No. S155742

IN THE

SUPREME COURT OF CALIFORNIA

DANIEL SHEEHAN et al.,

Plaintiffs and Appellants,

v.

THE SAN FRANCISCO 49ERS, LTD.,

Defendant and Appellee.

On Review From a Decision by the Court of Appeal,
First Appellate District, Division Four
Case No. A114945

On Appeal From an Order of the
San Francisco County Superior Court, No. CGC-05-447679
Hon. James L. Warren

ANSWER BRIEF

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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether a complaint brought under the Privacy Initiative to challenge pat-downs conducted by a private party as a condition of entry to a sports entertainment event states a cause of action when it is clear from the face of the complaint that the plaintiffs voluntarily consented to the pat-downs.

INTRODUCTION AND SUMMARY OF ARGUMENT

"He who consents to an act is not wronged by it."

This fundamental "Maxim of Jurisprudence" (Civ. Code § 3515) long pre-dates its codification in California statute and properly controls the decision in this case.

Appellants, two fans of the San Francisco 49ers, complain because the 49ers require all persons entering the stadium on the day of a football game to undergo a limited pat-down as a condition of entry. It is undisputed from the face of appellants' Complaint that they knowingly and voluntarily consented to the pat-downs: The Complaint expressly states that they voluntarily bought their tickets with knowledge of the pat-down requirement and expecting that a pat-down would be a condition of entry to the stadium.

Given this concession, the Superior Court and the Court of Appeal both found that appellants had failed to plead a viable claim under

the Privacy Initiative. This conclusion represented a straightforward application of the standard adopted by this Court in *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, as applied, not just in *Hill* itself, but in numerous subsequent decisions of this Court and the Courts of Appeal. Following principles well established in constitutional jurisprudence and at common law, California courts have routinely rejected the proposition that a person who knowingly and voluntarily consents to an alleged infringement of privacy interests has a viable Privacy Initiative claim.

Appellants claim no material infringement of any informational privacy interest, which (as *Hill* emphasized) is the primary focus of the Privacy Initiative. Instead, appellants assert only a nebulous "autonomy privacy" claim based on the proposition that it was offensive to them to be briefly patted on the outside of their clothed bodies as a condition of entry to a crowded football stadium. Regardless of whether this identifies a protected privacy interest, the second and third prongs of the *Hill* standard – a *reasonable* expectation of privacy in the interest asserted and a *serious* invasion of that reasonably-held expectation – were plainly absent. Once appellants voluntarily, as an exercise of free will, consented to the pat-downs, they had no reasonable expectation of not being patted down. Nor could it have been an "egregious breach of the social norms underlying the privacy right" (*Hill,* 7 Cal.4th at 37) for the

49ers, a private party that in no way coerced appellants to attend the games, to rely on that consent in proceeding with their routine security procedure.

Reduced to its essence, appellants' claim represents an effort to create a new constitutional claim for battery. Under appellants' theory, moreover, a plaintiff would not be required to show a lack of consent (an essential element of common-law battery); indeed, appellants would make such consent no more than a "factor" to be considered in a fully litigated balancing of interests. This argument finds no support in the Privacy Initiative, in this Court's decisions, or elsewhere in the law.

Moreover, in contesting the legal significance of their own choice to consent to the pat-downs, appellants seek to deprive others of their right to choose the terms and conditions under which they will associate with one another. Appellants ignore the constitutional right, recognized in *Hill*, of private parties like the 49ers to choose how they will pursue their legitimate property and associational interests. And by arguing that no California citizen may give the consent that the 49ers require as a condition of entry (or at least no consent on which the 49ers may rely), appellants seek to eliminate the ability of their fellow citizens to choose an entertainment option that offers a level of security for themselves and their families that they may prefer.

There is, of course, no constitutional right to attend a football game. Nor is there a right to attend a football game sponsored by a private

party on terms of one's own choosing. There is no issue presented here of deprivation of a necessity of life, of coercion or economic duress, of fraud, or of any of the other abuses that appellants seek to convince this Court are somehow implicated by the Court of Appeal's decision. The Court of Appeal simply followed established legal principles and treated as controlling appellants' admitted knowing and voluntary consent to be patted down as a condition of attending an entertainment event. Appellants' claim was therefore correctly barred at the threshold.

STATEMENT OF THE CASE

Appellee The San Francisco Forty Niners, Ltd. ("49ers"), is a member club of the National Football League ("NFL"). (AA 104, ¶ 3.)[1] The 49ers play their home games at Monster Park in San Francisco. (*Ibid.*)

Beginning in the 2005 season, the NFL adopted a security policy requiring each person entering an NFL stadium on game day to undergo to a limited pat-down inspection as a condition of entry. (*Id.* ¶¶ 9, 10.) For NFL games in San Francisco, this policy is implemented by the 49ers, a private party, which conducts the pat-downs through private "event staff" screeners. (*Id.* ¶¶ 3, 9.) As described in appellants' Complaint, those

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[1] Citations to the record appendix below are provided as "AA __." (Citations to the Reporter's Transcript appear as "RT __.") Because the ruling at issue here sustained a demurrer, the underlying facts are drawn from appellants' Complaint (and, where applicable, Amended Complaint) and are, for current purposes, assumed to be true.

inspected are asked to stand still while screeners "touch," "pat" or "lightly rub" their backs and down the sides of their clothed bodies. (*Id.* ¶¶ 9, 10.)

Appellants, two long-time season ticket-holders, each attended several 49ers home games in 2005; on each occasion, they were patted down as a condition of entry. (*Id.* ¶¶ 5, 6, 9.)

This suit was filed in December 2005. (AA 1-2.) The Complaint asserted a single cause of action for declaratory and injunctive relief under the "privacy clause" of Article 1, Section 1 of the California Constitution (commonly referred to as the "Privacy Initiative").

On January 30, 2006, the 49ers filed a demurrer to the Complaint, which was heard by the Hon. James Warren. (AA 7.) At the hearing, Judge Warren observed that appellants arguably had no standing, as their Complaint included allegations only about the 2005 NFL season, which had ended. (RT 2:11-25.) It was then agreed that appellants could amend their Complaint to reflect the fact that they had renewed their tickets for the 2006 season. (RT 2:11-8:21.)

Appellants then filed their Amended Complaint, alleging that:

> "In or about February 2006, Daniel and Kathleen Sheehan purchased 49ers season tickets for the 2006-2007 NFL season. The Sheehans are informed and believe that the 49ers intend to continue conducting physical pat-down searches of all persons entering or reentering Monster Park during the 2006-2007 season." (AA 106, ¶ 12.)

On June 20, 2006, Judge Warren issued an order sustaining the 49ers' demurrer. (AA 196.) Relying on *Hill*, Judge Warren found that appellants had failed to allege a prima facie violation of the Privacy Initiative. He pointed out that, under *Hill*, a complaint must allege facts sufficient to establish three threshold elements:

> "First, there must be a specific legally protected informational or autonomy privacy interest .... Second, there must be a reasonable expectation of privacy, i.e., 'an objective entitlement founded on broadly based and widely accepted community norms,' on plaintiffs' part.... Third, '[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right.'"

(AA 197-98 [citing and quoting *Hill*, 7 Cal.4th at 35-37].)

On the second element – reasonable expectation of privacy – Judge Warren observed that *Hill* requires a plaintiff to "conduct himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she must not have manifested, either specifically or by conduct, a voluntary consent to the invasive actions of defendant." (AA 198 [citing *Hill*, 7 Cal.4th at 26].) The Amended Complaint made clear that "Plaintiffs had full notice of the pat-down policy – and the requirement of consent to a pat-down prior to game entry – prior to purchasing their tickets for the 2006–2007 season." (AA 198.) Judge Warren therefore concluded that, as a matter of law, "Plaintiffs' voluntary consent to the pat-down policy by their purchase of the 49ers 2006-2007 season tickets shows that Plaintiffs

do not have a reasonable expectation of privacy in regards to the pat-downs before entry to the 49ers games." (AA 199.)

Judge Warren went on to hold, in the alternative, that appellants' voluntary renewal of their season tickets for the 2006 season "also shows that the pat-downs are not sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." (*Id.*) He concluded that, having made the voluntary decision to buy the tickets with "foreknowledge" of the pat-down policy, appellants "cannot now claim that the pat-downs are 'highly offensive to a reasonable person.'" (*Ibid.*)

Appellants sought review in the First District Court of Appeal, which affirmed. (*Sheehan v. The San Francisco 49ers, Ltd.* (2007) 153 Cal.App.4th 396.) In a majority opinion written by Justice Reardon and joined by Presiding Justice Ruvolo, the Court of Appeal confirmed that Judge Warren had properly applied the standard first enunciated in *Hill* and subsequently applied in numerous decisions of this Court and the Courts of Appeal. Pursuant to this standard, the Sheehans had no reasonable expectation of privacy under the circumstances presented:

> "[T]here is no question that they had full notice of the patdown policy and the requirement of consenting to a patdown prior to entering the stadium for a game. With notice and knowledge of this prospective intrusion, they nevertheless made the decision to purchase the 2006 season tickets. By voluntarily 're-upping' for the next season under these circumstances, rather than opting to avoid the intrusion

> by not attending the games at Monster Park, the Sheehans impliedly consented to the patdowns. On these undisputed facts we determine, as a matter of law, that the Sheehans have no reasonable expectation of privacy."

