S018180

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JENNIFER HILL and J. BARRY McKEEVER, Plaintiffs and Respondents, vs. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant and Petitioner.	No. S018180 Court of Appeal No. H005079 Santa Clara County Superior Court No. 619209
THE BOARD OF TRUSTEES OF THE LELAND STANFORD JUNIOR UNIVERSITY, Intervenor.	

OPPOSITION BRIEF OF RESPONDENTS

On Review of the Decision by the Court of Appeal of the State of California, Sixth Appellate District

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PRELIMINARY STATEMENT

This case challenges a sweeping drug testing program implemented by the National Collegiate Athletic Association ("NCAA") in the Fall of 1986, requiring college athletes in each of twenty-six NCAA sports to consent in advance to random and monitored urinalysis drug tests in post-season competition. The program, unlike any other that has come before the California courts, tests the urine of male and female college athletes for over 2,600 banned substances, the vast majority of which are FDA-approved, over-the-counter or prescription medications. As part of the program, male and female college athletes are interrogated about the medications they have taken in the weeks prior to the urinalysis and then ordered to urinate while an NCAA monitor watches. If the NCAA detects a banned substance, such as Contac or Sudafed, in the urine of the athlete, it orders the athlete's university to suspend him or her from competition for 90 days. All of this occurs without regard to suspicion of drug use.

Two Superior Court judges and a unanimous Court of Appeal found the program unconstitutional under Article I, Section 1 of the California Constitution. The Superior Court issued a permanent injunction after considering an extensive body of evidence at trial including testimony from twenty-six different witnesses, nearly two hundred exhibits, numerous deposition excerpts and declarations, extensive scientific literature, as well as the entire record submitted on plaintiffs' previous motion for a preliminary injunction in March, 1987. The Superior Court made ninety-seven separate findings of fact upon

which it based its conclusion that the NCAA urine testing program violated the California Constitution.

The Court of Appeal found that substantial evidence supported the following findings:

> (1) the NCAA urine testing program invades student athletes' right to privacy by forcing them to reveal confidential medical information to an NCAA official, by requiring that an NCAA official watch them urinate, and by revealing sensitive and confidential information about them from the urinalysis itself [JA 265-66 (Findings of Fact, hereinafter "FF", 12, 14 and 15)];[1]
>
> (2) there is no significant use of drugs by college athletes in connection with athletic competition, and no evidence of any use whatsoever with respect to many of the drugs and many of the sports involved in the testing program [JA 266-67 (FF 22-25), 268-69 (FF 30-34)];
>
> (3) none of the 2,600 drugs for which testing occurs improves athletic performance, and none endangers the health and safety of student athletes during athletic competition [JA 269 (FF 36), 270 (FF 39), 271 (FF 2-4), 272-73 (FF 6-11)];
>
> (4) the NCAA's random, announced drug testing is not an effective or scientifically valid method of detecting or deterring drug use in connection with athletic competition, and in fact is more likely to impair than to protect the health of student athletes because it interferes with the patient/physician relationship [JA 265 (FF 13), 270 (FF 41-42), 277 (FF 33)];

1/ Respondents adopt the abbreviations the NCAA used in its opening brief (hereinafter "AOB"). Thus, "RT" refers to the transcript of the trial; "PI" refers to the transcript of the preliminary injunction hearing; and "JA" refers to the parties' joint appendix.

(5) the program is overbroad because it tests for substances which do not enhance athletic performance, which are not used in college athletics and which are not even available [JA 275 (FF 23)]; and

(6) the NCAA failed to try available, less intrusive alternatives, such as a comprehensive drug education program, or a testing program based on reasonable suspicion, which would have more effectively achieved its stated goals. JA 277-79 (FF 34-35, 40-42, 45-47).

Because substantial privacy interests were invaded, the trial court correctly required the NCAA to show that a "compelling need" for testing existed, that the program was narrowly tailored to meet its goals, and that less intrusive alternatives were not available. Applying this standard, the Superior Court found, and the Court of Appeal affirmed, that the NCAA's objections were not sufficiently compelling and that in any event there was no sufficient evidence of drug use by student athletes, nor any threat to competition or the health of college competitors, to establish such a compelling need. The court further concluded that testing for 2,600 substances in 26 sports did not constitute a narrowly tailored program, and that less intrusive alternatives, such as drug education and probable cause testing, were available.

Faced with such findings, it is not surprising that the NCAA now argues that this case can be decided "as a matter of law," and that evidence is irrelevant. However, given the lack of evidence supporting either the need or effectiveness of the NCAA's program, and its incredible overbreadth, the findings make clear that under any standard of review the NCAA's drug testing

program is unconstitutional.

STATEMENT OF THE CASE

This case began in January, 1987, when Stanford diver Simone LeVant challenged the right of the NCAA to test her for more than 2,600 substances without any evidence or suspicion of her prior use of drugs. JA 1091-1120. The Honorable Peter Stone entered a temporary restraining order on January 13, 1987, permitting LeVant to compete in NCAA diving competition pending a hearing on a preliminary injunction. JA 1121-22. On March 31, 1987, after reviewing the extensive briefing, hundreds of pages of deposition testimony and several declarations, and hearing the arguments of counsel, Judge Stone issued a preliminary injunction declaring the program "scientifically unsophisticated and overbroad." JA 35-38.

Following Judge Stone's issuance of the preliminary injunction order, Stanford University intervened, claiming that it could not enforce an unconstitutional program. JA 41-51. In addition, Stanford athletes Jennifer Hill and J. Barry McKeever joined as plaintiffs. JA 52-82. The case then was reassigned to the Honorable Conrad L. Rushing. JA 1123.

In October, 1987, Judge Rushing conducted an evidentiary hearing on plaintiffs' motion for a preliminary injunction. JA 185-201. After hearing eight days of testimony from fourteen witnesses, reviewing numerous exhibits, declarations, deposition excerpts and scientific literature, and after weeks of careful deliberation, Judge Rushing issued a preliminary injunction on

December 18, 1987, enjoining the NCAA from enforcing its drug testing program in all sports except football and men's basketball. Judge Rushing allowed the NCAA to continue testing the urine of football and male basketball players for amphetamines, cocaine and anabolic steroids, but banned monitored urination. JA 187-88.

Rejecting a proposal to stipulate that Judge Rushing's order on the preliminary injunction would constitute the final permanent injunction, the NCAA insisted on proceeding to a full trial to present additional evidence. Accordingly, at trial which began February 8, 1988, the NCAA called ten additional witnesses, all of them experts, in an unsuccessful attempt to justify its program. The plaintiffs also called two additional witnesses. On August 10, 1988, Judge Rushing issued a permanent injunction, declaring the NCAA's drug testing program to be unconstitutional in its entirety and precluding application of the program to any Stanford athletes. JA 239-40. At no time during proceedings in the trial court did the NCAA demur, move for judgment on the pleadings, move for summary judgment, or in any other way argue that the issues now presented are purely matters of law, not subject to evidence or proof.

STATEMENT OF FACTS

Respondents Jennifer Hill and Barry McKeever were Stanford students and members of Stanford's varsity athletic teams. JA 1077-79; PI 379-80. Hill was a member of the Stanford women's soccer team for four years and was co-captain her senior

year. JA 1077. McKeever was a linebacker on Stanford's football team and majored in political science and communications. PI 378-80. He attended Stanford on an athletic scholarship and would not have been able to continue his education at Stanford without such assistance. PI 379. McKeever's urine was tested during the 1986 football season before he played in the Gator Bowl. PI 382. Both Hill and McKeever found the prospect of urinating in front of an NCAA monitor to be abhorrent, particularly in light of the fact that neither of them has ever been accused or suspected of using drugs. JA 1078-79; PI 390-91.

1. The Impact On Privacy Was Found to be Serious And Pervasive.

The testimony of athletes, coaches, physicians and NCAA officials unanimously supported the court's finding that the NCAA's monitored testing program constitutes a direct and serious invasion of important privacy interests. JA 265-66 (FF 12-18). The privacy invasion begins in the weeks preceding NCAA championship events or bowl games. The NCAA's list of banned substances is so broad that coaches and trainers, such as NCAA witness Thomas J. Kerin, the head trainer at the University of Tennessee, instruct their athletes not to take aspirin, cough syrup or anything without checking with a physician. RT 487-88. Not only are the athletes unable to treat themselves for common ailments like a cold or cramps, but Doctors Bunce, Greenblatt, Lowenthal and Dorman testified that the program interferes with the physician's ability to treat the athlete in the best way the physician sees fit. JA 265 (FF 13), 1146-48; RT

1233-34, 1251-54; PI 251-52, 319-20. Student athletes and their physicians are understandably reluctant to permit use of those substances because urinalysis drug tests cannot distinguish between therapeutic dosages and abuse. JA 270 (FF 42); RT 417-18, 1233.

The invasion is compounded at the testing site when an NCAA official demands confidential information about an athlete's medical history, including a request for all medications taken in the last two to three weeks. JA 265 (FF 12); RT 100-01; PI 1198. An NCAA official directly asks women athletes if they are using birth control medication and if so, what kind. JA 265 (FF 12); RT 969-70. After these embarrassing disclosures, each athlete is handed a beaker and directed to a stall or urinal where an NCAA official watches the partially disrobed athlete while he or she urinates -- an experience that both Barry McKeever and Ruth Berkey, the assistant executive director of the NCAA, described as very embarrassing. JA 265 (FF 14); PI 389-91, 416-17, 1198-99.

