No. S155742

IN THE

SUPREME COURT OF CALIFORNIA

DANIEL SHEEHAN et al.,

Plaintiffs and Appellants,

v.

THE SAN FRANCISCO 49ERS, LTD.,

Defendant and Respondent.

SUPREME COURT
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After a Decision by the Court of Appeal,
First Appellate District, Division Four
Case No. A114945

On appeal from an Order of the
Superior Court of California
County of San Francisco
Case No. CGC-05-447679
Hon. James L. Warren

Answer to Petition for Review

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I. INTRODUCTION AND SUMMARY OF REASONS WHY REVIEW SHOULD NOT BE GRANTED

This case involves a routine application of the time-honored principle that a person who voluntarily consents to what might otherwise be considered an invasion of his or her privacy may not thereafter challenge the allegedly invasive conduct. The legal principle applied by the Court of the Appeal in this case was neither novel nor inconsistent with that applied by other courts – including this Court – in analogous circumstances. There is accordingly no reason for this Court to grant review.

The petitioners here, Daniel and Kathleen Sheehan (hereafter "petitioners"), are two fans of the San Francisco 49ers ("49ers") football team who enjoy attending 49ers games live at Monster Park in San Francisco. They do not like one of the 49ers' conditions for attendance at those games – a limited pat-down security inspection, performed by private event screeners for every person entering the stadium. However, petitioners' dislike of this security measure was outweighed by their desire to attend the games. After having been patted down several times during the 2005 season – and knowing that the 49ers intended to continue the measure in the 2006 season – petitioners renewed their season tickets for 2006.

On these undisputed facts, the trial court found that petitioners had voluntarily consented to the pat-downs, at least for 2006 onward, and that this consent barred their claim under the "Privacy Initiative" provision of the California Constitution. The Court of Appeal agreed. This holding represented an unremarkable application of the basic principle, going back to the common law, that a plaintiff seeking to sue for an invasion of asserted privacy rights "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." (*Hill v. Nat'l Collegiate Athletic Ass'n* (1994) 7 Cal.4th 1, 26.) As discussed below, the courts have relied repeatedly on that principle in rejecting Privacy Initiative claims asserted in the face of a plaintiff's voluntary consent. Petitioners, in contrast, have not identified a single case in which a Privacy Initiative claim against a private party has been upheld notwithstanding knowing and voluntary consent by the plaintiff to the alleged invasion.

Petitioners' assertion that their consent was not "voluntary" rests upon a fundamental misunderstanding of the law of consent. Consent may be voluntary even if it is grudging or provided in return for a benefit that the plaintiff would have preferred to receive without it. It may also be voluntary where, as here, it is expressed through conduct rather than through words. And while there are some limited situations in which the *government* is precluded under the First and Fourth Amendments from, in effect, coercing consent to an infringement of constitutional rights by threatening to withhold a valuable government benefit, there is absolutely no authority (and petitioners offer none) for the proposition that a private party may not require consent as a condition of attendance at a sporting event. There is no constitutional right to attend a football game. And, as popular as 49ers' games may be, attending those games is hardly a necessity of life. Petitioners may not have *liked* the fact that they had to consent to the pat-downs in order to attend 49ers games, but there is no question that their consent was a voluntary exercise of their free will.

In short, there is no need to grant review here "to secure uniformity of decision or to settle an important question of law." Cal. Rules of Court § 8.500(b)(1). The Petition for Review should be denied.

II. FACTS AND PROCEDURAL HISTORY

Respondent 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 policy requiring each person entering an NFL stadium on game day to submit to a limited pat-down inspection as a condition of entry. (*Id.* ¶¶ 9, 10.) 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 petitioners' Complaint, those 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.)

Petitioners, two long-time season ticket-holders, each attended several 49ers home games in 2005; on each occasion, they submitted to a pat-down inspection as a condition of entry. (*Id.* ¶ 5, 10.)

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.[2]

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 suggested that the expiration of the 2005 NFL season created a standing problem for petitioners, whose complaint included allegations only about that season. (RT 2:11-25.) It was then

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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 Petition seeks review of the affirmance of a demurrer, the underlying facts are drawn from petitioners' complaint (and, where applicable, amended complaint) and are, for current purposes, assumed to be true.

