No. S155742

IN THE

SUPREME COURT OF CALIFORNIA

DANIEL AND KATHLEEN SHEEHAN,

Plaintiffs and Appellants,

v.

THE SAN FRANCISCO 49ers, LTD.,

Defendant and Respondent.

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

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: S155742

Case Name: Daniel and Kathleen Sheehan v. The San Francisco 49ers, Ltd.

Please check the applicable box:

☑ There are no interested entities or persons to list in the Certificate per California Rules of Court, rule 14.5(d)(3).

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.

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I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether a business may prevent any judicial scrutiny of a privacy intrusion under Article I, section 1 of the California Constitution, no matter how severe or unjustified the intrusion may be, simply by informing customers that they must acquiesce in the forfeiture of their constitutional rights as a condition of obtaining access to its commercial goods and services.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This is a privacy challenge to a San Francisco 49ers policy that requires every man, woman and child attending a 49ers home football game to submit to a full-body pat-down search before entering the stadium. By a divided vote, the Court of Appeal upheld a Superior Court order sustaining a demurrer to the complaint. Both the trial court and the Court of Appeal majority held that plaintiffs failed to state a cause of action under Article I, section 1 of the California Constitution because they knew of the 49ers' mass, suspicionless pat-down search policy before buying their 2006 season tickets. The reasoning of the lower courts cannot be reconciled with this Court's decisions establishing the framework for analyzing a claim under Article 1, section 1. If allowed to stand, it will irrevocably undermine the long tradition established by this Court of interpreting Article I, section 1 to protect fundamental privacy rights.

A commercial entity may not constitutionally require its patrons to give up their privacy rights as a condition of doing business simply by providing advance

notice of the condition. Thirty five years ago, California voters amended the state Constitution to secure privacy as an "inalienable right"– one that cannot be easily bought or bargained away. The voters contemplated that courts would protect their privacy by evaluating the nature and the severity of the privacy intrusion as well as the necessity for its imposition. To uphold an intrusive and degrading pat-down search without considering its justification would be to eliminate the need to justify any other searches that a private entity wishes to impose as a condition of doing business – even a strip search according to counsel for the 49ers – so long as a business has notified its customers in advance. Similarly, a private employer would be free to impose regular drug testing and body searches on its employees based merely on prior notice. A private obstetrics practice could require as a condition of prenatal care that its patients agree to genetic tests and abortions upon a diagnosis of fetal abnormality. An apartment complex could condition rental on evidence that the tenants and their children are biologically related.

The rationale would extend to informational privacy as well. Taken to its logical extreme, this theory would allow telephone companies to slip a notice into consumers' bills that in the future their calls would be monitored. Hospitals could avoid any Article I, section 1 obligation to keep medical or mental health records private by conditioning patients' access to health care on their agreement that their records may be disclosed to others at the hospital's discretion. Online booksellers could notify buyers that their purchases will be divulged. An internet service provider could post a notice that it will display the web sites visited by its

subscribers. Banks, telephone companies, insurers, and private colleges could similarly shrug off any inconvenient confidentiality obligations imposed by our Constitution. Private entities could share the "cradle to grave" information we necessarily give up to financial institutions, HMOs and communications firms to interact in modern life – a core concern of the privacy initiative. In short, consumers would be limited to a patchwork of statutory protections, some of which themselves might be subject to waiver, despite the voters' intent that a basic constitutional safeguard exist for intimate data.

The courts below failed to take account of the pivotal role played by Article I, section 1 in protecting privacy rights. They erred in authorizing the dismissal of this action for at least the following reasons:

First, as this Court made clear in *Loder v. City of Glendale*, 14 Cal. 4th 846, *cert. denied*, 522 U.S. 807 (1997), Article I, section 1 claims may be dismissed at the demurrer stage only where the claims "involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant." In all other cases, the gravity of the privacy intrusion must be balanced against its justification in determining whether the defendant has violated Article I, section 1. The rule adopted by the courts below renders the 49ers' justification for the pat-down searches irrelevant, in direct contravention of the framework mandated by this Court in *Loder*.

Second, consent, extracted as a condition of obtaining goods or services, does not automatically negate a privacy claim under Article I, section 1. Instead,

as this Court made unmistakably clear in *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1 (1994), and then reaffirmed in *Loder*, such extracted consent is but one factor to be considered in weighing the justification for the policy against the severity of the privacy intrusion involved.