(*Id.* at 403.)

Justice Rivera dissented, taking exception to the majority's conclusion that the trial court had acted within its discretion in not affording plaintiffs a second opportunity to amend their Complaint. (*Id.* at 406-08.)[2] Justice Rivera also disagreed with the majority regarding its application of the *Hill* standard, arguing that the precedents upon which the majority relied were distinguishable from the circumstances presented here. (*Id.* at 408-10.)

ARGUMENT

I. The Court of Appeal's Holding Appropriately Relied on the Undisputed Fact That Appellants Voluntarily Consented to the Pat-Downs.

It is useful to begin with a fact that is beyond dispute on the face of the Amended Complaint: Appellants consented to the challenged pat-downs. They did not *wish* to give their consent, but they did so, and they did so as a voluntary exercise of free will. This fact substantially

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[2] Appellants have not sought review on this issue, which is not mentioned in either their Petition for Review or their Opening Brief. At no time have appellants identified any factual allegations they would add to another amended complaint that would have a material bearing on the issues presented here.

narrows the issue presented on appeal and answers many of appellants' arguments about potential implications of the Court of Appeal's decision.

For example, many of appellants' arguments imply that an affirmance would free businesses of any potential liability under the Privacy Initiative if they merely provide "notice" of an intended invasion, regardless of whether that notice is seen and fully understood, and regardless of whether the ensuing consent is knowing and voluntary. (*See, e.g.*, Op. Br. at 1-4, 23.) The Court of Appeal's decision was not so broad. Rather, it focused on the fact, conceded on the face of the Amended Complaint, that appellants were not only given notice of the pat-downs but chose, knowingly and voluntarily, to attend 49ers games in the full knowledge that consent to a pat-down was a condition of attendance.

A. It Is Apparent from the Face of the Amended Complaint that Appellants Voluntarily Consented to the Pat-Downs.

Semantics aside, there is no real dispute that appellants voluntarily consented to be patted down as a condition of entry to 49ers games. Consent is "voluntary" if provided – either in words or conduct – through the exercise of free will, rather than as a result of duress or coercion. (*People v. James* (1977) 19 Cal.3d 99, 106-07.) The fact that an individual faces a difficult choice does not alter the character of his or her consent as long as the choice is made freely, knowingly, and without

coercion. (*Id.; see also Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 248; *People v. Boyer* (2006) 38 Cal.4th 412, 445-46.)

The Amended Complaint clearly demonstrates that this standard was satisfied. It states that appellants were subject to pat-downs throughout the 2005 NFL season and continued to attend the games anyway. It further alleges that appellants bought their tickets for the 2006 season in the full knowledge and expectation that the pat-downs would continue. (AA 106 ¶ 12.) This is accordingly not a "mere notice" case; when appellants chose to attend 49ers games in 2006, they did so in the full knowledge and expectation that pat-downs would be a condition of admittance to the stadium.[3]

In *Johnston v. Tampa Sports Authority* (11th Cir. 2007) 490 F.3d 820, the Eleventh Circuit addressed facts virtually identical to those presented in this case:

> "Johnston knew that he would be subjected to a pat-down search by the Authority if he presented himself at an entrance to the Stadium to be admitted to a Buccaneers game. That is, he chose to submit voluntarily to the search, stating only a verbal objection followed by his submission to the pat-down search process..."

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[3] This is one of several reasons why appellants' reliance on *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747 and other cases dealing with exculpatory contracts is misplaced. The contract clause in *City of Santa Barbara* purported to release the city from liability for future gross negligence. The parents who signed that contract obviously did not do so in the expectation that the city would actually commit gross negligence and cause the death of their child.

(490 F.3d at 825.)[4] On these facts, the court concluded, as a matter of law, that the plaintiff had voluntarily consented to the pat-downs:

> "Johnston was not in custody at the time of the search, rather, he presented himself willingly at the search point. The screeners did not coerce Johnston, they merely performed the search to which Johnston submitted. Johnston was not under any express or implied threat of physical or other retribution if he refused to submit to the search. Johnston was well aware of his right to refuse to submit to the pat-down search.... At the search point, Johnston pulled his shirt up (apparently to show that he was not wearing [a bomb]) and asked not to be patted down. When screeners insisted on the pat-down before permitting Johnston to enter, Johnston elected to be patted down."

(*Id.*)

The facts here, as alleged by appellants, are essentially the same. Like Johnston, appellants did not wish to be patted down and objected to the process (in their case silently), but, also like Johnston, their actions represented an exercise of free will. They were not in custody, were not coerced, were not subjected to threats of physical violence or other intimidation; they were well aware of their right and ability to walk away. Under these circumstances, there can be no legitimate question that their consent was knowing and voluntary.[5]

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[4] In Tampa Bay, the pat-downs were conducted by the stadium authority, a governmental instrumentality, and the claim was brought under the Fourth Amendment. There is (and can be) no such claim in this case, as the pat-downs at Monster Park are conducted by the 49ers, a private party.

[5] Appellants' consent is no less "voluntary" simply because it was implied from their conduct. Consent that is "implied" when expressed (continued...)

Appellants nonetheless seek to create the appearance of coercion by asserting that a 49ers game is "the only game in town." (Op. Br. at 30.) This argument is hardly sufficient to support a conclusion that appellants were coerced into giving their consent. Even for the ardent fan who really sees a 49ers game as "the only game in town," such an event is, in the end, still only that: a game. NFL games are entertainment events that appellants are in no way compelled to attend. If appellants wish to avoid pat-downs, they can simply watch the games on television or choose another form of recreation on Sunday afternoons.

B. The Court of Appeal's Holding Does Not Extend to Situations In Which Knowing and Voluntary Consent Is Absent.

The Court of Appeal's holding was premised on the express concession in appellants' pleading of facts demonstrating the existence of voluntary consent. (*See* 153 Cal.App.4th at 403.) Nothing in that holding requires rejection of a Privacy Initiative claim on demurrer where consent is not apparent from the pleadings, or where its voluntary nature is in genuine dispute. Thus, for example, nothing in the Court of Appeal's decision "would allow telephone companies to slip a notice into consumers' bills that in the future their calls would be monitored." (Op. Br. at 2.) Nor

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through conduct is no less "voluntary" or valid than when expressed through words. (*See People v. Frye* (1998) 18 Cal.4th 894, 990; *People v. Timms* (1986) 179 Cal.App.3d 86, 90.)

would it permit online booksellers simply to post a "website notice" that buyers' purchases would be divulged (*id.*) – or any of the other parade of horribles offered by appellants in their brief. The Court of Appeal's ruling rested, not on mere notice (much less the constructive notice implied in many of the examples in appellants' parade), but rather on actual, voluntary consent.

Once this is understood, it becomes clear that the issue presented here is much narrower than appellants suggest. The Court of Appeal confirmed that the San Francisco 49ers, a private business, can offer fans the *choice* of an entertainment experience with a level of security and safety in which hundreds of thousands of people voluntarily elect to participate – and which many (and probably most) prefer to the lower level of security that appellants seek to impose through litigation. This holding was based upon a sensible application of the *Hill* standard that is fully consistent with both the precedents of this Court and appellants' legitimate privacy interests.

II. The Court of Appeal Correctly Held That, In Light of Their Consent, Appellants' Claim Fails to Satisfy the *Hill* Requirement of a Reasonable Expectation of Privacy.

Appellants argue that the Court of Appeal misapplied the *Hill* standard by giving too much emphasis to their consent to the pat-downs. In fact, the Court of Appeal's ruling was fully consistent with the pertinent decisions of this Court and the Courts of Appeal, as well as with the

original purpose and intent of the Privacy Initiative. Indeed, viewed in the context of broader constitutional and common-law doctrines (which *Hill* recognized to be an important interpretive source for the Privacy Initiative), the Court of Appeal's decision is very much in the mainstream of long-established law.

A. The *Hill* Test Governs This Case.

In *Hill*, this Court presented a comprehensive analysis of the purpose and scope of the Privacy Initiative, based upon, *inter alia*, the history of privacy law in California and the ballot information presented to voters. (7 Cal.4th at 20-27.) The questions addressed in *Hill* were (a) whether the Privacy Initiative applies at all to actions of private parties and (b) if so, the pertinent standards for such application. The Court answered the first question in the affirmative but cautioned that the Privacy Initiative does *not* automatically impose on private parties the same restrictions that the Privacy Initiative and the Fourth Amendment impose on state actors. (*Id.* at 20, 34-35, 38-39, 48-50.) [6]

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[6] *See also id.* at 59-60 (conc. and dis. op. of Kennard, J.) (agreeing with the majority's legal standard and noting that "the correct legal analysis will differ depending in part on the governmental or nongovernmental status of the defendant.... when the actions of a nongovernmental entity or person are alleged to have invaded constitutional privacy rights, the majority opinion properly demands an additional degree of judicial caution.").