The privacy invasion deepens with the analysis of the sample. All three NCAA laboratory directors testified in great detail about the wealth of information they garner in conducting their urinalysis. RT 363-66; PI 549, 571, 615-17, 632-39, 832-52. Dr. Catlin, the director of the laboratory at UCLA, informs the NCAA of the presence of all kinds of substances in the urine regardless of whether they are on the list of banned substances. RT 1337. The tests reveal various medical conditions and the existence of substances ingested weeks,

months, or even one year prior to testing. JA 265-66 (FF 15-16); RT 864-66; PI 887-89.

If the NCAA declares an athlete ineligible, further privacy invasions take place. As Stanford's Athletic Director explained, it is virtually impossible to avoid media attention when an otherwise eligible student is abruptly declared ineligible for a bowl game or championship competition. JA 266 (FF 17); PI 71-72, 102-04. This type of attention and censure can be psychologically damaging to a student athlete, according to psychiatrist Paul Walters, especially where, as here, the athlete might not have done anything improper. PI 430-31.

2. The Extent of Drug Use Among College Athletes In Connection With Athletic Competition Was Found to be De Minimis.

After examining all the NCAA test results, reviewing surveys, and listening to the testimony of NCAA coaches, trainers and physicians, the trial court concluded that "athletes do not use drugs any more than college students generally" and that they "actually use drugs less during the athletic season than their peers." JA 266 (FF 19). Richard Schultz, the Executive Director of the NCAA, publicly opined that college athletes have a much less serious drug problem than any other segment of our society. JA 269 (FF 35), 956. Despite belated claims to the contrary, the NCAA did not enact its drug testing program because of evidence of mounting drug use; indeed, the NCAA felt that it did not have to prove use of drugs in order to ban them. JA 269 (FF 35); RT 32.

In its opening brief, the NCAA relies heavily on statistics from a Michigan State survey (JA 324-56), which was not limited to the use of drugs in connection with athletic participation but rather concerned general social use. This data is irrelevant to whether athletes ever use drugs to enhance athletic performance. Moreover, the study itself pointed out its limitations as reliable evidence, advising: (1) the results "cannot be generalized to all athletes in the sports surveyed" (only ten sports), "nor can the results be generalized to other sports"; (2) the findings could be biased due to the low response rate; and (3) use of drugs may have been overreported. JA 324. The study concluded that student athlete drug use is primarily social and experimental, not related to the team, and the majority of athletes did not use drugs because they had no desire to try them, saw no need to use them, and were concerned about their health. JA 328.

More reliable evidence indicated that drug use related to athletic competition was minimal and related primarily to one sport. For example, at Stanford, the women's soccer coach, the women's gymnastics coach, the men's baseball coach and the men's basketball coach all testified that they have not seen drug use related to athletic competition in their sports. JA 145-46, 273 (FF 14); RT 1076; PI 142-43, 367-68. Typical of the coaches' views was that of Stanford men's basketball coach Mike Montgomery, who testified that in his nineteen years of coaching college basketball players he had never seen, heard of or suspected any player on his team or on an opposing team of using

any drug or chemical substance to enhance performance. RT 1079-80. Montgomery and the other coaches felt that because of their close involvement with their athletes they would know if any athlete was using or abusing drugs. JA 145-46; RT 1077-79; PI 140, 367-69. Despite the NCAA's access to thousands of coaches across the country, the NCAA did not call a single coach or athlete to testify about drug use; therefore, no evidence contradicted the coaches' opinions. Rather, the NCAA relied on witnesses such as self-proclaimed expert, Gayle Olinekova, whom the trial court found "not credible." JA 268 (FF 28); RT 557.

Since none of the survey evidence indicated drug use in connection with athletic competition,[2] the court determined that the best evidence of drug use in preparation for or participation in NCAA post-season competition were the NCAA testing results. JA 266-67 (FF 22). Indeed, the NCAA claimed that one of the purposes of its program in the first year was to gather empirical evidence of drug use. PI 1261. This empirical evidence demonstrated that no women had been declared ineligible in any sport. JA 267 (FF 23), 759, 1036-51. Of the 14 sports tested in the 1986-87 season, there also were no ineligible findings in baseball, cross country, golf, gymnastics, indoor track, lacrosse, softball, swimming and diving, tennis, volleyball or wrestling. JA 759.

The test results confirm that use of drugs in connection

2/ For example, a Stanford survey showed that zero percent of women athletes had ever used a drug to enhance athletic performance. JA 849.

with athletics is not only rare but also limited to a single sport: football. The NCAA tested 3,511 students during the 1986-87 season. Of those, only 34 (less than one percent) were declared ineligible. Thirty-one of the 34 ineligibles were football players and 25 of those were declared positive for anabolic steroids. The percentage of football players declared ineligible for steroids was only 2.5 percent. The only other ineligibles were in track and field (1 positive for steroids out of 528) and basketball (2 positive for cocaine out of 320 tested). JA 760.

Similarly, all ineligible findings during the 1987-88 drug tests were limited to the sport of football (21 ineligible out of 1,589 athletes tested). Of the 21 football players declared ineligible, 7 were for steroids (0.5%), 2 for diuretics (0.1%), 7 for marijuana (0.5%) and 5 for cocaine (0.3%).[3] JA 267 (FF 25), 379. Not a single athlete tested positive for amphetamines or Category 1 (stimulant) use, nor was there any evidence of any abuse of sympathomimetic amines. See infra note 5; JA 268-69 (FF 32), 760, 961; PI 842-43, 1026-27.

The evidence demonstrated that there was no drug involvement in any sport except football. And, even in football, the problem related only to steroid use and involved a small minority of football players. JA 269 (FF 34).

3/ The marijuana and cocaine test results were not even remotely related to athletic competition since football players were tested days, and even weeks, before their bowl games. JA 276 (FF 30); RT 1258-59, 1310; PI 823-24.

3. The Banned Substances Were Found To Have No Effect On Athletic Competition Or Upon The Health And Safety Of Student Athletes.

The trial court found that none of the drugs on the NCAA list actually enhanced the performance of an athlete in NCAA sports. JA 271 (FF 2). That finding is supported by substantial evidence. Indeed, all experts admitted that most of the 2,600 banned substances (JA 762-820) would impair rather than enhance performance (JA 985, 988; RT 30-35, 39, 42-45, 48, 80, 82-84, 129-30, 792-93, 849-50, 852-54, 1236-38, 1240-41, 1245-48, 1254-55, 1258, 1269-70, 1272-74, 1378-79; PI 279-80, 689-91, 825-26),[4] a fact known to the NCAA before it began its costly urine testing program. The NCAA's own Special Drug Committee, which was set up to establish the drug testing program, concluded that drugs do not enhance athletic performance. JA 307. Dr. Robert Murphy, a member of the original NCAA drug committee (PI 974), also concluded that no substance consistently has been shown to increase athletic performance. JA 985. Similarly, Dr. Hanley, another NCAA committee member whom the NCAA called as an expert, opined that none of the drugs that are supposed to improve performance works very well. RT 30-35, 39, 42-44, 48, 80, 82-84, 129-30.

The court heard extensive expert testimony as to the performance enhancing capabilities of each category of drugs on the NCAA's list of banned substances. Dr. Greenblatt, the Chief

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4/ Not surprisingly, the evidence established that, generally speaking, athletes will not ingest substances that might impair their athletic performance. RT 490-91.

of the Division of Clinical Pharmacology at New England Medical Center and Professor of Psychiatry and Medicine at Tufts University School of Medicine (RT 1221), testified that there is no hard evidence that any of the substances in Categories 1 and 2 (stimulants and sympathomimetic amines) improve athletic performance in any sport. RT 1237-38, 1245. In fact, as Dr. Greenblatt explained, stimulants are more likely to impair performance in actual competition because they cause distractability, loss of concentration, shaky or tremulous hands and jumpiness. RT 1243. The NCAA's experts, Doctors Murphy and Hanley, agreed that amphetamines and stimulants do not improve athletic performance beyond any placebo effect. JA 272 (FF 7, top), 988; RT 39, 48-49.

Likewise, there was no evidence that diuretics improve athletic performance. JA 272 (FF 7, bottom). In the sport of wrestling where, theoretically, a wrestler could use diuretics to compete in a lower weight class, the evidence was that diuretics would weaken the wrestler and probably impair his athletic performance. RT 849-50, 1236-37, 1269-70. With respect to street drugs, the experts unanimously agreed that marijuana impairs, rather than enhances, performance. RT 30, 44-45, 501-02, 1258; PI 276-78, 825. Cocaine also impairs performance because it has depressant effects and results in loss of concentration. RT 1246-48.