Finally, the rule adopted below will render Article I, section 1 completely ineffectual in the private sector context. The protection Article I, section 1 was intended to provide against overreaching by private businesses would disappear in the face of a defendant's claim that, having been given notice of an intended privacy invasion, those who object may simply take their business elsewhere.

Substantial privacy invasions require justification. This case affords the Court an opportunity to reaffirm the vital role that Article I, section 1 plays in protecting Californians' privacy in their daily encounters with the business world.

III. FACTS

Daniel Sheehan and Kathleen Sheehan are longtime San Francisco 49ers fans. (AA 104)[1] Daniel Sheehan has purchased 49ers season tickets every year since 1967; he attended every 49ers home game at Monster Park during the 2005 regular season. Kathleen Sheehan has been a 49ers season ticket-holder since 2002; she attended every regular season home game in 2005 but one. (*Id.*)

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[1] The following facts are taken directly from the allegations of the first amended complaint and, in the context of an appeal from an order sustaining a general demurrer, are accepted as true. *Serrano v. Priest*, 5 Cal. 3d 584, 591 (1971).

Beginning in September 2005, "Event Staff" screeners at Monster Park subjected the Sheehans, along with every other ticket-holder attending a 49ers home game, to a pat-down search before allowing them into the stadium. On each occasion, after being herded through barricades, the Sheehans were forced to stand rigid, with their arms spread wide, to allow the screeners to run their hands around their backs and down the sides of their bodies and legs. A few feet away, members of the San Francisco Police Department stood and observed these pat-down searches. (AA 105) This new practice resulted not from a specific threat to the stadium, but rather was the result of a directive from the National Football League to every NFL franchise throughout the country to conduct full-body pat-down searches of football fans entering games. (*Id.*)

The Sheehans find the pat-down searches intrusive and offensive. They consider them to be a serious invasion of their right to privacy and object to being forced to undergo the pat-down searches in order to continue attending 49ers home games. (AA 105-106)

IV. PROCEDURAL HISTORY

The Sheehans filed their complaint for declaratory and injunctive relief in December 2005. (AA 1) The 49ers responded with a general demurrer. (AA 7) At the hearing on the demurrer, the trial judge, *sua sponte*, questioned whether the Sheehans had standing, as their complaint alleged only ticket purchases for the 2005 regular season, which had ended by that point. (RT 2:11025) The parties agreed that the Sheehans, by stipulated order, would file an amended complaint

alleging that they had renewed their tickets for the 2006 regular season, and that the 49ers' demurrer would test the sufficiency of the amended complaint. (RT 3:5-8:21)

The Superior Court sustained the demurrer, ruling that the amended complaint failed to allege a prima facie claim under Article I, section 1. The court held that the Sheehans had "voluntarily consented" to the pat-down searches by renewing their 2006 season tickets with "full notice of the pat-down policy" and that this renewal, coupled with knowledge that stadium access was conditioned on submission to a pat-down search, eliminated the Sheehans' reasonable expectation of privacy. (AA 198-199)

On July 17, 2007, a divided Court of Appeal panel affirmed. *Sheehan v. San Francisco 49ers, Ltd.*, 62 Cal. Rptr. 3d 803 (2007). The majority acknowledged that the Sheehans had alleged a legally protected privacy interest, the first element of the prima facie standard established in *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1 (1994). *Id.* at 808. However, the majority held that, *as a matter of law*, the Sheehans' renewal of their season tickets with knowledge of the search condition foreclosed their ability to demonstrate a reasonable expectation of privacy, the second element of *Hill*. *Id.* at 808-10. The justification for the search was deemed irrelevant to the inquiry. In so holding, the majority dismissed this Court's admonition in *Loder*, 14 Cal. 4th at 892, that *Hill's* three threshold elements were intended to weed out only trivial privacy claims; it characterized *Loder* as a decision that "attempted to clarify" the

limited, threshold screening purpose of the *Hill* elements, but concluded that, as a plurality opinion, *Loder* did not "attain the status of precedent." (*Id.* at 807, & fn. 4).

In dissent, Justice Rivera argued that neither *Hill*, nor any of its progeny fairly read, recognized "implied consent" based only on advance notice of a privacy intrusion as anything more than a *"diminishment* of privacy expectations," which by itself does not defeat an Article I, section 1 claim. *Id.* at 812 (dissent) (emphasis in original))

This Court granted review on October 10, 2007.