[2] The privacy clause was adopted pursuant to a voter initiative in 1972 and is commonly referred to as the "Privacy Initiative."

agreed that petitioners could amend their complaint to include allegations incorporating the fact that they had renewed their tickets for the 2006 season. (RT 2:11-8:21.)

Petitioners 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 v. National Collegiate Athletic Association* (1994) 7 Cal. 4th 1, Judge Warren found that petitioners 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 [citing and quoting *Hill*, 7 Cal. 4th at 35, 36, 37].) He held that petitioners' claim "fails under the second and third elements of *Hill*." (AA 198.)

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." 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.)[3]

Petitioners appealed to 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

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[3] Judge Warren went on to hold, in the alternative, that petitioners' 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." (AA 199.) Having made the voluntary decision to buy the tickets with "foreknowledge" of the pat-down policy, petitioners "cannot now claim that the pat-downs are 'highly offensive to a reasonable person." (*Ibid.*) The Court of Appeal found it unnecessary to reach this second ground for Judge Warren's decision.

> 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."

153 Cal.App.4th at 403.[4]

Petitioners now seek review of the Court of Appeal's decision. For the reasons set out below, the petition should be denied.

III. ARGUMENT

A. THIS CASE PRESENTS NEITHER A CONFLICT BETWEEN THE COURTS OF APPEAL NOR AN IMPORTANT UNSETTLED LEGAL QUESTION.

The Court of Appeal's decision here represents a straightforward application of established law. Its ruling was consistent with both common sense and decades of decisions from both this Court and others recognizing that a person who has voluntarily consented to an

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[4] Justice Rivera dissented, taking exception to the majority's conclusion that the trial court had acted within its discretion in not affording the plaintiffs a second opportunity amend their complaint. (The Petition for Review does not seek review on this issue. At no time have petitioners identified any factual allegations they would add to another amended complaint that would have had a material bearing on the lower courts' rulings.) Justice Rivera also disagreed with the majority on its application of the *Hill* standard, arguing that the precedents upon which the majority relied (which are discussed below) were distinguishable from the circumstances presented here.

asserted privacy invasion cannot thereafter be heard to complain about the assertedly invasive conduct.

Petitioners identify no conflict between the Courts of Appeal on the issue presented here. There is none. Indeed, there is no conflict with the decision in this case to be found anywhere. The NFL's pat-down policy has been challenged in several jurisdictions, and in every single case that challenge has ultimately been rejected. Most recently, the United States Court of Appeals for the Eleventh Circuit rejected a Fourth Amendment challenge to the patdowns performed by the Tampa Stadium Authority on grounds virtually identical to those applied by the Court of Appeal here. (*See Johnston v. Tampa Sports Auth.* (11th Cir. 2007) 490 F.3d 820 [rejecting Fourth Amendment claim of season ticketholder who, with advance notice of pat-downs, presented himself at stadium entrance to attend game and so gave voluntarily consent for pat-downs]; *see also Stark v. Seattle Seahawks* (W.D. Wash. June 22, 2007) 2007 WL 1821017 [rejecting Fourth Amendment claim based on absence of state action]; *Chicago Park Dist. v. The Chicago Bears Football Club, Inc.* (N.D. Ill. Aug. 8, 2006) 2006 WL 2331099 [rejecting claim for lack of standing].) There is no reason why the result should have been different in this case.

1. The Court of Appeal Applied the Well-Established Standard for Evaluating a Privacy Initiative Claim.

As this Court has recently reiterated, *Hill v. NCAA* is the controlling case on the interpretation and application of the Privacy Initiative. (*See Pioneer Electronics (USA), Inc. v. Super. Ct.* (2007) 40 Cal. 4th 360 [quoting and applying the *Hill* standard].) Among other things, *Hill* sets out the minimum threshold elements of a prima facie Privacy Initiative claim. One of these elements is "a reasonable expectation of privacy in the circumstances." (*Hill* 7 Cal. 4th at 39-40.) If – but only if – the plaintiff establishes *all three* of the threshold elements, the court then

proceeds to balance the privacy intrusion against any "important interests" proffered to justify the challenged conduct. (*Id.* at 37, 40.) The Court stated explicitly that each of the three threshold elements of a plaintiff's claim may be adjudicated as a matter of law where the pertinent facts are not in dispute. (7 Cal. 4th at 40.) *Hill* thus established a framework through which Privacy Initiative suits may be analyzed at the threshold to screen out claims that fail as a matter of law.