Crediting the testimony of Dr. Greenblatt, the court concluded that there was no scientific evidence to show that anabolic steroids would improve performance in any sport. JA

271-72 (FF 5); RT 1245-46, 1254-55. In fact, the NCAA's own expert, Dr. Hanley, testified that steroids do not improve performance any more than the placebo effect and that even the placebo effect varies and is inconsistent. RT 80-83. Furthermore, there was little dispute that anabolic steroids do not improve aerobic performance. JA 1012; RT 852-54; PI 258-59.

There was no evidence that drug use in NCAA athletic competition is actually endangering the health and safety of student athletes. JA 269 (FF 36). Nor was there any evidence that any college athlete had ever been injured in competition as a result of drug use. JA 269 (FF 36); RT 486. The NCAA admitted that it had no evidence that any student athlete had ever injured anyone else because of drug use. JA 269 (FF 36), 270 (FF 39).

Physicians and athletes testified at trial that the NCAA program was more likely to interfere with, rather than safeguard, athletes' health and safety. JA 265 (FF 13), 270 (FF 41-42). Most of the substances which contain the banned drugs are over-the-counter or prescription medications, which are designed to improve the health of the athlete. JA 270 (FF 41); RT 1233-34, 1251-54. Doctors Dorman, Walters, Greenblatt, Lowenthal and Bunce all testified that banning so many useful medications may be harmful to the health and safety of athletes who are afraid of taking the needed medication for fear that a positive drug test will result.[5] JA 270 (FF 42), 1146-48; RT 417-18, 1233-34, 1251-

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5/ That fear is well-grounded. The concentration level for sympathomimetic amines must be above 10 micrograms per milliliter (a very low threshold) before a urine sample is reported as positive. The NCAA rules further provide that a decision on (cont.)

54; PI 251-52, 319-23, 466-67.

4. The NCAA's Drug Testing Program Was Found Unable To Accomplish Even Its Stated Goals.

The Superior Court found that the NCAA drug testing program fails to achieve its own stated goals. JA 275-76 (FF 25-26). NCAA officials readily admitted that the drug testing done by the NCAA is not designed to and cannot determine whether an athlete took a substance in preparation for or participation in an NCAA post-season competition. JA 276 (FF 27); RT 1237, 1278-79, 1317-18; PI 163-65, 250-52, 1101. Most fundamentally, the urine testing program does not further the goal of assuring fairness in athletic competition because urinalysis drug tests do not measure whether an athlete's performance is currently enhanced, a fact admitted by the NCAA's own experts. JA 276 (FF 27-28); RT 861-62; PI 1101. Drug tests detect only the presence of drug traces or metabolites which remain in urine days or even weeks after consumption, long after any psychoactive or physical effect has worn off. JA 265-66 (FF 15-16); RT 121, 864-66, 1258-59, 1310, 1317-19, 1369-70; PI 887-90. Urinalysis drug tests do not reveal when or how much of the drug was taken, or whether the

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eligibility for a student found positive for sympathomimetic amines "will be based on declaration (of use) consistent with concentration levels determined by laboratory analysis and other data." Dr. Nordschow, who makes these determinations for the NCAA, described the decision as an "educated guess." JA 274 (FF 20); RT 336-38, 355, 358. Doctors Greenblatt and Baselt declared that it was scientifically impossible to make such a determination. JA 274-275 (FF 20); RT 1233-35; PI 221-23. Examples of arbitrariness abound. The NCAA declared one student ineligible who had over 10 mc/ml of pseudoephedrine in urine (JA 961; PI 839-40, 1025-27) but did not declare a student ineligible who had 200 mc/ml of the same substance. RT 1382-83.

athlete's performance at the event was in any way affected. JA 276 (FF 28); RT 1233-35, 1279-81, 1317-20; PI 163-65, 312. A positive test, therefore, has little probative value as to whether an athlete's performance was actually enhanced (even assuming drugs can enhance performance).

The NCAA program is also ineffective in deterring drug use. The NCAA produced no scientific or empirical evidence that drug testing is an effective deterrent to drug use. JA 277 (FF 32-33); RT 1229-30, 1233, 1294-95, 1302, 1304-05; PI 431, 468-69. The NCAA testing, which is preannounced and takes place only at post-season events, at best deters drug use among a very small number of people and only for the immediate period of the drug testing. RT 1152-53. Moreover, drug testing alone, without counseling and rehabilitation, is not an effective deterrent to drug use. PI 429-32. Yet, the NCAA fails to provide any counseling or rehabilitation, or offer schools any assistance in counseling or rehabilitation for athletes whose test results indicate drug abuse even though the NCAA's own survey showed that 75 percent of NCAA schools did not have a plan for treating or rehabilitating student athletes. JA 832-35; RT 1018, 1166-67. This defect in the program exists despite expert consensus that counseling and rehabilitation are critical elements of any substance abuse program. JA 270-71 (FF 45), 832-35; RT 345, 479-80, 486, 493, 1166-67, 1188; PI 429-32, 505.

5. Less Intrusive Alternatives Were Found to Exist.

The court found that the NCAA had not adequately tried

available, less intrusive methods to achieve the stated goals of its drug testing program. JA 279 (FF 47). Prior to 1986, the NCAA's half-hearted drug education program was woefully inadequate even though, according to drug education experts, a comprehensive drug education program with a counseling and rehabilitation component would be far more effective than drug testing in deterring drug use. JA 270-71, 277 (FF 32, 35-37), 278 (FF 40-42); RT 195, 1160; PI 53, 424-26, 431-32, 464-65, 467-69, 1084-86. Yet, nearly 60 percent of college athletes have never had a seminar on drug and alcohol abuse. JA 721, 1146-48. The NCAA also failed to consider testing based on reasonable suspicion as an alternative to suspicionless random testing. JA 278 (FF 45), 693; RT 944- 973. Expert testimony established that reasonable suspicion testing for anabolic steroids would be more effective than random testing in detecting athletes who use steroids. RT 192-93, 1256-57.

ARGUMENT

I. THE SUBSTANTIAL EVIDENCE TEST GOVERNS THIS COURT'S SCOPE OF REVIEW.

The Court of Appeal correctly determined that the Superior Court's extensive findings were supported by substantial evidence. The appellate court noted that "all presumptions favor the exercise of the [trial court's power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences], and the trial court's findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence." Hill v. National Collegiate

Athletic Ass'n, 223 Cal.App.3d 1642, 1652 (1990) (citing People v. Leyba, 29 Cal.3d 591, 596-97 (1981)) (brackets in original).

The trial court lived with this controversy for months. The parties presented conflicting evidence on such factual questions as the extent of drug use among college athletes in connection with athletic competition, the accuracy and reliability of urinalysis drug tests, the impact of specific drugs on health and athletic performance, the efficacy of drug testing with respect to the NCAA's stated goals, and the effectiveness and viability of alternatives to random drug testing. The adjudication of these factual issues turned largely on the credibility of numerous lay and expert witnesses. As the Court of Appeal found, substantial evidence supported the trial court's findings. Hill, 223 Cal.App.3d at 1675.

Although the NCAA pays lip service to the substantial evidence test, it cites to weak, contradictory evidence that the trial court rejected in making its findings of fact. Indeed, the NCAA virtually ignores the trial court's findings despite the fact that it was the NCAA who insisted on a full trial on the merits and called ten of the twelve witnesses who testified during the trial. It is fair to say that the more the trial court heard about the factual underpinnings of the NCAA's drug testing program, the more unconstitutional that program appeared to be. The Court of Appeal, after exhaustively reviewing the trial court's findings of fact, unanimously concluded that the NCAA's drug testing program was unconstitutional. Not surprisingly, then, the NCAA attempts to steer this Court away

from an in-depth analysis of the findings of fact since any such analysis would reveal that the NCAA's urine testing program would be unconstitutional regardless of the legal standard applied to it.

II. ARTICLE I, SECTION 1 OF THE CALIFORNIA CONSTITUTION REQUIRES A SHOWING OF COMPELLING NEED WHEN FUNDAMENTAL PRIVACY INTERESTS ARE INVADED.

A. The NCAA Program Invades Fundamental Privacy Interests.

The NCAA's program of mandatory random urine screening of student athletes unquestionably violates several areas of privacy protected by Article I, Section 1 of the California Constitution. This Court, in holding that a courtroom witness could not be compelled without sufficient cause to submit to drug testing, has already recognized that urinalysis drug testing invades "privacy and dignitary interests protected by the due process and search and seizure clauses." People v. Melton, 44 Cal.3d 713, 739 n.7, cert. denied, 488 U.S. 934 (1988). The Courts of Appeal subsequently have held that the "collection and testing of urine intrudes upon reasonable expectations of privacy." Wilkinson v. Times Mirror Corp., 215 Cal.App.3d 1034, 1048 (1989); Luck v. Southern Pac. Transp. Co., 218 Cal.App.3d 1, 16, cert. denied, 111 S.Ct. 344 (1990). See also Semore v. Pool, 217 Cal.App.3d 1087, 1099 (1990). (pupillary reaction test, although less intrusive than urine test, may invade privacy).

The NCAA's drug testing program is far more invasive than any of the programs challenged in prior cases. It invades a

mulitplicity of discrete and substantial privacy interests. First, the NCAA requires "monitored" urination during which the sample is collected directly under the watchful eye of an NCAA monitor, exposing the students' genitals. The United States Supreme Court has observed:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 617 (1989) (citation omitted).

