing to challenge searches and access to remedies, has been developed by this Court in open recognition of and appreciation for the balance between protecting an individual's private life from government intrusion and the public interest in efficient and accurate law enforcement. The rapid changes in the realm of digital media counsel for the continuation of this fact-specific inquiry, not an attempt by the courts to develop a rigid, catchall rule in a legislative fashion.

For the foregoing reasons, this Court should find that the CFL lacks standing to bring this motion. This Court should also reverse the Fourteenth Circuit's attempt to accord special constitutional protection to digital evidence through application of a rigid, bright-line framework and should instead apply the currently established warrant requirement, subject to recognized exceptions in a fact-specific inquiry to ensure that the constitutionally mandated standard of "reasonableness" is met.