Virtually all post-Hill cases considering claims under the Privacy Initiative – including the decisions of this Court – have explicitly cited and applied the *Hill* standard.[5] Respondents, however, argue that the Court of Appeal misapplied *Hill* because it failed to take into account a "clarification" offered in a plurality decision of this Court in *Loder v. City of Glendale* (1997) 14 Cal.4th 846. (*See* App. Br. at 7-11.) This argument is a complete red herring. Nothing in the Court of Appeal's decision here is in any way inconsistent with *Loder*.[6]

Loder involved a challenge under both the Fourth Amendment and the Privacy Initiative to certain drug-testing requirements

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[5] *See, e.g., Pioneer Electronics,* 40 Cal.4th at 370-72; *Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal.4th 30; *Loder v. City of Glendale* (1997) 14 Cal.4th 846; *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; *Barbee v. Household Auto. Fin. Corp.* (2003) 113 Cal.App.4th 525, 533; *TBG Ins. Servs. Corp. v. Super. Ct.* (2002) 96 Cal.App.4th 443, 449; *Feminist Women's Health Ctr. v. Super. Ct.* (1997) 52 Cal.App.4th 1234.

[6] This Court need not tarry over petitioners' argument about whether the *Loder* plurality opinion is "binding" in light of specific statements that were or were not made in other opinions in that case. (Petition at 8-9.) 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, any particular answer to that question.

imposed by a government employer. This Court upheld some of the requirements and rejected others. In the opinion cited by petitioners, 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 opine 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 his opinion suggested an intent to eliminate the plaintiffs' initial obligation to demonstrate the existence of all three threshold elements – including a reasonable expectation of privacy.[7]

Petitioners argue that the *Hill* standard is only intended to screen out "trivial" cases. It appears, however, that for petitioners "trivial" is in the eye of the beholder. Both before and after *Loder*, the California courts – including this Court – have consistently applied the *Hill* screening mechanism to do what this Court plainly had in mind in both *Hill* and *Loder*: to screen out Privacy Initiative claims that are defective as a matter of law.[8] And, contrary to petitioner's suggestion, such cases typically have involved interests that, although not legally protected for one reason or another, were hardly "trivial" in the sense of not involving potentially

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[7] For the same reason, petitioner's reliance on *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, is misplaced. In that case, which involved a challenge to a state law requiring a minor to obtain parental consent before obtaining an abortion, there was no serious dispute that the threshold elements of *Hill* were satisfied.

[8] *See, e.g., Pioneer Elecs.*, 40 Cal.4th at 370; *Heller v. Norcal Mut. Ins. Co.* (1994) 8 Cal.4th 30; *Rosales v. City of Los Angeles* (2000) 82 Cal.App.4th 419; *TBG Ins. Servs. v. Super. Ct.* (2002) 96 Cal.App.4th 443; *Leibert v. Transworld Sys., Inc.* (1995) 32 Cal.App.4th 1693.

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. (*E.g.*, *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]; *TBG Ins. Servs.*, 96 Cal.App.4th at 452 [personal financial information not protected when placed by plaintiff on computer to which employer had reserved a right of access]; *Rosales*, 82 Cal. App. 4th at 429 [private information in personnel records not protected because of conditional nature of statutory confidentiality].)

Similarly, the Court of Appeal rejected petitioners' claim here, not because it applied a different standard, but rather because, on the undisputed facts and applying the same standard California courts have routinely applied in all of these cases, that claim failed as a matter of law.

2. The Court of Appeal Properly Applied the *Hill* Standard in Finding that Petitioners' Claim Failed to Establish a Reasonable Expectation of Privacy.

The Court of Appeal, like the trial court, found that petitioners had no reasonable expectation of privacy because, having renewed their season tickets with full knowledge of the pat-down requirement, they voluntarily consented to the pat-downs. This finding was fully consistent with established law.

a) Consent is a Well-Recognized Bar to a Privacy Claim.

The principle that one cannot complain about an alleged invasion of privacy to which one has voluntary consented is well accepted. For example, in *Heller*, this Court required dismissal of a Privacy Initiative claim – without any balancing of interests – when a plaintiff had impliedly consented to the disclosure of which she complained. (8 Cal. 4th at 43-44.)