V. ARGUMENT

In 1972, California voters overwhelmingly approved Proposition 11, which added "privacy" to the list of fundamental rights guaranteed by the California Constitution. This Court has interpreted Article I, section 1 to secure Californians' confidential personal data and to protect bodily integrity and autonomy in making intimate decisions. The right to privacy is self-executing, and limits commercial as well as governmental intrusions. *Hill*, 7 Cal. 4th at 15. As this Court has observed, privacy '"is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.'" *Id.* at 18, quoting *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829-830 (1976).

A. The Sheehans Have Alleged a Prima Facie Claim For Invasion of Privacy.

The lower courts held that this case must be dismissed on demurrer, without any consideration of whether or not the pat-down searches at 49ers games are in any way justified. This Court has been clear, however, in holding that an Article I, section 1 case may dismissed at the demurrer stage only where the claims "involve so insignificant or de minimis an intrusion on a constitutionally protected privacy interest as not even to require an explanation or justification by the defendant." *Loder*, 14 Cal. 4th at 893. Plainly that is not the case here. The privacy intrusion alleged in the Sheehan's complaint is far from trivial, thus requiring the 49ers to come forward with evidence showing that the justification for the pat-down searches outweighs the Sheehans' interest in avoiding the indignity of having a stranger run his or her hands over their bodies.

1. *Hill's* Prima Facie Test Screens Out Only Trivial Privacy Claims.

In *Hill*, this Court articulated the requirements for a prima facie claim under Article I, section 1. A plaintiff must show "(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. Subsequently, in *Loder*, this Court clarified that *Hill*'s elements do not represent "significant *new* requirements or hurdles that a plaintiff must meet in order to demonstrate a violation of the right to privacy under the state Constitution":

> Under such an interpretation, *Hill* would constitute a radical

> departure from *all* of the earlier state constitutional decisions of this court cited and discussed in *Hill* (7 Cal.4th at p. 34, fn. 11), decisions that uniformly hold that when a challenged practice or conduct intrudes upon a constitutionally protected privacy interest, the interests or justifications supporting the challenged practice must be weighed or balanced against the intrusion on privacy imposed by the practice.

Loder, 14 Cal.4th at 891 (emphasis in original). This Court emphasized the importance of courts' assessing the justifications for privacy intrusions, and clarified that *Hill*'s prima facie test was never intended to short-circuit this critical protection for privacy:

> The "three elements" set forth in *Hill* properly must be viewed simply as "threshold elements" that may be utilized to screen out claims that do not involve a significant intrusion on a privacy interest protected by the state constitutional privacy provision. These elements do not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest.

Loder, 14 Cal.4th at 893.[2] This Court reaffirmed these Article I, section 1 standards in *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 330-331(1997). California appellate courts have subsequently recognized

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[2] *Loder* is authoritative on this point. A plurality opinion is binding authority on all issues it addresses, excepting only in cases where one or more concurring opinions either expressly disagree or only concur in the result without elaboration. *People v. Terrell*, 141 Cal. App. 4th 1371, 1383-84 (2006). In *Loder*, none of the concurring opinions took issue with the lead opinion's clarification of the *Hill* three-prong test, and none were merely concurrences in the result.

and properly applied *Loder*'s clarified *Hill* test in numerous Article I, section 1 privacy decisions.[3]

This Court's recent opinion in *Pioneer Electronics (USA) v. Superior Court* 40 Cal. 4th 360, 370-371 (2007), is consistent with *Loder's* approach to screening insubstantial privacy claims. *Pioneer* involved a pre-class-certification discovery dispute in which plaintiffs sought contact information for customers who had filed product complaints with Pioneer. The trial court allowed disclosure of the information, but only after notice was given informing the affected individuals that they could have the information withheld. Pioneer appealed, contending that affirmative consent was required before disclosure. This Court rejected the company's contention, holding that the disclosure of customers' contact information would not unduly interfere with their privacy, "given that the affected persons readily may submit objections if they choose." *Id.* at 372. Significantly,

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[3] *See, e.g., Coalition Advocating Legal Housing Options v. City of Santa Monica*, 88 Cal. App. 4th 451, 460 (2001) ("*Loder* was clear that *Hill* did *not* adopt 'a sweeping new rule' under which a challenge to conduct that significantly affects a privacy interest may be rejected without considering 'the legitimacy or strength' of the justification for it"); *Alfaro v. Terhune*, 98 Cal. App. 4th 492, 509 (2002) ("The key element in this process is the weighing and balancing of the justification for the conduct in question against the intrusion on privacy resulting from the conduct whenever a genuine, nontrivial invasion of privacy is shown."), *cert. denied*, 537 U.S. 1136 (2003); *In re Carmen M.*, 141 Cal. App. 4th 478, 492 (2006) ("Under the general balancing approach utilized in *Hill* . . . and *Loder* . . ., the identification of the legally recognized privacy interests at stake 'is the beginning, not the end, of the analysis.'") Federal courts adjudicating Article I, section 1 claims in diversity have also consistently construed *Loder*'s clarification of the *Hill* threshhold test as authoritative. *Leonel v. American Airlines*, 400 F.3d 702, 712 (9th Cir. 2005); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1271, fn. 16 (9th Cir. 1998).