As *Hill* explained, these distinctions flow from several considerations. The first is the greater danger posed by the "pervasive presence of coercive government power." (*Id.* at 38.) Where coercive government authority is *not* involved, the need for constitutional protection of privacy interests is inherently less.[7]

Second, the private sector offers "choice[s] and alternatives" through which a citizen may avoid unwanted invasions of privacy. (*Id.* at 38.) The marketplace can reasonably be expected to address privacy invasions that violate accepted social norms (the underlying standard of the *Hill* test). This provides a direct answer to appellants' suggestion that the Court of Appeal's ruling would permit the 49ers to require "strip searches" as a condition of attendance at their games. Even in their most successful seasons, it is difficult to imagine that the 49ers would have been able to sell more than a few tickets – even for "the only game in town" – had they imposed such a requirement.

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[7] Contrary to appellants' assertion, this distinction does not disappear merely because the pat-downs are performed as a security measure. The only "coercion" faced by appellants was the 49ers' refusal to admit them to a football game unless they complied with the 49ers' security requirements. That in no way resembles an exercise of coercive government power. Nor are private security personnel otherwise viewed as proxies for the government. (*See In re Christopher H.* (1991) 227 Cal.App.3d 1567 [holding that private security guards were not state actors, even though they searched, detained, and arrested suspects and then called in the police]; *People v. Taylor* (1990) 222 Cal.App.3d 612 [security guard not a state actor despite searching, handcuffing, and detaining a suspect and then involving the police].)

In those rare situations in which there is "limited or no competition" and additional regulation is required, "individuals and groups may turn to the Legislature to seek a statutory remedy against a specific business practice regarded as undesirable." (*Hill*, 7 Cal.4th at 39 [citing legislation forbidding polygraph tests as a condition of employment].) And, indeed, that is exactly what has happened in many of the situations of which appellants warn. (*See, e.g.*, Pen. Code §§ 630-38 [imposing prohibitions on the monitoring and disclosure of telecommunications].)[8] Such statutory prohibitions, rather than hammering with the blunt instrument appellants seek, can be carefully tailored to address specific issues of concern without unduly affecting countervailing interests. Notably, most such prohibitions expressly provide for waiver by consent. (*See, e.g.*, Pen. Code § 631 [prohibiting wiretapping "without the consent of all parties to the communication"].)

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[8] *See also* Civ. Code § 56.10(a) (subject to limited exceptions, "No provider of health care ... shall disclose medical information regarding a patient of the provider of health care or an enrollee or subscriber of a health care service plan without first obtaining an authorization"); Pub. Util. Code § 2891 (prohibiting telephone companies from disclosing private consumer information without consent); Online Privacy Protection Act of 2003, Bus. & Prof. Code §§ 22575-79 (requiring operators of web sites that collect personal information to post a privacy policy on the site and comply with the policy); Fin. Code §§ 4050-60 (requiring financial institutions that want to share information with third parties first obtain affirmative consent of affected consumers); *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 744-45 (holding that a landlord's policy excluding children was illegal discrimination under the Unruh Act).

Finally – and arguably of greatest significance – *Hill* emphasized the importance of respecting the legitimate associational and other interests of the private parties who organize activities and events. The Court stressed that "[p]rivate citizens have a right, not secured to government, to communicate and associate with one another on mutually negotiated terms and conditions." (7 Cal.4th at 39.) The Court thus recognized that a standard tipping too far toward overprotection of asserted privacy interests would risk chilling conduct that is itself constitutionally protected.

After concluding that the Privacy Initiative does impose some limitations on the actions of private actors, the *Hill* Court recognized the need for a standard to limit burdensome Privacy Initiative litigation to claims involving serious invasions of reasonably held expectations of privacy. The Court therefore established the now-familiar three-part threshold test for a prima facie claim under the Privacy Initiative. In sum, a plaintiff "must establish ... (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (7 Cal.4th at 39-40.) Each of these elements may be adjudicated as a matter of law where the pertinent facts are not in dispute. (*Id.* at 40.) If – and only if – the plaintiff establishes all three elements, the court then balances the privacy intrusion

against "other important interests" of the defendant justifying the challenged conduct. (*Id.* at 37, 40.)

The three *Hill* elements are inherently interrelated, with the second and third elements each deriving important content from the prior ones. Thus, for example, only after the court identifies and defines a protected privacy interest can it ascertain whether, under the circumstances presented, a plaintiff has a reasonable expectation of privacy associated with that interest. Similarly, the determination of whether a challenged invasion is "serious" must be made in light of what is being invaded – *i.e.*, a reasonable expectation of protection for an identified privacy interest.

Nearly all post-*Hill* cases considering claims under the Privacy Initiative – including those of this Court – have explicitly cited and applied the *Hill* standard.[9] Appellants argue that the Court of Appeal failed to take into account a "clarification" of *Hill* offered in *Loder v. City of*

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[9] *See, e.g., International Federation v. Superior Court* (2007) 42 Cal.4th 319, 338-39; *Pioneer Electronics (USA), Inc. v. Superior Court* (2007) 40 Cal.4th 360, 370-72; *Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal.4th 30, 42-44; *Loder v. City of Glendale* (1997) 14 Cal.4th 846, 889-98; *Tom v. City & County of San Francisco* (2004) 120 Cal.App.4th 674, 679; *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 447; *TBG Ins. Servs. Corp. v. Superior Court* (2002) 96 Cal.App.4th 443, 449; *Feminist Women's Health Ctr. v. Superior Court* (1997) 52 Cal.App.4th 1234, 1246.

Glendale. (*See* Op. Br. at 8.) But nothing in the Court of Appeal's decision in any way conflicts with *Loder*.[10]

Loder involved a challenge under both the Fourth Amendment and the Privacy Initiative to drug-testing requirements imposed by a government employer. The Court upheld some of the requirements and rejected others. In the opinion cited by appellants, Chief Justice George *confirmed* the framework established in *Hill*, including the prima facie elements to be used in screening out Privacy Initiative claims that do not involve a significant intrusion on a reasonable expectation of privacy. (14 Cal.4th at 890-91, 893.) He went on to emphasize that if the three threshold elements *are* present, the court must weigh the invasion shown against the defendants' proffered justifications for it. (*Id.* at 891-92.) But nothing in that opinion suggested an intent to eliminate the plaintiffs' threshold obligation to demonstrate the existence of all three elements – a conclusion that is confirmed by the express reliance on the *Hill* framework in the Court's subsequent decisions.[11]

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[10] The Court need not tarry over appellants' argument about whether the *Loder* plurality opinion is "binding." (Op. Br. at 9 n.2.) The majority's opinion below – which addressed that issue in a footnote in dictum (*Sheehan,* 153 Cal.App.4th at 401 fn.4) – did not turn on, or in any way require, a negative answer to that question.

[11] *See, e.g., Pioneer*, 40 Cal.4th at 370-73; *International Federation*, 42 Cal.4th at 338. For the same reason, appellants' reliance on *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 331), is misplaced. In that case, which involved a challenge to a state law requiring (continued...)

B. The Court of Appeal's Analysis Was Faithful to the *Hill* Framework.

Appellants assert that the Court of Appeal's decision is in conflict with the *Hill* standard, as well as with the application of that standard in *Hill* itself. This argument misconstrues the Court's analysis in *Hill*, in large part because appellants ignore the inherent interrelationship among the three *Hill* factors.

Hill was a challenge to drug-testing requirements that the NCAA imposed on student-athletes who participated in NCAA-sponsored competitions. Those requirements included not only the testing of urine samples and retention of data from the analysis of those samples, but also a highly intrusive collection process that included visual monitoring of the act of urination. (7 Cal.4th at 40-43.) The Court found that the privacy interest affected by this last requirement was particularly strong. (*Id.*)

In assessing the second prong of the threshold test, the Court held that the existence of a reasonable expectation of privacy must be considered in context. (*Id.* at 36; *see also id.* at 41 ["the reasonable expectations of privacy of plaintiffs (and other student athletes) ... must be

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a minor to have parental consent before obtaining an abortion, the Court found that the threshold elements of *Hill* were satisfied. Notably, *Lungren* and *Loder* both dealt with challenges to government action. (The defendant in *Loder* was a government employer, and the primary claim in that case was brought under the Fourth Amendment.) Neither addressed the role of consent in the context of private interactions.

viewed within the context of intercollegiate athletic activity and the normal conditions under which it is undertaken"].) Far from discounting the significance of the fact that student-athletes affirmatively consented to the testing requirements, the Court emphasized that the existence of consent severely diminished any reasonable expectation of privacy. (*Id.* at 42-43.) But the Court concluded that "the NCAA's use of a particularly intrusive monitored urination procedure justifie[d] further inquiry" into the NCAA's justifications for the requirement. (*Id.* at 43.)