The *Heller* plaintiff claimed that her doctor had infringed her protected 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. (8 Cal. 4th at 36.) In ordering that the demurrer to the privacy complaint be sustained, the Court held that, in 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.)

Petitioners' effort to distinguish *Heller* is circular. They argue that the plaintiff's claim in that case "was clearly barred by settled law." (Petition at 13.) But that is exactly the point: By filing a lawsuit, the *Heller* 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.[9]

The lower courts have also regularly rejected Privacy Initiative claims in which the plaintiffs had demonstrated, either verbally or through conduct, consent to the alleged invasions. (*See, e.g., TBG Ins. Servs. Corp. v. Super. Ct.* (2002) 96 Cal.App.4th 443 [consent to employer access to personal records on computer]; *Feminist Women's Health Ctr. v.*

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[9] This Court applied a similar analysis more recently in *Pioneer Electronics*, where it concluded that the Privacy Initiative did not require a 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.)

Super. Ct, 52 Cal.App.4th at 1249 [consent to semi-public self-demonstration of a gynecological procedure implied from acceptance of job for which such procedures were a condition]; *Wilkinson v. Times Mirror Corp.* (1989) 215 Cal. App. 3d 1034 [consent to offer of private employment conditioned on submission to a drug test].

For example, *TBG Insurance Services Corp. v. Superior Court* upheld an employer's right to retrieve private personal data that an employee had put on a company-owned computer kept at his home. The Court of Appeal 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 its employees' 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." (96 Cal.App.4th at 452; *see also Wilkinson,* 215 Cal.App.3d at 1049 [observing that applicants for employment who wished not to submit to drug testing could simply decline the offer of employment].)

Petitioners' effort to distinguish *TBG Insurance* fares no better than their effort to distinguish *Heller*. Petitioners argue that *TBG* plaintiff had no legitimate privacy interest in his personal information because his employer had prohibited personal use of the computer; they also assert that the *TBG* court discussed other subjects, including the reasons for the employer's policy. (Petition at 18 & n.18.) But neither of these points undermines that court's express finding that the employee's act in putting his personal information on the computer manifested consent to its disclosure, and 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].).[10]

Consent has also been upheld as a valid bar to claims under the Fourth Amendment, even though the government (unlike private parties) is subject to restrictions on its ability to seek consent as a condition of providing a government benefit. (*See* note 25 below.) Thus, searches of persons and their luggage as a condition to airport travel have been routinely upheld on the ground that travelers evidence their consent by entering the airport security inspection area with knowledge of the search requirement. In *Gilmore v. Gonzalez* (9th Cir. 2006) 435 F.3d 1125, the Ninth Circuit observed that "an airline passenger has a choice regarding searches: He 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.'" (435 F.3d at 1139 [internal quotation marks omitted].)[11]

The same principle has been applied in other circumstances as well. For example, in *Mathis v. Appellate Department* (1972) 28

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[10] Petitioners are also disingenuous in identifying *Feminist Women's Health Center* as a case in which the court conducted a full balancing analysis. (*See* Petition at 17 n.9.) Although that court did discuss the employer's reasons for its policy, the basis for its holding was clear: "[W]e return to plaintiff's consent . . . as part of her employment 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." (52 Cal.App.4th at 1249.)

[11] *See also, e.g., United States v. Doran* (9th Cir. 1973) 482 F.2d 929, 932 ("Having been exposed to the existence of the regulations and having chosen to participate in the activity, the implication of his consent is unavoidable.").

Cal.App.3d 1038, 1040, the driver of a motor vehicle was deemed to have consented to a search of the vehicle after he parked in a lot with a sign warning that vehicles would be subject to search. And in *Morgan v. United States* (9th Cir. 2003) 323 F.3d 776, 778, the court relied on implied consent as a basis for approving searches of persons entering military bases.

There was, accordingly, nothing new or unusual in the Court of Appeal's holding that petitioners' voluntary consent to the pat-downs barred their privacy claim. Notably, petitioners have not identified a single case, either in this Court in or in the Courts of Appeal, in which a Privacy Initiative claim against a private party has succeeded in the face of the plaintiff's voluntary consent.[12] They certainly have cited no authority for the proposition that consent is categorically, and as a matter of law, never sufficient to defeat a reasonable expectation of privacy.[13]

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[12] The only citation petitioners offer is to *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, a case having nothing to do with the Privacy Initiative. That case addressed whether a municipality could rely on an advance waiver of liability for negligence in defending a lawsuit alleging gross negligence in the death of a child. There was no discussion in the Court's decision of the Privacy Initiative or of the legal significance of consent in the privacy context.