Second, the NCAA requires that the athletes indicate all medications (including birth control pills) taken in the two to three weeks previous to giving their urine sample and uses the urine tests themselves to disclose a wide range of substances consumed by the student athletes. "A person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." Board of Medical Quality Assurance v. Gherardini, 93 Cal.App.3d 669, 678 (1979). Accord Wood v. Superior, 166 Cal.App.3d 1138, 1147 (1985); Jones v. Superior Court, 119 Cal.App.3d 534, 549-50 (1981); Gunn v. Employment Dev. Dept., 94 Cal.App.3d at 658, 663-65 (1979).

Third, the NCAA's testing program directly interferes with student-physician relationships and student access to bona fide therapeutic medication. The 2,600 substances banned by the NCAA includes those commonly prescribed for the treatment of

colds, allergies, high blood pressure, and asthma. JA 762-820; RT 417-18, 1233, 1251-54. With narrow exceptions,[6] the NCAA bans the use of these drugs regardless of whether they were taken by the athlete pursuant to a valid medical prescription. The trial court found that drug tests cannot distinguish therapeutic and nontherapeutic uses of compounds, and thus a student athlete must choose between risking disqualification and medical care. JA 270 (FF 41-42). Placing athletes in this kind of dilemma constitutes a substantial and unwarranted interference into the student athlete's relationship with his or her physician and right to medical treatment. In re Lifschutz, 2 Cal.3d 415, 431-32 (1970); Bartling v. Superior Court, 163 Cal.App.3d 186, 194 (1984); Gherardini, 93 Cal.App.3d at 679.

Fourth, because urine tests detect metabolites of substances consumed days, weeks, or even months before, urinalysis opens a "chemical window" through which the NCAA can surveil and intrude upon a student's private, "off-the-field" activities. For instance, urinalysis discloses a woman athlete's use of birth control pills even though such private, off-the-field activity has no effect upon the athlete's performance. JA 265-66 (FF 12, 15); RT 969-70. Cf. Rulon-Miller v. I.B.M., 162 Cal.App.3d 241, 248, 255 (1984) (employment regulations requiring inquiry into purely personal activities unrelated to employees job may violate right to privacy); Kelley v. Schlumberger, 849

6/ These exceptions include certain local anesthetics, three beta agonists for asthma, and corticosteriods.

F.2d 41 (1st Cir. 1988) (upholding verdict in favor of plaintiff fired because of a positive drug test resulting from off-duty use of marijuana).

Finally, the test results not only are reported to the NCAA, but are inevitably subject to widespread media speculation, rendering confidentiality non-existent. JA 266 (FF 17); PI 71-72, 102-04.

B. The Court of Appeal Properly Applied Strict Scrutiny to the NCAA's Drug Testing Program.

Because the NCAA's drug testing program substantially invades the privacy of student athletes, it is subject to strict judicial scrutiny, a test long established by the California courts in enforcing Article I, Section 1: The program is impermissible unless it is narrowly tailored to promote a compelling objective. That standard was first enunciated by this Court in White v. Davis, 13 Cal.3d 757 (1975).[7] This Court recognized that the legislative history of the 1972 privacy initiative, which added privacy to the list of inalienable rights secured by the California Constitution, indicated that the voters

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7/ The NCAA's claim that the Court of Appeals improperly subjected the program to strict scrutiny under the unconstitutional conditions analysis is meritless. Although the unconstitutional conditions analysis, first established in Bagley v. Washington Township Hosp. Dist., 65 Cal.2d 499, 505 (1966), is worded differently from the compelling interest language, it is functionally identical in the close judicial scrutiny it demands, and the heavy burden it imposes. Robbins v. Superior Court, 38 Cal.3d 199, 213-14 (1985); Committee to Defend Reproductive Rights v. Myers, 29 Cal.3d 252, 265-66, 276 n.22 (1981); id. at 289 n.2 (Bird, C.J., concurring).

intended that the traditional standard for evaluating invasions of fundamental constitutional rights would govern the new explicit California constitutional right to privacy:

> [T]he [ballot pamphlet] statement makes clear that the amendment does not purport to prohibit all incursion[s] into individual privacy but rather that any such intervention must be justified by a compelling interest.

White, 13 Cal.3d at 775.

In over 15 years of privacy litigation following White, this Court[8] and the Courts of Appeal[9] have uniformly demanded

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8/ Long Beach City Employees Ass'n v. City of Long Beach, 41 Cal.3d 937, 948 n.1 (1986); Conservatorship of Valerie N., 40 Cal.3d 143, 163-64 (1985); People v. Stritzinger, 34 Cal.3d 505, 511 (1983); City of Santa Barbara v. Admanson, 27 Cal.3d 123, 131 (1980); Loder v. Municipal Court, 17 Cal.3d 859, 865 (1976), cert. denied, 429 U.S. 1109 (1977). Even before an explicit right to privacy was added to Article I, Section 1 of the Constitution, this Court required a compelling justification for privacy invasions. Ballard v. Anderson, 4 Cal.3d 873, 880 (1971) (restriction on abortions would "necessarily" have to be based on a "compelling" state interest in order to be upheld); City of Carmel-By-The-Sea v. Young, 2 Cal.3d 259, 268 (1970) (financial disclosure law not jusitifed by compelling interest).

9/ See, e.g., American Academy of Pediatrics v. Van de Kamp, 214 Cal.App.3d 831, 843 (1989); People v. Stockton Pregnancy Control Medical Clinic, Inc., 203 Cal.App.3d 225, 241 (1988); Boler v. Superior Court, 196 Cal.App.3d 467, 473 (1987); Rider v. Superior Court, 199 Cal.App.3d. 278, 285 (1988); Binder v. Superior Court, 196 Cal.App.3d 893, 900 (1987); Eldorado Savings & Loan Ass'n v. Superior Court, 190 Cal.App.3d 342, 345 (1987); Kahn v. Superior Court, 188 Cal.App.3d 752, 765 (1987); Planned Parenthood Affiliates v. Van de Kamp, 181 Cal.App.3d 245, 279 (1986); Wood v. Superior Court, 166 Cal.App.3d 1138, 1147-48 (1985); Payton v. City of Santa Clara, 132 Cal.App.3d 152, 155 (1982); Board of Trustees v. Superior Court, 119 Cal.App.3d 516, 531-32 (1981); Morales v. Superior Court, 99 Cal.App.3d 283, 290 (1979); Central Valley Chapter of Seventh Step Foundation, Inc. v. Younger, 95 Cal.App.3d 212, 237-40 (1979); Gunn v. Employment Development Dep't, 94 Cal.App.3d 658, 663 (1979); Board of Medical Quality Assurance v. Gherardini, 93 Cal.App.3d 669, 681 (1979); Fults v. Superior Court, 88 Cal.App.3d 899, 903 (1979).

that a cognizable burden on privacy be justified as the least invasive means of achieving an objective. This familiar analytic framework reflects the concept of privacy as a fundamental right, explicitly anchored in our state's highest law. When the voters added "privacy" to "life," "liberty" and "property" as the inalienable rights enumerated in the first section of the first article of the California Constitution, they expected that their personal privacy would be sacrificed only when necessary to satisfy a paramount public need. The voters entrusted the courts with safeguarding their fundamental rights by applying the traditional searching judicial scrutiny of privacy invasions.

Implicitly acknowledging that its drug testing program cannot hope to survive strict judicial scrutiny, the NCAA urges this Court to reject sixteen years of constitutional doctrine and fashion a new diluted standard for privacy analysis. The NCAA now argues that compelling interest analysis means something different -- and less protective -- in Article I, Section 1 litigation than in all other constitutional litigation by engaging in a disingenuous reading of carefully selected portions of cases. Read properly, these cases either found that a challenged program did not trigger strict scrutiny because it did not impose a cognizable burden on privacy or that it did invade privacy and thus was impermissible absent a compelling justification.

The first class of opinions cited for a lenient standard of review are cases in which courts found that a challenged program did not trigger strict scrutiny because it did not impose

a cognizable burden on privacy. Schmidt v. Superior Court, 48 Cal.3d 370, 389-90 (1989) (minimal age requirements for mobilehome parks affecting "limited" number of units); Wilkinson v. Times Mirror Corp., 215 Cal.App.3d 1034, 1047 (1989);[10] Miller v. Murphy, 143 Cal.App.3d 337 (1983) (fingerprinting of regulated occupation); Garrett v. Los Angeles City Unified School Dist., 116 Cal.App.3d 472 (1981) (single medical x-ray for tuberculosis). Schmidt, Wilkinson, Miller and Garrett have been read as cases in which the challenged program imposed an insufficient burden of privacy to trigger constitutional analysis. See, e.g., Luck, 218 Cal.App.3d at 20 n.14; In re Respondent B, 91 C.D.O.S. 3018 (April 22, 1991) (opinion of State Bar Court). They apply the familiar principle that strict scrutiny follows only after a litigant makes a prima facie case of a cognizable invasion of privacy. Where plaintiffs cross that litigation threshold, as clearly they have here, compelling interest is the standard.