Nowhere in the *Hill* decision is there any indication that consent may *never* present a threshold bar to any Privacy Initiative claim; nor has any subsequent decision so held.[12] To the contrary, *Hill* makes clear that, just as consent has long represented a potential absolute defense to a common-law privacy claim, full and voluntary consent may also bar a claim under the Privacy Initiative. (*Id.* at 26, 40.)

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[12] Certainly there is no such holding to be found in the decisions of this Court. Plaintiffs cite dictum from one Court of Appeal decision suggesting that consent should be merely one factor in a full balancing analysis, but in that case the court expressly found that no consent had been provided. (*See Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, 193.) *Cramer v. Consol. Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683, 694, simply rejected the overly broad claim that employees' consent to drug-testing allowed the employer also covertly to monitor the employees' restroom. And contrary to appellants' assertion, the court in *Barbee v. Household Auto. Fin. Corp.* (2003) 113 Cal.App.4th 525, 532-33, did not find a "balancing analysis" to be required (Op. Br. at 20) but rather held that the plaintiff had failed to establish a reasonable expectation of privacy.

In this case, one must begin, as *Hill* instructs, by defining the privacy interest at issue. The interest appellants allege is one against the "unwanted physical intrusion" of being briefly touched by strangers on the outside of their clothed bodies. (AA 105, ¶ 11.)[13] If this is a protected privacy interest at all (which is questionable at best – *see* pp. 46-50 below), it is certainly far less substantial than that involved in *Hill.*

Hill next instructs that one must consider the extent of any reasonable expectation of privacy with respect to the privacy interest at issue. The standard is an objective one and must take into account the context in which that interest is allegedly being infringed. (7 Cal.4th at 36-37.) The pertinent context includes, among other things, the "customs, practices, and physical settings surrounding particular activities" and "the presence or absence of opportunities to consent voluntarily." (*Id.*)[14]

Here, the pertinent context is a crowded football game attended by tens of thousands of people, seated shoulder to shoulder for

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[13] Appellants have from time to time offered a variety of rhetorical flourishes to characterize this interest, including describing it as an interest in not being "forced to endure the unwanted groping of a stranger." These rhetorical embroideries do not materially change the fundamental nature of the interest asserted.

[14] *See also id.* at 60 (Kennard, J. concurring and dissenting) (commenting that the majority opinion "correctly requires that a plaintiff who alleges invasion of the constitutional right to privacy must demonstrate a reasonable expectation of privacy in the circumstances" and that "the majority properly focuses on the context in which the invasion of the privacy interest occurs," while cautioning that the issue must be assessed in light of "[g]overning social norms").

several hours.[15] In this context, any reasonable expectation of "privacy" in the sense of not being touched by strangers (whether deliberately or otherwise) was minimal to begin with; once further diminished by appellants' consent, any such expectation was, for legal purposes, eliminated. The Superior Court and Court of Appeal were accordingly both correct in their application of the *Hill* standard.

C. The Holding Below Is Fully Consistent With Post-*Hill* Decisions of This Court and the Courts of Appeal.

The Court of Appeal's decision was also consistent with the manner in which the *Hill* standard has been applied by this Court and the other Courts of Appeal in the decade and a half since *Hill* was decided.

Both before and after *Loder*, this Court and the Courts of Appeal have consistently applied the *Hill* screening mechanism to do what the Court plainly had in mind in both *Hill* and *Loder*: to screen out Privacy Initiative claims that are deficient as a matter of law.[16] Contrary to appellants' suggestion, such cases often have involved claims that, although

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[15] *See People v. Burns* (Sup. Ct. 1989) 540 N.Y.S.2d 157, 161 [143 Misc.2d 262, 267-68] ("What is a reasonable expectation [of privacy] ... varies with locale. In that staid, quiet civilized atmosphere of the 42nd Street library, people respect each other's space completely. How different it is in a crowded subway car during rush hours, where the only expectation of privacy one can reasonably entertain is in the integrity of one's own blood stream.").

[16] *See, e.g., Pioneer*, 40 Cal.4th at 370; *International Federation*, 42 Cal.4th at 338; *Heller*, 8 Cal.4th at 43; *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419, 428; *TBG Ins. Servs.*, 96 Cal.App.4th at 449; *Leibert v. Transworld Sys., Inc.* (1995) 32 Cal.App.4th 1693, 1702.

not legally sustainable for one reason or another, were hardly "trivial" in the sense of not involving potentially significant privacy interests. Rather, the claims were rejected because the asserted privacy interests were not protected as a matter of law, either as a result of the plaintiff's own conduct or for other reasons.[17]

Heller is directly on point. In *Heller*, the Court ordered that a demurrer to a Privacy Initiative claim be sustained due to the plaintiff's implied consent to the disclosure of her medical records. (8 Cal.4th at 43-44.) The plaintiff claimed that her doctor had infringed her privacy rights by discussing her medical condition with (and disclosing her medical records to) the third-party insurer for another doctor whom the plaintiff was suing in a medical malpractice action. (*Id.* at 36.) In ordering that the demurrer to the plaintiff's Privacy Initiative claim be sustained, the Court held that, by instituting the medical malpractice suit, the plaintiff had placed her physical condition in issue, thus rendering "unreasonable" as a matter of law any expectation that her medical information would remain confidential. (*Id.* at 43-44.)

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[17] *See, e.g., International Federation*, 42 Cal.4th at 338 (holding public employees had no reasonable expectation of privacy in their salaries in light of the Public Records Act.); *Heller*, 8 Cal.4th at 43-44 (privacy interest in medical records not protected because of plaintiff's conduct in filing lawsuit that implicitly authorized their disclosure); *Rosales*, 82 Cal.App.4th at 429 (private information in personnel records not protected because of conditional nature of statutory confidentiality).

Appellants try to distinguish *Heller* by arguing that the claim in that case "was clearly barred by settled law." (Op. Br. at 12.) But that is exactly the point: by filing a lawsuit, the plaintiff put her medical condition at issue and impliedly consented to the disclosure of evidence – including her medical records – bearing on that issue. And "settled law" dictated that she could not then complain that the disclosure invaded her privacy.

The Court applied a similar analysis in *Pioneer Electronics*, where it held that the Privacy Initiative did not require separate consent before a class action plaintiff was given access to the identities of consumers who had complained to the defendant about its product. Applying *Hill*, the Court concluded that those consumers did not have a reasonable expectation of privacy because, among other things, they had "already voluntarily disclosed their identifying information to [the defendant]." (40 Cal.4th at 372.) Appellants point to the fact that the Court went on to discuss the interests put forward to justify the disclosure. (Op. Br. at 11.) But the Court explicitly stated that the failure to demonstrate the threshold *Hill* elements "could end our inquiry as these elements are essential to any breach of privacy cause of action under *Hill* before any balancing of interests is necessary." (40 Cal.4th at 373.) The Court merely offered a "brief examination" of the opposing interests to "reinforce" its conclusion. (*Id.*)

The lower courts have also rejected Privacy Initiative claims in which the plaintiffs demonstrated, either verbally or through conduct, consent to the alleged invasions. For example, *TBG Insurance* upheld an employer's right to retrieve personal data that an employee had put on a company-owned computer kept at his home. The court concluded that the employee did not have a reasonable expectation of privacy, because he knew of the company's computer monitoring policy but had used the company's computer for personal use anyway. (96 Cal.App.4th at 453-54.) The court observed that the employee, aware that the company had reserved the right to monitor his computer usage, could easily have avoided any invasion of his private information by not putting it on the computer in the first place. He therefore had "the opportunity to consent to or reject the very thing that he now complains about." (*Id.* at 452.)

Appellants argue that the court in *TBG Insurance* did not find consent "dispositive." (Op. Br. at 20.) This is a remarkable contention, given that court's express statement that "we view [plaintiff's] consent as a *complete defense* to his invasion of privacy claim." (96 Cal.App.4th at 450 n.5 [emphasis added].) To be sure, the *TBG Insurance* court discussed other elements as well – some of which might also have been independently dispositive of the privacy claim – but, like this Court in *Pioneer*

Electronics, it left no doubt that failure to establish the threshold *Hill* elements was dispositive.[18]

Nor did the decision in *Feminist Women's Health Center* turn on a full balancing analysis. (*See* Op. Br. at 20-21.) In that case, the plaintiff was required, as a condition of her employment at a health-care center that emphasized progressive feminist methods of care, to demonstrate – in front of her co-employees and others – "cervical self-examination." (52 Cal.App.4th at 1247.) She challenged this requirement under the Privacy Initiative. Recognizing that the privacy invasion would otherwise be severe (*id.*), the court upheld the employer's right to make it a condition of employment. By accepting a job at the center with knowledge of this requirement, the plaintiff gave her consent to the invasion of privacy that the requirement entailed. (*Id.* at 1248-49.) Although the court discussed the employer's reasons for its policy, it concluded that that summary adjudication on the Privacy Initiative claim was appropriate because the plaintiff had voluntarily consented: "[W]e return to plaintiff's consent to demonstrate cervical self-examination as part of her employment

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[18] Appellants also seek to distinguish *TBG Insurance* because the plaintiff had agreed that he would use the company-supplied computer only for business purposes and would permit the company to monitor his use of it. This is not a ground for distinction; it is the reason the case is on point. The plaintiff voluntarily accepted a benefit (a company-owned computer) from a private party (in this case his employer) with the knowledge that the benefit was subject to conditions that impinged on privacy interests he might otherwise have had.

agreement with the Center. The Center was not obligated to hire plaintiff, and consent remains a viable defense even in cases of serious privacy invasions." (*Id.* at 1249; *see also Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1049 [observing that applicants for employment who wished not to submit to drug testing could simply decline the offer of employment].)