[13] None of the cases cited by petitioners for the proposition that past precedents have categorically "rejected" the sufficiency of consent to defeat a constitutional privacy claim (Petition at 17 & n.9) support that proposition. *Cramer v. Consol. Freightways, Inc.* (9th Cir. 2001) 255 F.3d 683, 696, simply rejected a claim that employees' consent to drug-testing allowed an employer also to secretly monitor the employees' restroom. In *Kraslawsky v. Upper Deck Co.* (1997) 56 Cal.App.4th 179, 188, the court expressly found that no consent was present. The privacy claim in *Barbee v. Household Automotive Finance Corp.* (2003) 113 Cal.App.4th 525, was *rejected*, with heavy emphasis on the issue of notice and implied consent. *Smith v. Fresno Irrigation Dist.* (1999) 72 Cal.App.4th 147 and *Loder* were both cases against government (rather than private) employers, who are subject to the unconstitutional conditions doctrine. (*See* notes 19 and 25 (continued...)

b) The Mere Fact That Petitioners' Consent Was "Implied" Does Not Render It "Involuntary."

Petitioners argue that their privacy claim nonetheless remains viable because their consent to the pat-downs was only "implied" and was therefore not "voluntary." Petition at 14. This argument fundamentally confuses the concepts that petitioners seek to invoke. Consent is "implied" if it is provided through conduct rather than verbally;[14] it is "voluntary" if provided – either in words or by conduct – through the exercise of free will.[15] Consent may thus be both "implied" *and* "voluntary."[16]

The Eleventh Circuit's analysis in *Johnston* of pat-downs conducted by the Tampa Stadium Authority offers a classic example of consent that was both "implied" and "voluntary":

> 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

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below.) And, as discussed in note 10 above, *Feminist Women's Health Center* was decided expressly on the issue of consent.

[14] *People v. Harrington* (1970) 2 Cal.3d 991, 995 (Consent "may be expressed by actions as well as words."); *People v. Timms* (1986) 179 Cal.App.3d 86, 90 ("Consent to search may be implied by conduct"); Levenson, California Criminal Procedure (2006) § 5.38 ("Consent need not be express, but may be implied from the circumstances.").

[15] *People v. James* (1977) 19 Cal.3d 99, 106 ("manifestation of consent" must be voluntary, i.e., "the product of ... free will."); *People v. Shandloff* (1985) 170 Cal.App.3d 372, 383 (same).

[16] Conversely, consent can be both "express" and "involuntary." For example, if a police officer puts a gun to a suspect's head and compels him to verbalize consent to a search, that consent is "express" rather than "implied," but it will not be deemed "voluntary." (*Florida v. Bostick* (1991) 501 U.S. 429, 438; *People v. Boyer* (2006) 38 Cal. 4th 412, 447.)

> 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 and did in fact express his objection to the searches to specific screeners and over the telephone to the Buccaneers....When screeners insisted on the pat-down before permitting Johnston to enter, Johnston elected to be patted down...
>
> Considering the totality of the circumstances, the Court concludes that Johnston voluntarily consented to pat-down searches each time he presented himself at a Stadium entrance to attend a game. The record is replete with evidence of the advance notice Johnston was given of the searches including preseason notice, pregame notice, and notice at the search point itself."

490 F.3d at 825.

Petitioners do not claim different facts here – indeed, in the Court of Appeal they argued that *Johnston* (in which the Eleventh Circuit's decision had not yet been issued) was on all fours with this case.[17] The Court of Appeal was correct in concluding that the Eleventh Circuit's analysis – which represented a straightforward application of the standard law on consent, is equally applicable here. (*Sheehan*, 153 Cal. App. 4th at 405.)

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[17] *See, e.g.*, Appellants' Opening Br. at 15-16 (Oct. 10, 2006) (characterizing *Johnston* as "the most directly pertinent ... authority"). The trial court decision in *Johnston* is also prominently featured in the Petition for Review. Relegated to a passing mention in a footnote (Petition at 11 n.6) is the acknowledgment that the Eleventh Circuit *reversed* that decision – not in a "perfunctory" decision, as petitioners assert, but in a published opinion that addressed the issue of consent in some detail.