10/ The Wilkinson court identified several factors, not present here, that particularly minimized the intrusiveness of the pre-employment drug testing program. First, subjecting urine samples for analysis for alcohol and drugs was deemed only slightly more intrusive than the procedures which plaintiffs reasonably expected, since job applicants had to submit to a medical examination conducted to determine fitness for the job in question anyway. Second, the samples were collected in a medical environment, during the pre-employment physical, by persons unrelated to the employer. Third, applicants were not observed while furnishing the samples. Finally, medical history and other information provided by the applicants and the results of the urinalysis were confidential; none of the revealed information was provided to Matthew Bender. Thus even assuming arguendo Wilkinson was correctly decided, it is inapposite to the case at bar.

The NCAA purports to find a diluted standard of review from language of "balance" selectively culled from Article 1, Section 1 opinions. Read properly, every decision, including those of this Court, applies a traditional compelling interest standard.[11] In Loder v. Municipal Court, 17 Cal.3d 859 (1976), this Court began its analysis by stating that "compelling interest" is the test, id. at 864, and ends by concluding that retention of arrest records satisfies that demanding standard. Id. at 876. Courts of Appeal have understood Loder as requiring a compelling interest for the retention and dissemination of nonconviction data. American Academy of Pediatrics, 214 Cal.App.3d at 162-65; Seventh Step, 95 Cal.App.3d at 237. Similarly, in Doyle v. State Bar, 32 Cal.3d 12 (1982), this Court clearly applied the compelling interest test, citing White and Gherardini for the rigorous justification required for access to client financial records. Doyle, 32 Cal.3d at 19-20. The State Bar Court properly reads Doyle as demanding traditional strict scrutiny. In re Respondent B., 91 C.D.O.S. at 3019 (citing Doyle for authority that Article I, Section 1 "require[s] a 'compelling interest' to justify [a privacy] invasion"). No court has read Loder and Doyle, as the NCAA claims to, as tacitly embracing a

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11/ Most of the decisions cited by the NCAA involve discovery requests for sensitive information protected by Article 1, Section 1. While using the language of "balance" in weighing the need for disclosure against the privacy interest, California courts have engaged in traditional compelling interest analysis. The ascertainment of the truth in litigation is a compelling concern. Vinson v. Superior Court, 43 Cal.3d 833, 842 (1987); Britt v. Superior Court, 20 Cal.3d 844, 855 (1978).

novel, lax standard.

The NCAA disregards the independence of the California Constitution by claiming that drug testing programs should be subject only to the relaxed "reasonableness" inquiry used by federal courts under the Fourth Amendment. The standards for constitutional adjudication under Article I and the federal Fourth Amendment are widely disparate. As the Court of Appeal has stated, merging the standards would require a serious distortion of settled law:

> The constitutional right to privacy does not prohibit all incursion into individual privacy, but provides that any such intervention must be justified by a compelling interest. This test places a heavier burden on [the private entity defending a drug testing program] than would a Fourth Amendment privacy analysis, in which the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Although [the employer] urges us to use the Fourth Amendment test, we see no reason to depart from existing precedent applying the compelling interest test in cases arising under article I, section 1 of the state Constitution.

Luck, 218 Cal.App.3d at 20 (citations and footnotes omitted).

The voters added "privacy" to the list of inalienable freedoms explicitly secured by our state constitution to supplement existing constitutional protections, and thus to prevent intrusions that would be permitted under the federal Constitution. American Academy of Pediatrics, 214 Cal.App.3d at 840-42; Seventh Step, 95 Cal.App.3d at 235; Porten v. University of San Francisco, 64 Cal.App.3d 825, 829 (1976). In urging this Court to make the state and federal constitutional standards co-

extensive, the NCAA is essentially asking this Court to nullify the additional protection for personal privacy sought by the voters as well as prior decisions of this Court. This Court should reject this invitation.

This Court likewise should reject the NCAA's invitation to fashion lax levels of scrutiny for it simply because it is a private entity. To do so would thwart the clear intent of the people of California. The ballot argument expressly identifies private business as the focus of the amendment's protection each and every time it mentions the government.[12] Consistent with this unambiguous legislative history, an unbroken line of cases has applied the privacy clause of Article I, Section 1, and its

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12/ The following excerpts make clear that private business was of equal concern to the voters:

(1) "At present there are no effective restraints on the information activities of government and business."

(2) The right of privacy "prevents government and business interests from collecting and stockpiling unnecessary information about us . . . ."

(3) "The proliferation of government and business records over which we have no control limits our ability to control our personal lives."

(4) "Even more dangerous is the loss of control over the accuracy of government and business records on individuals."

(5) "[F]ew government agencies or private businesses permit individuals to review their files and correct errors."

Voters' Pamphlet, November 7, 1972 General Election, at 26-27 (emphasis added).

strict judicial scrutiny, without regard to whether the entity is private or public.[13] Morever, the NCAA is in a particularly inappropriate position to advance such a major doctrinal change in Article I, Section 1 law, since it has the essential attribute which warrants the application of constitutional restriction -- it has monopoly power over the market of intercollegiate sports.[14]

The NCAA's argument that lesser scrutiny should obtain because intercollegiate activities are "voluntary" must likewise be rejected. As the NCAA itself recognizes, intercollegiate sports for many college students is an integral and important part of their education. Indeed, for the many college athletes, such as Barry McKeever, who depend upon their athletic scholarships, refusing consent to NCAA drug testing would be tantamount to forfeiting their college education. The NCAA's drug testing program is hardly "voluntary" when imposed by the

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13/ See, e.g., Luck, 218 Cal.App.3d at 19; Semore, 217 Cal.App.3d at 1094; Cutter v. Brownbridge, 183 Cal.App.3d 836 (1986); Miller v. NBC, 187 Cal.App.3d 1463, 1491 (1986); Park Redlands v. Covenant Control Committee, 181 Cal.App.3d 87, 98 (1986); Porten, 64 Cal.App.3d at 829; Chico Fem. Women's Health Center v. Butte Glen Medical Services, 557 F. Supp. 1190, 1203 n.23 (E.D. Cal. 1983).

14/ Marsh v. Alabama, 326 U.S. 501 (1948) (First Amendment applied to "company town"); Robins v. Pruneyard Shopping Center, 23 Cal.3d 899 (1979) (free speech clause of California Constitution applied to shopping center); Gay Law Students' Ass'n v. Pacific Telephone and Telegraph Co., 24 Cal.3d 458, 470-71 (1979) (Equal Protection Clause of California Constitution applied to public utility). Cf. Pinsker v. Pacific Coast Society of Orthodontists, 12 Cal.3d 541 (1974) (:: -:· law requirement of "fair procedure" required of monopolistic medical organization).

association which has a virtual monopoly on collegiate sports.

Even more fundamentally, the "voluntariness" argument, if accepted, would completely undermine the vitality of the privacy clause. Any entity could circumvent the protection of Article I, Section 1 and "produce a result which [it] could not command directly," Speiser v. Randall, 357 U.S. 513, 526 (1958), simply by conditioning the benefit it offers upon waiver of one's privacy, or even by merely announcing in advance its intent to invade one's privacy. For instance, what would stop the City of Santa Barbara in Adamson from advising all new incoming residents that households with unrelated members should live elsewhere, or the University of San Francisco in Porten from declaring that it will make student transcripts accessible to anyone? Or more to the point, what would prevent the employer in Luck from announcing that henceforth all employees will be subject to random urinalysis drug tests irrespective of the nature of their job? California voters never intended to let the right to privacy under Article I, Section 1 be eviscerated by allowing an entity, be it public or private, to "buy up" the fundamental right to privacy under the rubric of "voluntariness."

The NCAA tries hard to escape traditional constitutional review because its drug testing program cannot survive it. It blames judicial scrutiny for its failure, claiming that the compelling interest test is "fatal" to any privacy limitation. This is simply incorrect. Strict judicial scrutiny does not invariably result in the invalidation of a challenged program. In this large state, with its pressing modern problems,

California courts regularly conduct searching judicial scrutiny and decide that some privacy invasions must be endured for the collective security of the public -- for example, to combat crime, Loder, 17 Cal.3d at 876, to regulate the legal profession, Doyle, 32 Cal.3d at 19-20, or to control the AIDS epidemic. Johnetta J. v. Municipal Court, 218 Cal.App.3d 1255 (1990). In those cases, the judiciary has performed the task entrusted to it and has ensured that the means chosen are narrowly fashioned to promote the important objective with a minimum sacrifice of precious privacy rights.

C. The Court Of Appeal Properly Affirmed That The NCAA Failed To Establish A Compelling Interest.

Because both the Superior Court and Court of Appeal properly found the NCAA drug testing program constituted a substantial and cognizable privacy invasion, the burden fell upon the NCAA to prove its program was narrowly tailored to advance a compelling interest which could not be accomplished by any less intrusive alternative. Long Beach Employees, 41 Cal.3d at 948 n.12; City of Santa Barbara, 27 Cal.3d at 131; White, 13 Cal.3d at 775. The NCAA failed to carry that burden at trial.