If anything, the issues presented here are more straightforward and easier to resolve than those presented in any of the cases discussed above. Here, the condition to which appellants consented was not a condition of access to the judicial system (*Heller*), of employment (*Feminist Women's Health Center* or *Wilkinson*), of the means necessary to conduct one's job (*TBG Insurance*), or of the ability to complain about a defective product (*Pioneer*). And the alleged privacy interest at issue involves nothing so substantial as disclosure of private financial and medical information (*Heller, Wilkinson,* or *TBG Insurance)* or a semi-public display of an intimate medical procedure (*Feminist Women's Health Center*). Appellants simply wanted to attend a football game, and the pat-downs were a condition of entry. In that context, their consent was clearly sufficient to defeat any *reasonable* expectation of privacy that they might otherwise have had.

D. The Holding Below Is Consistent with the Purpose and Intent of the Privacy Initiative.

In *Hill*, one of the primary sources that the Court considered in assessing the proper standards for implementing the Privacy Initiative was the information before the voters when they approved the Initiative as Proposition 11 in 1972.[19] This material, the Court concluded, was the best information available on the voters' intent. (7 Cal.4th at 16; *see People v. Privitera* (1979) 23 Cal.3d 697, 709.)

The arguments presented in the official Ballot Pamphlet on Proposition 11 belie any suggestion that the voters had in mind the dramatic reformulation of established law that appellants seek here. The argument starts by referring to "[t]he proliferation of government snooping and data collecting" that "is threatening to destroy our traditional freedoms." It goes on to focus heavily on the "right of privacy" as one that "prevents government and business interests from collecting and stockpiling unnecessary information about us and from misusing information gathered for one purpose in order to serve other purposes or to embarrass us." (*Id.*)

The argument in support of Proposition 11 placed particular emphasis on the proposition that "[f]undamental to our privacy is the ability

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[19] *See* Ballot Pamp., Proposed Stats. and Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) (hereinafter "Ballot Pamphlet") (Attached as Ex. A to accompanying Motion and Request for Judicial Notice).

to control circulation of personal information." (*Id.* at p.2 [emphasis added].) The pamphlet goes on to warn about "*loss of control* over the accuracy of government and business records" and the fact that "[t]he average citizen also does not have *control* over what information is collected about him." (*Id.* [emphasis added].)

Apart from its near-total focus on *informational* privacy, the most striking point about the Ballot Pamphlet is its emphasis on the issue of "control" – that is, on the ability of California citizens to control the extent to which government and businesses can collect, maintain, and use information about their private affairs. This strongly indicates that, far from intending to preclude conduct that might otherwise interfere with a protected privacy interest, the Initiative focused on giving citizens the right to *control* whether such interference would occur. This in turn demonstrates that when a citizen does exert such control by granting consent to an action that would otherwise constitute an invasion of privacy, the purpose of the Initiative is fully satisfied.

Here, appellants remained at all times in control over the privacy interest they assert. If they did not wish to be patted down at a 49ers game, they could simply choose an alternative form of recreation. Nothing in either the language of the Privacy Initiative or in the official ballot pamphlet indicates an intent by either the authors of Proposition 11 or the voters who approved it to require anything more.

E. Well-Established Principles of Constitutional and Tort Law Confirm That Appellants' Voluntary Consent Bars their Claim.

1. Consent is a Long-Accepted Bar to Private Claims of the Kind at Issue Here.

In its past decisions considering claims under the Privacy Initiative, this Court has looked for guidance to established legal doctrines that have been applied in analogous circumstances. Thus, for example, in *Hill*, the Court considered at length – and largely adopted as the basis for its Privacy Initiative framework – the body of existing law applicable to analogous "privacy" claims, including principles established under the common law. (7 Cal.4th at 23 ["in order to discern the meaning of 'privacy' as used in the Privacy Initiative, we must examine the various legal roots of the privacy concept"].)

The "Maxim of Jurisprudence" that "[h]e who consents to an act is not wronged by it" has been part of the California Civil Code since 1872. (Civ. Code § 3515.) This maxim is recognized throughout California law, including in contexts closely analogous to this case. Here, appellants complain that the 49ers' security personnel subjected them to "unwanted physical intrusions" as a condition of entry to football games. (AA 105 ¶11.) This is, in essence, a simple tort claim of battery – an "intentional, unlawful and harmful contact" (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1495 [internal quotations omitted]) – recast as a

constitutional privacy claim. And examination of longstanding common law as it applies to battery (as well as to common law privacy torts) confirms that appellants' consent bars their claim.

At common law, consent is not merely a defense to a claim of battery – the *absence* of consent is an element of the plaintiff's prima facie case. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 166.) A plaintiff must show, moreover, not only that she did not verbally consent to the complained-of contact; she must also show that consent was not implicit in her conduct. (*Sayadoff v. Warda* (1954) 125 Cal.App.2d 626, 629; *see also* Rest.2d Torts § 892(2).)

Just two years ago, this Court reiterated these accepted legal principles in the battery context. In *Avila v. Citrus Community College District*, the Court considered a claim arising from an incident in which the plaintiff was struck by a baseball thrown intentionally at his head during a game. The Court held that a demurrer was properly sustained because the complaint "establishe[d] Avila voluntarily participated in the baseball game; as such, his consent would bar any battery claim as a matter of law." (38 Cal.4th at 166.) Consent bars claims for battery in the medical malpractice arena as well. (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 240.)

California courts have also consistently held consent to be a bar to common-law privacy torts. As the Court explained in *Hill*,

> "the plaintiff in an invasion of privacy case must have conducted himself or herself in a manner consistent with an actual expectation of privacy, i.e., he or she *must not have manifested by his or her conduct a voluntary consent to the invasive actions of defendant.*"

(7 Cal.4th at 26 [emphasis added].) Thus, for example, in *Gill v. Hearst Publishing Co.* (1953) 40 Cal.2d 224, 230, the Court found that the plaintiff had waived any right to privacy by voluntarily assuming a pose in a public place. (*See also* Prosser & Keeton, Torts (5th ed. 1984) § 117, p. 867 ["It has been said that chief among the defenses [to invasion of privacy] at common law is the plaintiff's consent to the invasion."]; Rest.2d Torts § 892A com.a. [consent bars tort claim for invasion when "unaffected by fraud, mistake or duress"].)

The Court of Appeal's ruling was therefore consistent with long-established doctrines bearing on the legal significance of consent in closely analogous circumstances. Appellants point to nothing in the language or history of the Privacy Initiative indicating that the electorate intended the Initiative to create a new "constitutional" battery cause of action under which allegedly offensive physical contact is actionable even in the clear presence of consent.

2. Even in the Context of Government Action, Voluntary Consent Bars a Constitutional Challenge.

As *Hill* made clear, there are important differences between the analysis to be applied in a case, such as one under the Fourth

Amendment, involving the "coercive power of the government," and one involving only private parties. Nonetheless, it is instructive to recognize that, even in cases under the Fourth Amendment, voluntary consent has long been accepted as controlling in circumstances analogous to those presented here.

The Eleventh Circuit's decision in *Johnston* (discussed at pp. 10-11 above) is most directly on point. There, the court analyzed the facts presented – which were identical in all material respects to those alleged in appellants' Amended Complaint – and concluded that, under the Fourth Amendment "totality of the circumstances" test, there was no question that the plaintiff had consented to the pat-downs, thus barring his claim as a matter of law. (*Johnston*, 490 F.3d at 825.) No inquiry into justifications for the pat-downs was necessary. (*Id.* at 824-25.)

Appellants acknowledge the close similarity between this case and *Johnston*. (*See* Op. Br. at 27 n.10.) But aside from labeling the Eleventh Circuit's analysis "cursory" – an unconvincing assertion given that the published *Johnston* opinion addressed the issue of consent in considerable detail – appellants make no attempt to distinguish that decision. Instead, they rely heavily on the district court's opinion in that case (*see* Op. Br. at 27-28), even though it was soundly rejected by the Eleventh Circuit. (*Johnston*, 490 F.3d at 825 ["It was clear error for the

district court to find that Johnston did not consent to the pat-down searches ...."].)