Plaintiffs might have preferred not to consent to the pat-downs at Monster Park, but their consent was nonetheless a knowing and voluntary exercise of their free will. Under these circumstances, they had no reasonable expectation of privacy.

c) The Court of Appeal's Decision Was Not Inconsistent with the Discussion of Consent in *Hill*.

Pointing to language in *Hill* indicating that student-athletes' consent to the NCAA's drug-testing program was not alone adequate to decide that case, petitioners argue that it follows that consent may never be relied upon to defeat a Privacy Initiative claim on demurrer. Petition at 15-16.

This extreme argument is neither required by, nor consistent with, the decision in *Hill*. The mere fact that consent was not deemed adequate in the particular circumstances of *Hill* does not mean that consent can *never* be adequate to eliminate a reasonable expectation of privacy.[18] Indeed, as discussed above, numerous subsequent decisions – including from this Court – have rejected privacy claims as a matter of law on precisely that ground. And *Hill* itself made clear that consent is a viable defense to a Privacy Initiative claim, as "[p]articipation in any organized activity carried on by a private, nongovernment organization necessarily entails a willingness to forgo assertion of individual rights one might

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[18] The Court in *Hill* made clear that its treatment of consent in that case was based on the unusual facts presented there, stating that, although the students' reasonable expectation of privacy was heavily diminished by consent, "further inquiry" was required because of "[t]he NCAA's use of a particularly intrusive monitored urination procedure," through which students were visually monitored in the act of urination. (7 Cal.4th at 43.) No similarly extreme invasion is alleged here. Notably, the Court still ultimately rejected the Privacy Initiative claim in that case.

otherwise have in order to receive the benefits of communal association." (7 Cal. 4th at 43.)

The reference in *Hill* to activities carried out by "nongovernment" organizations is significant.[19] While *Hill* resolved previous uncertainty about whether the Privacy Initiative applied to the actions of private parties at all (finding that it did), the Court stressed that the application of the Initiative in the wholly private context is subject to different considerations than apply to government action under the Fourth Amendment.[20] Analyzing the history of the Privacy Initiative, the Court observed that, in the context of private businesses, the voters' principal concern was with the unconsented-to disclosure and misuse of private

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[19] It also distinguishes the two cases on which petitioners rely (*Loder* and *Smith*) that found consent, standing alone, to be insufficient to justify drug testing programs for government employees. *See, e.g.*, Petition at 16 (quoting the statement in *Loder* that "a search otherwise unreasonable cannot be redeemed by *a public employer's* exaction of a 'consent' to the search as a condition of employment." 14 Cal.4th at 886 n.19 (emphasis added).) Government employers are subject to limitations in this context that do not extend to private actors. (*See Wilkinson*, 215 Cal.App.3d at 1050 [explaining that, while public employers are subject to the "unconstitutional conditions" doctrine, private entities are not]).

[20] Petitioners suggest (without explanation or support) that the Fourth Amendment is "less protective" than the Privacy Initiative. (Petition at 19.) While this is true to the extent that the Privacy Initiative has some application to purely private action (whereas the Fourth Amendment applies only to action by the government), neither *Hill* nor its progeny have suggested that the Privacy Initiative offers greater *substantive* protection than the Fourth Amendment. To the contrary, *Hill* made clear that that substantive limits that the Privacy Initiative imposes on private parties are, if anything, less stringent than those the Fourth Amendment imposes on the government.

information amassed in huge databases. (7 Cal.4th at 17 [quoting official ballot pamphlet].) Absence of consent was therefore, in a sense, an implicit consideration underlying the Privacy Initiative from the outset.