The NCAA advances two interests in support of its drug testing program: ensuring fair competition in its post-season games and protecting the health and safety of college athletes. Fair competition in post-season events, though significant, pales in importance in comparision to the compelling interest in combating crime or controlling the AIDS epidemic found sufficient in Loder and Johnetta J..

Even if ensuring fair competition in post-season collegiate games could constitute a "compelling interest," the trial court found that the banned drugs did not in fact enhance the performance of college athletes in the 26 sports tested and hence the program does not further that interest. JA 271 (FF 2). Although the evidence on this point was conflicting in some respects, the trial court's finding, based on its assessment of expert testimony, is supported by substantial evidence. See supra pp. 12-15. The NCAA contends the Court of Appeal erred in requiring the NCAA to prove "beyond scientific dispute" that the banned drugs enhance performance. AOB 35. The court imposed no such burden. The Court of Appeal merely affirmed that the evidence presented by plaintiffs and Intervenor Stanford University was more credible and substantial than that presented by the NCAA.[15]

With respect to the second goal, the NCAA's asserted interest in protecting the health of college athletes cannot justify violating the constitutional right to privacy which belongs to the very students the NCAA purportedly seeks to protect. The NCAA seeks to violate the constitutional rights of students "for their own good." This naked assertion of paternalism is entirely dissimilar to the usual justification given for employee drug testing of protecting other employees and the public from the acts of a drug-impaired worker. See, e.g.,

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15/ The NCAA's scientific experts were far from unbiased since they had their monetary and professional careers linked to continued NCAA drug testing. RT 1367-69.

Skinner, 489 U.S. at 628. If the government cannot force an individual to submit to an intrusion of one's bodily integrity to receive life supporting treatment, Bartling, 163 Cal.App.3d 186; Conservatorship of Drabick, 200 Cal.App.3d 185 (1988), then surely the NCAA cannot require college athletes to submit to invasive urinalysis drug testing because the NCAA determines that the use of any of 2,600 drugs may be detrimental to their health. Cf. Robbins, 38 Cal.3d at 215 (paternalistic interest in improving the quality of life of welfare recipients did not justify invasion of their fundamental right to privacy). Again, even if this interest could be deemed sufficiently compelling, the NCAA's attempt to justify the urine testing program as protecting the athletes' health also had no factual basis. The Court of Appeal affirmed the trial court's finding that there was no evidence that drug use in NCAA athletic competition was in fact endangering the health and safety of athletes. Hill, 223 Cal.App.3d at 1668. In fact, the overreaching scope of the 2,600 drugs banned by the NCAA have caused athletes to allow many ailments to go untreated in order to assure a "clean" test. JA 270 (FF 42). As a result, the overall impact of the NCAA drug testing program as a practical matter is deleterious to the health of college athletes.

Moreover, both purported justifications are rendered insufficient by the trial court's finding that there was no significant drug use in connection with intercollegiate competition, a finding supported by substantial evidence. See

supra pp. 7-9.[16] The NCAA's evidence of drug use generally discussed in its opening brief is irrelevant because it does not pertain to use in competition, the only use to which the NCAA progam is directed.

The NCAA attacks the trial court's finding that there is no substantial drug use in connection with intercollegiate sports with the possible exception of steroid use in football. Relying on federal law, the NCAA contends it need not "prove" widespread drug use before it implements massive urine testing. AOB 24-27.[17] However, this Court's past decisions make clear that a searching analysis of the facts is critical in determining

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16/ The NCAA, citing frequently to those portions of Dr. Lowenthal's articles which opine about the use of certain drugs, fails to inform the court of Dr. Lowenthal's fundamental view, which was that drugs do not under any circumstances enhance performance. PI 258-61, 272, 277-81, 284, 286-87.

17/ The NCAA wrongly relies on Buckley v. Valeo, 424 U.S. 1 (1976), County of Nevada v. MacMillen, 11 Cal.3d 662 (1974) and Garrett, 116 Cal.App.3d 472 for the proposition that it need not prove drug use among student athletes before invading their privacy. AOB 26-27 In MacMillen and Buckley, legislation was enacted in response to well-documented problems of financial improprieties by candidates and legislators. Garrett is inapposite because, as discussed supra, the court did not apply the compelling interest test because a de minimus privacy invasion was involved. In any event, the record there showed that more than 100 students were exposed to tuberculosis by a former employee, and six of those students developed active tuberculosis. Garrett, 116 Cal.App.3d at 479. Cf. Ingersoll v. Palmer, 43 Cal.3d 1321, 1338-39 (1987) (documenting the fact that alcohol-related auto accidents caused more deaths between 1976 and 1980 than did the Vietnam War during its bloodiest year). Moreover, while the need for a factual justification might be diminished where the consequences of a risk are catastrophic, see National Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989), a lesser showing cannot be justified here where there are no such consequences.

whether a compelling need exists to justify an incursion into individual privacy. For example, in Loder, this Court rigorously reviewed and catalogued the numerous facts applicable to the criminal process in determining whether the government has demonstrated a compelling interest in keeping records of arrests which did not result in conviction. Loder, 17 Cal.3d at 864-68. See also Robbins v. Superior Court, 38 Cal.3d 199, 214-16 (1985) (rejecting the existence of a compelling governmental interest overcoming a right to privacy because of a lack of factual showing); id. at 221-22 (Lucas, J., dissenting) (arguing that the factual record establishes a compelling interest). Moreover, the Fourth Amendment cases relied upon by the NCAA are inapposite: The importance of relying on the factual record in Article 1, Section 1 cases stems directly from the California Constitution's compelling interest test itself, which is very different from the scrutiny required under the Fourth Amendment. See infra pp. 40-42.

D. The NCAA's Broad, Invasive Program Is Not Narrowly Tailored To Accomplish Even The NCAA Stated Objectives.

The NCAA's program is neither narrowly tailored nor effective in accomplishing its stated purposes. Hill, 223 Cal.App.3d at 1673. The NCAA's drug testing program is supposed to disqualify athletes only if a positive urinalysis test shows that a banned substance was used in preparation for or participation in championship or post-season events. JA 264-65 (FF 11). But the testing program can never accomplish this goal

because urinalysis simply cannot determine when or for what purpose a banned substance was used. See supra pp. 15-16. Conversely, under the program, student athletes can use drugs as long as the NCAA does not catch them through urine testing. For example, students who admitted to using a cocaine spray and steroids were not declared ineligible because their urine tests were negative. JA 265 (FF 11), 1169-70; PI 1018, 1245. Students who test positive in their school's drug testing program are allowed to compete so long as they do not test positive under the NCAA program. JA 265 (FF 11); PI 517, 1256-57.

The NCAA's urine screening program suffers further because it tests too many athletes for too many drugs. JA 281-82. The appellate court affirmed that "the test program was too broad, and its accuracy doubtful." Hill, 223 Cal.App.3d at 1675. Even if the NCAA had proven some drugs do enhance performance, which it did not, all of the clinical pharmacologists and toxicologists who testified admitted that the NCAA's drug testing program "includes substances which do not enhance performance, for which there is no evidence of use in college athletics and which are not even available." JA 275 (FF 23); RT 5, 30-35, 39, 42-45, 48, 82-84, 784-88, 1272-75, 1336-37, 1378-80, 1385-89; PI 277-81, 287, 824-26, 828. The program tests all athletes, without any suspicion of use, and in all sports regardless of whether the athlete would have had any incentive to use the particular banned substance. JA 192, 197. Female divers and golfers, as well as male football players, are tested for anabolic steroids even though the testimony was nearly undisputed

that women athletes are not using steroids and have no incentive to do so. JA 267 (FF 23), 759, 1039-46; RT 1380.

The NCAA Drug Testing Committee originally recommended a plan which would limit testing to stimulants in all sports and anabolic steroids in three sports. JA 306-07. Apparently moved by its perception of the current public crusade against drugs, the NCAA rejected the recommendation of its committee and subsequently decided to make the drug testing program as broad as possible. Indeed, the NCAA program is even broader than that of the International Olympic Committee.[18]

With respect to the health and safety rationale, it is also undisputed that the vast majority of the banned 2,600 drugs are legal and have a beneficial therapeutic value. JA 270 (FF 41). The net effect of the drug testing program is to injure rather than to promote the athletes' health. More fundamentally, the one-time testing at post-season events is simply not designed to address the health of college athletes, since it evinces no concern for the vast majority of athletes who do not have the fortune of qualifying for a bowl game or other post-season

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18/ The NCAA tests for "street drugs," such as marijuana; the IOC does not. PI 963. In addition, the NCAA's list of banned substances is fatally overbroad because each category contains the words "and related compounds" or "others." Dr. Catlin, one of the NCAA's laboratory directors, could not explain what the NCAA meant by "others." RT 1388. Athletes likewise have no way of knowing what drugs actually are prohibited. Even the NCAA's own laboratory directors, consultants and staff could not agree on what drugs are contained on the list. For example, Doctors Catlin, Voy and Patmont thought that codeine was on the banned list under street drugs; Dr. Nordschow was not sure; and Dr. Hanley and Ms. Berkey stated that it was not. JA 275 (FF 24); RT 125, 244, 279, 1386-87; PI 964, 1230.

play. Perhaps most tellingly, the program does not address at all the drug that poses the most serious threat to student athletes' health: alcohol. JA 270 (FF 44). Nor does the program have any drug counselling or rehabilitating component, an essential ingredient to any program designed to help its targets. The NCAA does not even require a physical exam. Hence, in respect to its stated goal, the NCAA's program is ineffective at best, disengenuous at worst.