Both California and federal courts have routinely upheld consent as barring Fourth Amendment challenges in other analogous circumstances as well. For example, in *Mathis v. Appellate Department* (1972) 28 Cal.App.3d 1038, 1040, a driver was deemed to have consented to a search of his motor vehicle after entering and parking in a parking lot with a sign warning that vehicles would be subject to search. The same principle was applied to uphold an individual's implied consent to a search as a condition of entering a military base. (*Morgan v. United States* (9th Cir. 2003) 323 F.3d 776, 781-82.) And courts have regularly upheld searches of persons and their luggage as a condition of airport travel on the ground that travelers demonstrate their consent by entering the airport security area with knowledge of the search requirement. Thus, in *Gilmore v. Gonzales* (9th Cir. 2006) 435 F.3d 1125, the Ninth Circuit explained:

> "We have held, as a matter of constitutional law, that an airline passenger has a choice regarding searches: [H]e may submit to a search of his person and immediate possessions as a condition to boarding; or he may turn around and leave. *If he chooses to proceed, that choice, whether viewed as a relinquishment of an option to leave or an election to submit to the search, is essentially a 'consent,'* granting the government a license to do what it would otherwise be barred from doing by the Fourth Amendment."

(Id. at 1139 [emphasis added].)[20]

Typically, in situations like that presented here, courts (including this Court) view consent as insufficient to defeat a Fourth Amendment claim only where there is a serious question of whether the consent is genuine and voluntary. Most often, the issue is whether the consent was obtained "by 'official coercion,' ... i.e., by 'threat,' express or implied, or 'force,' overt or covert." (*Boyer*, 38 Cal.4th at 447 n.21 [citing *Schneckloth*, 412 U.S. at 228-29].) Only if under all the circumstances, it has appeared that consent was not given voluntarily – that is it was "coerced by threats or force" – is the consent invalid and the search deemed unreasonable. (*Id.* at 446.)[21]

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[20] *See also People v. Woods* (1999) 21 Cal.4th 668, 674 (probationers may validly consent in advance to warrantless searches in exchange for opportunity to avoid service of prison term). Although, in the context of a Fourth Amendment challenge to an intrusive government search policy, some courts also consider the justification for the policy, consent is nonetheless generally recognized as a valid basis for upholding a search. (*See, e.g., McMorris v. Alioto* (9th Cir. 1978) 567 F.2d 897, 901 [attorney consented to magnetometer and pat-down searches when he entered courthouse to attend court proceedings, even though his consent was "exacted as the price of entering the courthouse to discharge duties necessary to his profession"].)

[21] *See also In re Manuel G* (1997) 16 Cal.4th 805, 822 (finding valid consent where the officer "did not draw his gun or deter or stop the minor from continuing what he was doing" and the individual was approached in a "public place"); *United States v. Drayton* (2002) 536 U.S. 194, 204 (finding consent where there was "no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice").

As discussed in Section I above, appellants have made no allegations that would call into question the voluntariness of their consent under this standard.[22] Instead, appellants merely argue that courts applying the Fourth Amendment "have repeatedly condemned mass, suspicionless pat-down searches of patrons at stadium and arena events." (Op. Br. at 24.) But nearly all of the cases appellants cite in support of this proposition involved very different factual circumstances, typically flowing from active involvement by armed police officers, often with other indicia of coercion and/or no advance notice and ability to avoid the search. (*See, e.g., Wheaton v. Hagan* (M.D.N.C. 1977) 435 F.Supp. 1134, 1147 [pat-downs conducted by "a substantial number" of armed police and many patrons did not "in fact know of their right to refuse"]; *State v. Iaccarino* (Fla. App. 2000), 767 So.2d 470, 474 [describing aggressive and extensive searches by off-duty police officers].)[23]

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[22] Appellants allege that San Francisco police officers are sometimes physically present in the vicinity when pat-downs occur. (AA 105, ¶ 9.) Notably, however, appellants did not (and could not) allege that police officers participated in any way in the pat-downs or that their presence prevented appellants from simply walking away if they wished not to be patted down.

[23] *See also State v. Seglen* (N.D. 2005) 700 N.W. 2d 702 (pat-downs conducted by police officers); *Gaioni v. Folmar* (M.D. Ala. 1978) 460 F.Supp. 10, 12 (aggressive searches conducted by a large force of armed police officers); *Stroeber v. Commission Veteran's Auditorium* (S.D. Iowa 1977) 453 F.Supp. 926, 929-30 (searches conducted randomly by a significant number of uniformed, off-duty policemen, and patrons not given adequate notice of the search); *Collier v. Miller* (S.D. Tex. 1976) 414 F.Supp. 1357, 1366 (no signs informing patrons of the search policy); (continued...)

Had state action existed here, any Fourth Amendment claim appellants might have brought would have failed under established Fourth Amendment standards. And "[t]he 'privacy' protected by the Privacy Initiative is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment ...." (*Hill*, 7 Cal.4th at 30 n.9.)

3. Appellants' Claim Represents an Improper Attempt to Apply the Unconstitutional Conditions Doctrine to Private Actors and Private Benefits.

Appellants' claim ultimately rests on the argument that a private party cannot condition the receipt of a private benefit – in this case, the privilege of attending a 49ers football game – on a basis that affects any privacy interest. Such a holding would amount to an unprecedented and wholly improper application of the "unconstitutional conditions" doctrine to restrict the actions of a private entity in conducting a private business.

The unconstitutional conditions doctrine holds that the *government* may not condition the grant of a *public* benefit on a basis that infringes a constitutional right. As explained in *Perry v. Sindermann*,

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Jacobsen v. City of Seattle (Wash. 1983) 658 P.2d 653, 654 (pat-downs conducted by police and plaintiffs were unaware they were subject to search prior to entering the concert); *Nakamoto v. Fasi* (Haw. 1981) 635 P.2d 946, 952 (security guards had excessive discretion leading to "selective enforcement and the unequal treatment of individuals"); *Jensen v. City of Pontiac* (Mich. Ct. App. 1982) 317 N.W.2d 619, 621 (prior to the trial court's modification of the search procedure, security guards "exercised too much discretion as to whom they would search").

(1972) 408 U.S. 593, the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.... This would allow the government to produce a result which [it] could not command directly." (*Id.* at 597 [internal citations and quotations omitted].)

Courts applying the unconstitutional conditions doctrine have consistently stressed its purpose as avoiding abuse of *government* power in imposing improper conditions on the grant of *government* benefits. (*See, e.g., Committee to Defend Reprod. Rights v. Myers* (1981) 29 Cal.3d 252, 264.)[24] Accordingly, where this Court has considered the unconstitutional conditions doctrine in the context of a Privacy Initiative challenge, the case has always involved a benefit provided by the government.[25]

Appellants have not cited a single case in which the unconstitutional conditions doctrine has been applied to conditions imposed by a *private* entity on a *private* benefit; nor does there appear to be any such precedent. To the contrary, courts have consistently held that the

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[24] *See also Rankin v. McPherson* (1987) 483 U.S. 378 (public employment); *Robbins v. Superior Court* (1985) 38 Cal.3d 199 (county general assistance program).

[25] *See, e.g., Robbins*, 38 Cal.3d 199, 214 (county general assistance program); *Committee to Defend Reprod. Rights,* 29 Cal.3d at 264 (Medi-Cal benefits); *Parrish v. Civil Service Comm'* (1967) 66 Cal.2d 260, 262 (county welfare benefits); *see also Loder*, 14 Cal.4th at 886 n.19 (rejecting consent as alone sufficient to justify drug testing required as a condition of government employment).

unconstitutional conditions doctrine does *not* apply in such a context. (*See, e.g., Wilkinson v. Times Mirror Corp.* (1989) 215 Cal.App.3d 1034, 1050 [rejecting applicability of unconstitutional conditions doctrine to a Privacy Initiative claim against a private entity].) Even the dissent below acknowledged that the unconstitutional conditions doctrine "does not apply to nongovernmental actors." (153 Cal.App.4th at 411 (Rivera, J., dissenting).)[26]

The benefit at issue here – attendance at a 49ers football game – is not provided by the government. And there is certainly no constitutional right to attend a football game.[27] Rather, the privilege of attendance derives from a freely revocable license issued by the 49ers, a private entity. (*See Johnston,* 490 F.3d at 824.) The unconstitutional conditions doctrine is accordingly inapplicable.

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[26] *See also Koveleskie v. SBC Capital Markets, Inc.* (7th Cir. 1999) 167 F.3d 361, 368 (unconstitutional conditions doctrine "specifically requires governmental action inducing a waiver of rights"); *U.S. v. Woodrum* (1st Cir. 2000) 202 F.3d 1, 10 (rejecting unconstitutional condition argument because, "[a]lthough public employers ordinarily cannot condition employment on an employee's consent to a search, ... the taxi involved in this incident was privately owned and the driver privately employed").

[27] *See Flores v. Los Angeles Turf Club, Inc.* (1961) 55 Cal.2d 736, 742 ("[I]t appears to be the almost universal rule in the United States that ... there exists no constitutional or common law right of access to race tracks or other places of public amusement...."); *see also James v. City of Long Beach* (C.D. Cal. 1998) 18 F.Supp.2d 1078, 1082-83 (no constitutionally protected interest in "recreational viewing of a sports event" or in supporting local baseball team at its home stadium).