Moreover, the *Hill* Court recognized three critical differences between the government and private parties in the area of privacy protection. The first of these is the greater danger posed by the "pervasive presence of coercive government power." (*Hill*, 7 Cal. 4th at 38.) Where only private parties are involved, that concern does not apply.[21]

Petitioners seek to discount the significance of the fact that only private parties are involved here by asserting that their failure to consent to the patdowns would have deprived them of the ability to attend 49ers games. But the difference between "the pervasive presence of coercive government power" and a private party's ability to deny attendance at an entertainment event is surely self-evident. Moreover, petitioners' characterization of security pat-downs as a "quintessentially law enforcement activity" (Petition at 23) is simply wrong, for at least two reasons. First, private security screeners are *not* proxies for the state or

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[21] Most of the Fourth Amendment search-and-seizure cases upon which petitioners rely are clearly distinguishable on this ground alone, involving as they did the active and intimidating involvement of police officers with badges, guns, and the power to arrest. (*See, e.g.*, *Wheaton v. Hagan* (M.D.N.C. 1977) 435 F.Supp. 1134, 1147 [pat-downs conducted by "substantial number of police," armed and in uniform]; *State v. Seglen* (N.D. 2005) 700 N.W.2d 702 [pat-downs conducted by police officers].) Many of these cases are also easily distinguished based on the absence of notice of the searches at issue. (*See, e.g.*, *Collier v. Miller* (S.D. Tex. 1976) 414 F.Supp. 1357, 1360 [no signs posted informing patrons of unwritten search policy]; *Stroeber v. Comm'n Veteran's Auditorium* (S.D. Iowa 1977) 453 F.Supp. 926 [no advance notice of search and plaintiffs not informed of their right to refuse search].)

subject to the limitations imposed on government actors.[22] And even when conducted by police officers or other government actors, security screening is not considered a "law enforcement" activity at all but is instead analyzed under a completely different Fourth Amendment rubric.[23]

Hill also pointed out that the private sector offers "choice[s] and alternatives" through which a citizen may avoid unwanted invasions of privacy. (7 Cal.4th at 38.) Petitioners argue that this consideration does not apply here, because the 49ers are "the only game in town." (Petition at 22.) This assertion would come as a surprise to the San Francisco Giants, the Cal Bears, or any of the other myriad sports and entertainment opportunities available on any given weekend in the Bay Area. Indeed, 49ers games are themselves available on television, as petitioners concede. The mere fact that live attendance at a 49ers game is petitioners' *first* choice for entertainment does not mean it is their only choice, much less

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22 *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]; *cf. United States v. Cleaveland* (9th Cir. 1994) 38 F.3d 1092 [no state action when power company employee enlisted police aid as a "backup" while investigating potential illegal power diversion).

23 *See, e.g., United States v. $124,570 U.S. Currency* (9th Cir. 1989) 873 F.2d 1240, 1243 (contrasting security searches from those performed for law enforcement reasons); *MacWade v. Kelly* (2d Cir. 2006) 460 F.3d 260 (upholding the random security screening in the New York subway system under separate "special needs" analysis). Nor can these pat-downs be characterized as "law enforcement" activity merely because police officers are physically nearby when they occur. (Petition at 23.) Petitioners do not (and cannot) allege that these police officers play any role in the pat-downs.

that the possibility of being unable to attend the games deprives them of free will.

Petitioners implicitly assume that they have a "right" (apart from whatever contractual right attaches to the tickets they purchase) to attend 49ers games. But "it appears to be the almost universal rule in the United States that in the absence of statute there exists no constitutional or common law right of access to race tracks or other places of public amusement." (*Flores v. Los Angeles Turf Club, Inc.* (1961) 55 Cal.2d 736, 742; *see also Johnston*, 490 F.3d at 826 [rejecting claim that plaintiff had right to attend game that was unconstitutionally infringed]). The fact that attending 49ers games in person is petitioners' preferred entertainment choice does not impose on the 49ers a special obligation to defer to petitioners' additional preferences about the conditions under which they will attend those games.

The last factor – the impact of a privacy claim on the private actor whose action is being challenged – is the third and arguably most important distinction between government and private actors recognized by the *Hill* court. "Private 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.) Petitioners continue to ignore the fact that this case involves the liberty interests, not just of themselves, but of the 49ers as well. Here, the 49ers, who do not wish to become unwilling hosts to a terrorist bomb attack broadcast on national television, have chosen to offer the opportunity to attend live football games only to those who

consent to a pat-down inspection. Petitioners' argument entirely disregards the 49ers' right to make that choice. But *Hill* confirms its existence.[24]

3. The Court of Appeal's Decision Does Not Create Confusion or Invite Businesses to Violate Protected Privacy Interests.

Petitioners suggest that the Court of Appeal's decision creates a significant change in the law by empowering private businesses to invade protected privacy interests willy-nilly merely by compelling consent as a condition of doing business. In fact, as discussed above, there is nothing new or remarkable about the principles upon which this case was decided. Indeed, the basic validity of consent to potential privacy invasions is accepted every day throughout society. No doctor would agree to treat a patient who did not consent to the otherwise actionable touching that examination and treatment entails (as well as to the gathering and retention of private information in medical records). No bank would give a loan to an applicant who did not consent to the disclosure of his credit report and other private financial information.