E. The NCAA's Failed Program Is Not The Least Intrusive Alternative.

The NCAA additionally failed to carry its further burden at trial of demonstrating that there exist no less intrusive means available to further its asserted interests. Long Beach Employees, 41 Cal.3d at 948 n.12; Robbins, 38 Cal.3d at 214 n.20 (1985); Wood, 166 Cal.App.3d at 1148; Porten, 64 Cal.App.3d at 832. The trial court's specific finding that the NCAA failed to carry its burden is supported by substantial evidence. JA 277 (FF 34).

The trial court found that drug education was a viable alternative to drug testing which had not been adequately attempted by the NCAA. JA 277 (FF 35). As the Court of Appeal noted, the NCAA's drug education effort prior to the drug testing program was minimal and consisted only of the publication of a brochure and some posters. Hill, 223 Cal.App.3d at 1673; JA 277 (FF 36); RT 195; PI 53, 988-96. Tellingly, the NCAA spent more than $1 million on drug testing in its first year; in a ten year period from 1975 to 1985, the NCAA spent a total of only $200,000

on drug education. JA 277 (FF 37); RT 1160; PI 1084-86, 1176.

As explained by Dr. Steven Danish, Chair of the Department of Psychology at Virginia Commonwealth University and faculty representative to the NCAA, educational and counselling programs without drug testing components have enjoyed success among student populations. JA 1053-56.

The NCAA contends that even if drugs do not enhance performance, some athletes think they do. JA 277-78 (FF 39); AOB 33. This makes the NCAA's singular focus on testing particularly deplorable. The NCAA's own experts testified that drug education is effective in destroying the myths concerning drugs and sports, such as the placebo effect and the effect of amphetamines. JA 277-78 (FF 39); RT 1161.

The NCAA also failed to consider testing based on reasonable suspicion as an alternative to random testing. JA 278 (FF 45), 693; RT 944, 973. Expert testimony established that a drug testing program for anabolic steroids (the one drug for which there is some indication of use in one sport) may be based on reasonable suspicion and would detect accurately many of those using steroids. RT 192-93, 1256-57. Reasonable suspicion testing would eliminate the unnecessary testing of many innocent student athletes. JA 278 (FF 45); RT 192-93, 1256-57. The trial court thus properly concluded that the NCAA had not adequately tried the available, less intrusive methods to achieve its stated goals. JA 279 (FF 47).

II. THE NCAA PROGRAM IS UNCONSTITUTIONAL EVEN UNDER A REASONABLENESS STANDARD.

Even under the less stringent Fourth Amendment, the courts permit suspicionless testing only under circumstances far more exigent than in the instant case. E.g., National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). In Von Raab, the Court sustained urinalysis testing of U.S. Customs Service employees slated for promotions into positions that involved either direct interdiction of illicit drugs or carrying of firearms. Von Raab, 489 U.S. at 679.[19] In Skinner, the Court upheld the Federal Railroad Administration regulations authorizing railroads to toxicologically test certain railroad train crews involved in major accidents. Skinner, 489 U.S. at 633-34.

Following Von Raab and er, the federal courts have limited the classes of employees that may be randomly tested to those who: (1) are engaged in duties which specially require the upmost integrity and a clear, direct nexus exists between those duties and purported drug use; (2) "discharge duties fraught with such risks of injury to others that even a momentary lapse can

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19/ The Court withheld judgment on the reasonableness of testing employees solely because they would handle classified materials, instead remanding the case to the Court of Appeal so that it could "clarify the scope of this category of employees." Von Raab, 489 U.S. at 678-79. The Court found that the record did not establish a sufficiently compelling interest to test a broad range of employees including accountants, attorneys and co-op students who are not "likely to gain access to sensitive information." Id. at 678.

have disastrous consequences"; and (3) handle "truly sensitive information." See Harmon v. Thornburgh, 878 F.2d 484, 490-91 (D.C. Cir. 1989) (prohibiting testing of federal prosecutors and Justice Department employees with access to grand jury proceedings, but allowing testing of employees holding top secret national security clearances), cert. denied, 110 S.Ct. 865 (1990). No court after Von Raab and Skinner has held interests in fair athletic competition or in protecting a student athlete against his or her own excesses justifies warrantless, suspicionless drug testing. Cf. National Treasury Employees Union v. Yeutter, 918 F.2d 968, 972 (D.C. Cir. 1990) (distinguishing professional drivers, who are responsible for their passengers' lives, from ordinary motor vehicle operators).

In permanently enjoining the drug testing of students in grades seven through twelve who participated in extra-curricular activities, the federal district court in Brooks v. East Chambers Consol. Ind. School District, 730 F. Supp. 759 (S.D. Tex. 1989), aff'd, 930 F.2d 915 (5th Cir. 1991), noted that none of the criteria identified in Von Raab as justifying drug testing applied to school children nor could they be analogized to similar factors in the school setting.

> While the discouragement of the use of drugs and alcohol by young people is honorable if the means of the discouragement are not narrowly tailored to that goal, then they are not reasonable in the constitutional sense.

Id. at 765.[20]

20/ The Brooks court refused to follow the Seventh Circuit's decision in Schaill v. Tippecanoe County School Corp., 864 F.2d (cont.)

III. THE SUPERIOR COURT'S INJUNCTION DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. The Enforcement Of Article I, Section 1 Against The NCAA's Post-Season Drug Testing Does Not Impose A Disruption To A Phase Of Interstate Commerce Which Demands Uniformity.

The NCAA's reliance on Partee v. San Diego Chargers Football Co., 34 Cal.3d 378 (1983), cert. denied, 446 U.S. 904 (1984), for the proposition that its need for national uniformity of regulation immunizes it from scrutiny under local law is based on its misunderstanding of Commerce Clause analysis and its misinterpretation of Partee.

A state may directly regulate significant aspects of interstate commerce even where national uniformity of interstate commerce is affected. Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (upholding local smoke abatement law requiring structural changes to steamers engaged in interstate commerce); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (upholding Indiana law regulating interstate takeovers of corporations incorporated in Indiana); Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714 (1963) (upholding application of state anti-discrimination law to airline pilot flying in interstate commerce).[21] The Commerce

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1309 (7th Cir. 1988), a case repeatedly cited by the NCAA. See, e.g., AOB 17-19, 25, 32, 33, 37, 38. The Brooks court reasoned that the outcome in Schaill would have been different if decided after the Supreme Court's decisions in Von Raab and Skinner.

21/ See also Goldberg v. Sweet, 488 U.S. 252 (1989) (upholding Illinois state tax on interstate telecommunications); Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas, (cont.)

Clause does not "prevent[] those state laws from reaching transactions that have interstate aspects but significantly affect state interests." Younger v. Jensen, 26 Cal.3d 397, 405 (1980).

Where a challenged law allegedly impinges upon an asserted need for national uniformity, the court must engage in a two-prong inquiry. First, it must determine whether the regulation actually impinges upon "an area where uniformity of regulation is necessary." Huron Portland Cement, 362 U.S. at 444 (emphasis added). If it does, the regulation is not per se illegal; the court must balance the extent of the burden against the strength of the local interest advanced by the challenged regulation. See Partee, 34 Cal.3d at 383 (impingement on uniformity can be justified by "a strong state interest"); Flood v. Kuhn, 443 F.2d 264, 268 (2d Cir. 1971) (finding that burden on interstate commerce "outweighs" the state's interest), aff'd, 407 U.S. 258 (1972); City of Oakland v. Oakland Raiders, 174 Cal.App.3d 414, 421-22 (1985) (city's interest in promoting public recreation, social welfare, and economic benefits outweighed by burden eminent domain would impose on interstate

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489 U.S. 493 (1989) (state regulation of interstate pipeline); Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (state law preventing oil producers and refiners from owning retail stations within the state); Chicago P.I. & P.R. Co. v. Arkansas, 219 U.S. 453 (1911) (state requirement of full train crews); Missouri Pac. R. Co. v. Norwood, 283 U.S. 249 (1931) (same); Smith v. Alabama, 124 U.S. 465 (1888) (state regulation of licensing railroad engineers); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938) (state regulation of weight and width of motor cars passing interstate over its highways).

commerce), cert. denied, 478 U.S. 1007 (1986). With respect to both prongs of the analysis, the court must examine the facts presented in the record in reaching its determination. Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 441 (1978); Colorado Anti-Discrimination Commission, 372 U.S. at 719.

The NCAA has made no showing whatsoever that the injunction would materially disrupt its operations or that uniformity in drug testing programs is "necessary". The Court of Appeal properly sustained the trial court's findings that the injunctions did not impose any undue burden on the NCAA's national operations:

> The trial court specifically found that the NCAA has held championships for eighty years without drug testing, and that the NCAA does not test at all of its championships. At the championships where it does test, it does not test all teams or all players. Furthermore, the court found that an injunction prohibiting testing of Stanford athletes and prohibiting retaliation against Stanford does not affect commerce since the commercial arrangements for the competitions and games "survived undisturbed."