Perhaps in recognition of this, appellants avoid express mention of the unconstitutional conditions label in their Opening Brief to this Court, despite referring to it openly in their arguments below.[28] Abandonment of the terminology, however, does not change the fundamental character of appellants' argument. They assert that the Privacy Initiative precludes the "imposition of [a] condition – sacrifice of a fundamental constitutional right – as part of the price of attending 49ers games." (Op. Br. at 17.) This is an unmistakable attempt to extend the unconstitutional conditions doctrine to an arena where it has no legal relevance. Virtually the same argument was flatly rejected in *Hill*:

> "To be sure, an athlete who refuses consent to drug testing is disqualified from NCAA competition. But this consequence does not render the athlete's consent to testing involuntary in any meaningful legal sense. Athletic participation is not a government benefit or an economic necessity that society has decreed must be open to all.... Participation in any organized activity carried on by a private, nongovernment organization necessarily entails a willingness to forgo assertion of individual rights one might otherwise have in order to receive the benefits of communal association."

(7 Cal.4th at 42-43.)

This reasoning applies with equal force here. Once appellants elected to attend a privately sponsored sporting event, that decision

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[28] *See* Appellants' Opening Brief to the Court of (Oct. 10, 2006) (characterizing the pat-down requirement as "an unconstitutional condition"); Appellants' Reply Brief to the Court of (Dec. 19, 2006) ("[T]he rationale underlying the doctrine of unconstitutional conditions fully applies in the private-sector Article I, section 1 context.").

necessarily entailed a willingness to forgo assertion of privacy interests they might have had in other contexts.

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The choice to forgo attending 49ers games or to submit to a pat-down to gain entry may have been a difficult one for appellants. But it was by no means the product of coercion, physical or otherwise. Because appellants were fully aware that the consequence of their voluntary choice to attend games was that they would be patted down, any expectation of privacy that appellants claim to have had in avoiding a pat-down was objectively unreasonable.

III. Appellants' Claim Also Fails to Satisfy the Third Prong of the *Hill* Test, Requiring a "Serious Invasion" of a Protected Privacy Interest.

Judge Warren held that, in addition to failing to establish a reasonable expectation of privacy, the First Amended Complaint failed to satisfy the third of the three *Hill* elements: an "egregious breach of the social norms underlying the privacy right." (AA 198 [quoting *Hill*, 7 Cal.4th at 37].) The Court of Appeal found it unnecessary to reach this aspect of the Superior Court's decision, which provides an independent ground for affirming the result below.

Hill makes clear that an objective standard is to be applied in assessing the seriousness of the alleged invasion, looking to social norms prevalent in the community rather than the subjective sensitivities of a

particular plaintiff. (7 Cal.4th at 37.) The pat-downs conducted by the 49ers are far from the kind of egregious breach of social norms with which *Hill* was concerned.

People v. Carlson (1986) 187 Cal.App.3d Supp. 6 – a case in which neither notice nor consent was present – provides a useful starting point. That case involved a similar "light touch around the waist" (*id.* at 22) by a Secret Service agent guarding a presidential candidate near a crowd in downtown San Francisco. The agent had a practice of routinely conducting such limited pat-downs of all persons near the front of a rope line under the pretext of merely jostling them in the crowd. Others in the crowd were targeted for similar pat-downs if they appeared to be suspicious. (*Id.* at 11-12.) The court held that the agent's touching of the defendant was "similar to a touch any person in the crowd might have inflicted" and hence constituted a "minimal" intrusion. (*Id.* at 22.)

The *Carlson* court considered additional factors before ultimately upholding the lawfulness of the agent's actions in the face of a Fourth Amendment challenge. But the persons patted down in *Carlson* had no notice of the agent's actions and did not consent to them.[29] Here, in

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[29] There can be little question that the *Carlson* court would have made even shorter shrift of the Fourth Amendment argument had voluntary consent existed, given the standard applied in Fourth Amendment cases. *See* pp. 33-38 above.

contrast, appellants had full notice of the pat-downs and gave their consent by attending the games. Accordingly, Judge Warren properly held that appellants could not, as a matter of law, show that the pat-downs constitute an "egregious breach of ... social norms." (AA 198.)

This Court recognized in *Pioneer Electronics* the importance of consent in assessing the third prong of the *Hill* standard. In that case, the Court, like the Superior Court here, found that the presence of consent precluded satisfaction of the second *and* third *Hill* elements, holding that "for much the same reasons why Pioneer customers had a reduced expectation of privacy, the trial court could properly find that no serious invasion of privacy would ensue if release of complaining customer identifying information was limited to the named plaintiff in a class action filed against Pioneer, following written notice to each customer that afforded a chance to object." (40 Cal.4th at 372 [pointing out that customers had already "voluntarily disclosed" their contact information to the defendant in making complaints about its product].)

Where voluntary consent exists, such a conclusion will typically follow as a matter of simple logic. As the Court observed in *Hill*, "[i]f voluntary consent is present, a defendant's conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability." (7 Cal.4th at 26 [quoting Rest.2d Torts, § 652B, com.c].) Here, if the alleged invasion about which appellants complain represented an

egregious breach of social norms, it is difficult to imagine that they (and tens of thousands of other people) would repeatedly submit to it simply to be entertained for a few hours at a football game.

The conclusion that no serious invasion exists in this case is further confirmed when one considers the inherently interrelated nature of the *Hill* elements. The privacy interest that appellants identify – the interest in not being touched by strangers in a crowded place – is surely a minimal one at best. (*See* pp.46-50 below.) Even if the presence of consent is completely ignored, appellants had no more than the most limited expectation of privacy attached to that asserted interest, given that the event they were attending was one in which being jostled and otherwise touched by strangers was a virtual certainty. Once appellants consented to the pat-downs, no reasonable person could conclude that the 49ers committed a serious breach of social norms in relying on that consent in performing the pat-downs to which appellants had consented and which were not dramatically different from physical contacts appellants could otherwise expect to occur at the game.[30]

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[30] Appellants do not claim that they were singled out for pat-downs; rather, they allege (correctly) that pat-downs were required of all persons attending the games. (AA 105, ¶ 9.) There is accordingly no question of appellants having suffered embarrassment or stigma from being singled out of the crowd for special treatment. (*Cf. United States v. Skipwith* (5th Cir. 1973) 482 F.2d 1272, 1275-76 [citing standardized feature of airport (continued...)

Other important factors reinforce the absence of any significant intrusion here. There is no impact on informational privacy, as no information is collected, stored, disseminated, or used for purposes other than the security screening itself. And more extensive intrusions on "autonomy" interests have been dismissed as negligible in past decisions. For example, in *Smith v. Fresno Irrigation District* (1999) 72 Cal.App.4th 147, which involved a challenge to employee drug tests, the court held that the *only* relevant privacy interest was the informational privacy interest implicated by disclosure of test results. Any invasion of autonomy privacy through the collection process was "negligible." (*Id.* at 160.)[31]

In short, appellants' allegations cannot, as a matter of law, support a conclusion that the challenged pat-downs amount to a "serious invasion" of any privacy interest. This provides an independent basis for affirmance of the result below.

IV. Appellants' Assertion of Any Protected Privacy Interest in This Case Is Open to Serious Question.

The Superior Court accepted *arguendo* that the first prong of the *Hill* test was satisfied, *i.e.*, that the privacy interest appellants alleged

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screening as a factor diminishing its invasiveness].)

[31] In *Hill,* the court found that the collection process required by the NCAA's testing program did involve a significant invasion of privacy, but that was because the collection procedure involved direct monitoring of urination, which, under accepted societal norms, is viewed as a particularly private act. (7 Cal.4th at 40-41.)

was subject to protection under the Privacy Initiative. The Court of Appeal, for its part, affirmatively found such an interest to exist. (153 Cal.App.4th at 402.) That conclusion, however, is open to serious question. At a minimum, the nature of the privacy interest alleged here should inform the Court's assessment of appellants' claim.

In *Hill*, the Court cautioned that privacy interests "do not encompass all conceivable assertions of individual rights." (7 Cal.4th at 35; *see People v. Privitera*, 23 Cal.3d at 709-10.) The Court identified two general categories of privacy interests: "informational privacy" interests and "autonomy" privacy interests. (7 Cal.4th at 35.) As discussed above, the proponents of the Privacy Initiative – and by extension the voters who approved it – were principally interested in informational privacy. (*See* pp. 29-30 above.) Indeed, *Hill* characterized informational privacy as "the core value furthered by the Privacy Initiative." (7 Cal.4th at 35; *see People v. Privitera*, 23 Cal.3d at 709.)