It is no answer to argue that such examples are inapposite because the doctor or the bank would, if sued, be able to justify these invasions for purposes of the court's balancing analysis. The *Hill* framework is intended to ensure that private parties are not forced to incur the burden of litigation and the need to justify their conduct where there is

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[24] Petitioners' arguments also fail to recognize the rights of the tens of thousands of other 49ers fans who choose to attend games with this security measure in place – at least some of whom doubtless consider the security measure a *positive* factor in their decision to attend. Under petitioners' logic, such fans would have no associational rights to choose to attend events that offer this kind of security, because no event organizer could lawfully offer them that option.

simply no protected privacy interest in the first place. As the *Hill* Court implicitly recognized, permitting full litigation of Privacy Initiative challenges that do not even present a *prima facie* case would have the inevitable and undesirable effect of chilling private conduct in which the defendant itself has a protected liberty interest. (*See* 7 Cal. 4th at 39; *cf. Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 268 [threat of a clearly nonmeritorious defamation action ultimately chills the free exercise of expression].)

Indeed, to hold, as petitioners urge, that consent may never be more than a "factor" in assessing the validity of an alleged privacy invasion would mean that no intelligent competent citizen would have the legal ability to give conclusive consent in the first place, no matter how voluntary or even enthusiastic that consent might be. Under petitioners' theory, no one could ever rely on any such consent, because it would never bar a subsequent lawsuit. Such an absurd result was clearly not the Court's intent in *Hill* (or in any of the other cases upon which petitioners rely, including *Loder*).

Nor was the Court of Appeal's holding here so necessarily broad (as petitioners seek to argue) that it would automatically allow any business to require any invasion it chose, no matter how severe, as a condition of doing business.[25] Petitioners offer examples of invasions that

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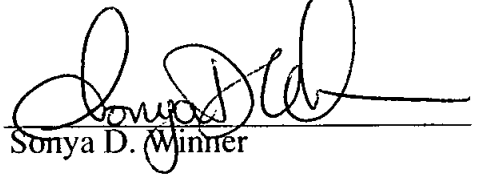
[25] There are established limitations on the government's ability to follow such a path. The "unconstitutional conditions" doctrine restricts the ability of a state actor to condition the grant of a government benefit upon consent to an invasion of constitutional rights. (*Perry v. Sindermann* (1972) 408 U.S. 593, 597; *Robbins v. Super. Ct.* (1985) 38 Cal. 3d 199, 213.) However, the doctrine applies only to the government; it has no application to private parties. (*Wilkinson*, 215 Cal.App.3d at 1050 [rejecting argument that the unconstitutional conditions doctrine has any applicability to a private person or entity].)

they believe could not properly be imposed even with consent. (Petition at 3.) Regardless of the merits of such hypothetical cases, none of them is *this* case. The application of the consent doctrine here was straightforward and fully consistent with existing law. Petitioners have not suggested any trend in the lower courts to push the envelope on the issue of consent or to apply it in any of the contexts about which petitioners express concern. Far from being "confused" (Petition at 12), the lower courts – with decades of experience behind them in assessing issues of consent in comparable contexts – are, and will remain, well able to do so in a responsible and reasoned manner.

IV. CONCLUSION

For the reasons stated above, the Petition for Review should be denied.

DATED: September 17, 2007 COVINGTON & BURLING LLP

By: 
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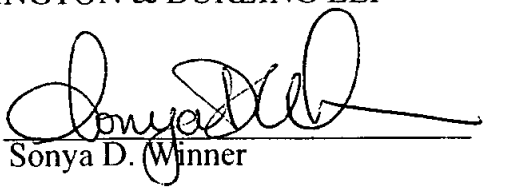
By: 
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Answer to Petition for Review

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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 September 17, 2007.

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