Hill, 223 Cal.App.3d at 1676. Moreover, as discussed above, the trial court found that the drug use in connection with athletic competition is virtually non-existent and that, in any event, the drugs tested do not actually enhance athletic performance. Indeed, the NCAA failed to make any showing of hardship at trial even though a temporary restraining order and preliminary injunction had been in place for nearly two years. These findings further establish that the conduct and integrity of the post-season games in which Stanford participates will not be affected by the injunction.

The decision in Partee is narrow and distinguishable: This Court expressly limited its decision to the player selection rules of the NFL, stating that multi-state activities of other businesses might well be subject to state regulation under the Commerce Clause. Partee, 34 Cal.3d at 385-86 n.5. The NFL is a business enterprise whose existence is predicated on a league structure. Parity in the long term and on-going competitiveness of its twenty-eight teams may well be essential to its economic survival. Partee involved a challenge to a long standing policy designed to ensure that parity: player selection and distribution. If Partee had succeeded, NFL teams in California could circumvent the draft and option rules and "steal" the best players from other teams who were still bound by the NFL rules. The resulting disparity in competitiveness within the league and disruption to the league structure was obvious and substantial.[22]

By contrast here, the NCAA is only an association of colleges, universities and conferences, wherein diversity not uniformity is the hallmark. Most tellingly, the NCAA exercises no control over drug testing during the season. There is no uniformity among colleges with respect to drug testing even within the same conference. For instance, UCLA has a random drug

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22/ In interpreting Partee, the National Football League, in its amicus brief, purports to rely on two Superior Court Minute Orders in Hebert v. Los Angeles Raiders and National Football League, Superior Court Case No. BC012506 (Nov. 2, 1990 and Nov. 5, 1990). Brief of Amicus Curiae National Football League at 1, 7, 8. That reliance is wholly improper because unpublished opinions may not be cited to or relied on by any party before this Court. See Cal. Rule of Court 977(a).

testing program. PI 497-99. Stanford and U.C. Berkeley do not. RT 213; PI 55. The Oregon State University tests for steroids only for cause. RT 192-93. Even during the post-season, the NCAA conducts drug testing at some championships and not others.

While the burden on commerce is minimal, the state interest in protecting the right to privacy is "fundamental and compelling." White v. Davis, 13 Cal.3d 757, 774 (1975). Whereas Partee involved a statutorily embodied economic policy, the injunction below vindicates the "inalienable" right to privacy which is explicitly enshrined in our state constitution, a right this Court has found to be "on par with defending life and possessing property." Vinson v. Superior Court, 43 Cal.3d 833, 841 (1987); Semore v. Pool, 217 Cal.App.3d 1087, 1096 (1990). Cf. Beard v. Alexandria, 341 U.S. 622, 640 (1951) (upholding state law designed to protect residential privacy against Commerce Clause challenge). Hence, there exists in this case what was lacking in Partee: a "strong state interest" sufficient to outweigh the burden, if any, on interstate commerce engendered by the injunction. Cf. Partee, 34 Cal.3d at 383.

B. The Injunction Is Not a Direct Economic Regulation of Commerce That Takes Place Wholly Outside Of The State's Borders, Whether Or Not The Commerce Has Effects Within The State.

This is not a case such as Healy v. The Beer Institute, Inc., 491 U.S. 324 (1989), in which a state legislature seeks to regulate directly economic transactions which occur wholly

outside the state's borders.[23] Rather, the injunction is simply an exercise of the Superior Court's personal jurisdiction and concomitant relief over the parties in this case, all of whom are "residents" of California.[24] The fact that the injunction may have occasional effects on games outside the state does not render it violative of the Commere Clause. Cf. Colorado Anti-Discrimination Commission, 372 U.S. at 720-22. To rule otherwise would revolutionize long-established principles of personal

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23/ Healy struck down a Connecticut statute requiring out-of-state shippers of beer to affirm that their posted prices sold in Connecticut were no higher than prices at which those products were sold in the bordering states of Massachusetts, New York and Rhode Island. The effect of the Connecticut statute was to restrict sales and pricing of out-of-state shippers in the border states and thus controlled "commerce that takes place wholly outside of the states' borders, whether or not the commerce has effects within the state," in violation of the Commerce Clause. Healy, 491 U.S. at 336 (citations omitted) (emphasis added). Such a regulation threatened to create a price "gridlock" thereby substantially burdening the flow of interstate commerce.

24/ Indeed, the real effect of the injunction is confined almost exclusively within California. Absent the injunction, Stanford athletes would be required to sign "consent" forms agreeing to NCAA drug testing before the start of the season. Failure to sign the form would result in immediate disqualification from NCAA-sponsored competition, and the athlete would be barred from participating in regular season play at Stanford. If the Stanford athlete signs the form, submits to NCAA drug testing, and tests positive, he or she will be disciplined in California (i.e., suspension from the team). In either event, the athlete will forfeit a significant component of the educational experience at Stanford, and some would lose their athletic scholarships. Furthermore, given the impossibility of keeping confidential one's suspension from the team, the public embarassment and humiliation would be felt most acutely at home in the Stanford community. Finally, many of the post-season events in which Stanford athletes participate occur in California. It is only in those occasional instances when a Stanford team is fortunate enough to participate in a bowl game or a final which is held outside the state does the injunction have any "extraterritorial" application.

jurisdiction and conflict of laws, for it is commonplace for business and individuals outside the state's borders to be subject to California jurisdiction and substantive law. See Calder v. Jones, 465 U.S. 783 (1984) (defamation suits brought by California resident against Florida newspaper reporter and publisher arising out of an article written and reported in Florida); Schlussel v. Schlussel, 141 Cal.App.3d 194 (1983) (suit arising out of obscene and threatening calls placed from Florida); Abbott Power Corp. v. Overhead Electric Co., 60 Cal.App.3d 272 (1976) (suit by California plaintiff for interference with contract caused by communications sent from out-of-state by foreign corporation). See also Restatement (Second) of Conflict of Laws § 53 ("a state has power to exercise judicial jurisdiction to order a person, who is subject to its jurisdiction, to do an act, or to refrain from doing an act in another state").

In Pines v. Tomson, 160 Cal.App.3d 370 (1984), the court rejected a challenge to the trial court's jurisdiction to enjoin defendants' discriminatory publications "in or outside of California," precisely the challenge advanced here:

> "'[I]n accordance with the general rule, . . . that a court of equity having jurisdiction of the person of defendant may render any appropriate decree acting directly on the person, even though the subject matter affected is outside the jurisdiction, a court having jurisdiction of the parties may grant and enforce an injunction, although the subject matter affected is beyond its territorial jurisdiction, or requires defendant to do or refrain from doing anything beyond its territorial jurisdiction which it could require him to do or refrain from doing within the jurisdiction.' [Citations.]"

Id. at 399-400 (quoting Allied Artists Pictures Corp. v. Friedman, 68 Cal.App.3d 127, 137 (1977) (ellipsis and brackets in original). Surely, the NCAA should not be permitted to drug test Stanford athletes on those few occasions when they compete in post-season play outside the state, any more than Southern Pacific could order Barbara Luck to submit to a random drug test simply because she attended a seminar in Arizona, or the City of Long Beach could polygraph its employees during a training session in Nevada.

Having found that the NCAA's drug testing program unconstitutionally invaded the rights of California residents, the trial court properly ordered the NCAA to cease invading Stanford students' privacy. That order does not remotely affect interstate commerce.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the trial court and permanently enjoin the NCAA from conducting its drug testing program against student athletes at Stanford University.

Dated: June 14, 1991

Respectfully submitted,

KEKER & BROCKETT

By: Robert A. Van Nest /mjp
Robert A. Van Nest
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JENNIFER HILL and J. BARRY McKEEVER

PROOF OF SERVICE BY HAND AND MAIL

I am over the age of eighteen years and not a party to this action. My business address is:

710 Sansome Street
San Francisco, California 94111-1704

On the date specified below, I served the attached:

OPPOSITION BRIEF OF RESPONDENTS

by placing a true copy thereof (to which was attached a copy of this document) in a sealed envelope and having said document hand delivered to each of the following:

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Attorneys for Defendant/Appellant NCAA

Margaret C. Crosby, Esq.
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I am employed in the County where the mailing described below occurred, and am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Services.

On the date specified below, I also served the attached:

OPPOSITION BRIEF OF RESPONDENTS

by placing a true copy thereof (to which was attached a copy of this document) in a sealed envelope with postage thereon fully prepaid. The envelope will be deposited with the United States

Postal Service on this day in the ordinary course of business in San Francisco, California, following ordinary business practices, addressed to the following:

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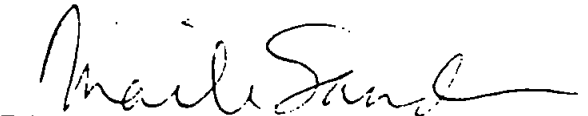
Executed on June 24, 1991, at San Francisco, California.

I, Maile Sandmann, declare under penalty of perjury that the foregoing is true and correct.



Maile Sandmann