Nonetheless, the Court confirmed in *Hill* that the Privacy Initiative protects certain types of autonomy privacy interests as well as informational privacy interests. In the context of autonomy privacy, however, the Court offered little comment on the scope of protection afforded *as against a private party*. Indeed, the privacy interests at issue in *Hill* itself were essentially informational in nature. The Court suggested that the monitored urination requirement of the NCAA's drug-testing

requirement affected an autonomy privacy right. (7 Cal.4th at 41.) However, the *Hill* plaintiffs' complaint was not that the NCAA forced them to urinate; rather, it was that it required them to display that act to a monitor – *i.e.*, to convey information (the view of the act of urination) that they preferred to keep private. This is very different from a standard autonomy privacy claim, which focuses on infringement of a person's right to engage (or refrain from engaging) in a particular action, such as the use of birth control or the performance of an abortion. And both are far afield from a challenge based, not on a restriction placed on someone's ability to make intimate personal decisions, but simply on one private party's objection to being touched by another private party.

While observing that "[t]he ballot arguments refer to the federal constitutional tradition of safeguarding certain intimate and personal decisions from government interference," the *Hill* Court cautioned that "they do not purport to create any unbridled right of personal freedom of action that may be vindicated in lawsuits against either government agencies or private persons or entities." (7 Cal.4th at 36.) This caution is particularly meaningful in the context of autonomy privacy, which inherently focuses on the right of citizens to make certain types of highly personal decisions (such as those involving reproduction) without interference *by the government.* Even in the context of government interference, it is generally accepted that the autonomy privacy right is not

boundless. When dealing solely with private parties, who have their own constitutionally protected liberty and property interests, courts should be particularly cautious before recognizing and protecting, through potentially burdensome litigation, a separate "autonomy privacy" right attached to ordinary day-to-day interactions. There may be rare situations in which such an autonomy privacy right, protected against interference by private actors, exists. But it surely does not exist here.

Here, the privacy right that appellants assert is, if anything, one of autonomy privacy. A pat-down at an NFL game does not collect information about a person, except in the most limited and ephemeral sense, and there is certainly no compilation or retention of information in databases, much less sharing of collected information with third parties. Appellants have implicitly recognized from the outset that no meaningful invasion of an informational privacy interest could be shown here.

But any acceptance of an autonomy privacy right in this case – particularly one that is protected against interference by private parties – would go well beyond any rational application of the purpose or intent of the Privacy Initiative. Appellants point to the reference in the official Ballot Pamphlet to "the right to be left alone." But that phrase referred to the long-established right of people to be free from government interference

in their private lives.[32] There is nothing in the history of the Privacy Initiative or its application by the courts to suggest that the California Constitution affords a private citizen a constitutional protection against a non-injurious touch by another private citizen.

Ultimately, appellants' claim here is that, absent proof of a justification, every simple battery represents a violation of a constitutional privacy right not to be touched. Appellants argue further that such a constitutional form of battery is not susceptible to the same absolute defense of consent that has always applied to a battery claim. Such a result is on its face preposterous, and if accepted would transform into a potential constitutional claim virtually every private interaction in which one individual's personal space or complete freedom of action is affected by the acts of another private party.

V. Appellants' Proposed Standard Is Unnecessary to Avoid the Evils They Predict and Would Impose a Widespread Chilling Effect on Constitutionally Protected Conduct.

"No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause

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[32] Even if broadly construed, this phrase cannot reasonably be extended to situations where, as here, the complaining party affirmatively chooses *not* to be "left alone." The 49ers did not, after all, force appellants to come to the stadium (where they would be joined by tens of thousands of other people); nor did the 49ers force appellants to be patted down. Appellants *chose* to attend 49ers games knowing that a pat-down was part of the experience they should anticipate.

of action for invasion of privacy." (*Hill*, 7 Cal.4th at 37.) Appellants' position, reduced to its essence, would open the floodgates to exactly the kind of frivolous litigation and injury to other constitutionally protected interests that the *Hill* standard is designed to avoid.

Much of appellants' brief is dedicated, not to the circumstances and context of this case, but rather to very different circumstances in which they claim the Court of Appeal's holding would result in widespread flouting of citizens' privacy interests by commercial entities. As shown above, much of appellants' rhetoric can be discounted simply by recognizing that the Court of Appeal's holding was limited to a situation in which it is beyond legitimate dispute that the plaintiff knowingly and voluntarily consented to the alleged invasion. The Court of Appeal did not suggest, for example, that businesses could embark on wholesale infringement of protected privacy interests merely by giving "notice" of their intention to do so, regardless of whether that notice presented people with a meaningful opportunity to give or withhold their consent.

Appellants' position, in contrast, would require an unprecedented infringement of the long-established liberties of both private commercial actors and the persons who choose to do business with them. Potentially challengeable "invasions" of arguable "privacy interests" occur constantly in everyday life. Lenders require consent to disclosure of credit

history and other personal information as a condition of making loans. Doctors and dentists require consent to intimate examination as a condition of treatment. Insurers require medical history and other private information as a condition of issuing policies. And if merely "touching" is to be considered a protected privacy interest, the list of potential infringers becomes unimaginably long, including a seamstress who takes a customer's measurements, a shoe salesman who fits a shoe, or a dance instructor who physically guides his students through the motions of the tango. Just at a 49ers game, one would have to include, among others, the fan who pushes and climbs past others in his row on the way to his seat, or the football player who slaps a teammate on the back after a good play.[33]

It is no answer for appellants to assert that these private actors, if sued, would ultimately be able to present adequate justifications for their conduct – that the doctor could prove her need to examine her patient, the lender could demonstrate a legitimate need for an applicant's credit history, and the seamstress could show a requirement for her customer's bust measurement. The shorter and easier answer – which

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[33] Further, as the Court observed in *Avila*, "the boxer who steps into the ring consents to his opponent's jabs; the football player who steps onto the gridiron consents to his opponent's hard tackle; the hockey goalie who takes the ice consents to face his opponent's slapshots; and, here, the baseball player who steps to the plate consents to the possibility the opposing pitcher may throw near or at him." (38 Cal.4th at 166.) These individuals would also all have at least threshold Privacy Initiative claims under appellants' proposed test.

appellants' position inherently rejects – is that consent provides an immediate threshold response to claims brought in these circumstances. The mere possibility that a privacy claim could nonetheless be made – and would, under appellants' proposed standard, require full litigation (including proof of the legitimacy of the alleged "invasion") – would inevitably impose a chilling effect on private conduct.[34] There is nothing in the Privacy Initiative – a measure primarily focused on preventing misuse of databases – that indicates any intent to remake society by requiring citizens to build walls between one another to avoid the possibility of being hauled into court and forced to justify ordinary behavior. To the contrary, the Ballot Pamphlet for Proposition 11 specifically identified other fundamental and equally important rights reflected in the California Constitution, including "acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness," that would be compromised by such a radical interpretation.

Appellants' position, moreover, implies a troubling judgment about the legal capacity of ordinary California citizens. Appellants'

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[34] *Cf. Jones v. Lodge at Torrey Pines Partnership* (Mar. 3, 2008, S151022) __ Cal.4th __ [72 Cal.Rptr.3d 624, 631] (discussing chilling effect on supervisors' ability to perform important job functions if made subject to FEHA retaliation suits); *Dodds v. American Broadcasting Co.* (9th Cir. 1998) 145 F.3d 1053, 1059 (restrictions on liability for reporting on public figures avoids chilling effect that state defamation laws would have on the dissemination of information on matters of public concern).

position is not simply that they should not be "required" to consent to pat-downs; it is that no 49ers fan is *legally capable* of giving a consent on which the 49ers may permissibly rely. Put differently, appellants assert that the 49ers may not permissibly offer an entertainment product that features the level of security and confidence generated by the pat-down policy – even if that product, offered in that way, is affirmatively attractive to fans. Ignoring the possibility that many fans may *prefer* to have pat-downs so as to decrease the likelihood that they and their families will be subject to a terrorist attack at an NFL game, appellants assert that the 49ers can satisfy those fans' wishes, and rely on their consent, only on pain of being dragged into court for a full trial in which they will bear the burden of justifying the way in which they have chosen to offer their product.

Such a remarkable extension of existing law and distortion of ordinary private and commercial relationships is not supported by the Privacy Initiative. It is not necessary to protect California citizens from privacy invasions of the kind with which the voters were concerned when they passed the Initiative. And it is certainly not justified as a basis for permitting appellants to avoid the minor inconvenience of a pat-down as a condition of attending a football game.

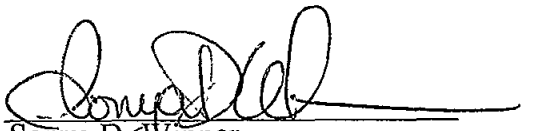
CONCLUSION

For the reasons stated above, the judgment of the Court of Appeal should be affirmed.

DATED: March 24, 2008

Respectfully submitted,

COVINGTON & BURLING LLP

By: 
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WORD COUNT CERTIFICATION

Pursuant to California Rule of Court 8.520(c)(1), I certify that the text of this brief consists of 13,642 words, including footnotes, as counted by the Microsoft Word 2003 word processing program used to write this brief.

DATED: March 24, 2008

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PROOF OF SERVICE

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ANSWER BRIEF

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on March 24, 2008.

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