although the discovery issue was thus resolved under the *Hill* prima facie standard, this Court nevertheless went on to weigh the seriousness of the privacy intrusion against its justification, noting that contact information regarding the identity of potential class members is generally and appropriately discoverable and that no revelation of intimate activities or information, and no undue intrusion into personal affairs, was implicated. *Id.* at 373-374.

Consistent with its limited screening purpose, *Hill*'s test has been used to winnow out Article I, section 1 claims on demurrer only where the claim as pleaded is plainly trivial. For example, in *Stackler v. Dept. of Motor Vehicles*, 105 Cal. App. 3d 240, 246-48 (1980), plaintiff sued the Department of Motor Vehicles, claiming that its requirement that driver's licenses include a photograph violated the driver's right to privacy. That case is an example of a trivial, even frivolous, privacy claim properly disposed of on demurrer. Indeed, this Court cited *Stackler* as a paradigm of an insubstantial case in *Loder*, 14 Cal.4th at 894, fn. 21. Only a handful of reported cases since *Hill* have upheld demurrers to Article I, section 1 claims, and all of them fall within this same de minimis category.[4]

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[4] *City of Simi Valley v. Superior Court*, 111 Cal. App. 4th 1077, 1085 (2003) (rejecting Article I, section 1 claim based on allegation that police refused family members of deranged man access to him during efforts of crisis negotiating team); *Mansell v. Otto*, 108 Cal. App. 4th 265, 272-79 (2003) (no privacy violation where criminal defendant and his counsel had court order permitting them access to crime victim's mental health records). *Nahrstedt v. Lakeside Village Condominium Ass'n.*, 8 Cal.4th 361, 387-88 (1994) (condominium owner had no Article I, section 1 right to keep pets in violation of condominium association rules); *Clausing v. San Francisco Unified School Dist.*, 221 Cal. App. 3d 1224, 1238-39 (1990) (Article I, section 1 does not impose a

Heller v. Norcal Mut. Ins. Co., 8 Cal.4th 30 (1994), illustrates an appropriate use of *Hill*'s screening function on demurrer. There, plaintiff in an underlying medical malpractice action claimed an Article I, section 1 privacy violation when medical information discoverable in that action was shared between the liability insurer for the defendant doctor and the plaintiff's subsequent treating doctor, who was also designated as a defense expert. This Court upheld dismissal of *Heller* on demurrer, based on well established case law and statutes authorizing discovery of a medical malpractice plaintiff's medical history. *Id.* 43-44, fn. 4. Thus, as the dissent below noted, *Heller* is a case in which the plaintiff's privacy claim was clearly barred by settled law – law which reflects both judicial and legislative determinations that the privacy intrusion entailed in disclosure of plaintiff's medical information to defendant's expert and insurer was justified in this litigation context. Under these circumstances, *Hill*'s basic screening function made its disposition by demurrer appropriate.

Conversely, where a plaintiff *has* pleaded a substantial privacy intrusion, courts have consistently recognized that the plaintiff's reasonable expectation of privacy presents a mixed question of law and fact, necessitating a balancing of interests that renders the case inappropriate for resolution on demurrer. *Semore v. Pool*, 217 Cal. App. 3d 1087, 1097-1100 (1990) (refusing to determine intrusiveness of eye-scan drug test implemented by employer on demurrer);

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mandatory, affirmative duty on school officials to protect and defend students against violation of privacy rights by third parties).

Sanchez-Scott v. Alza Pharmaceuticals, 86 Cal. App. 4th 365, 371-73 (2001) (reversing order sustaining demurrer on invasion of privacy claim arising from unauthorized presence of non-medical observer at oncology examination). As in *Hill*, these decisions have consistently resolved Article I, section 1 privacy claims on a fully developed, and in some instances extensive, evidentiary record.[5]

2. The Sheehans' Amended Complaint Includes All of the Elements of a *Prima Facie* Privacy Claim.

The Sheehans have easily satisfied the threshold requirements for pleading a constitutional privacy claim. Their complaint alleges a legally protected privacy interest:

> The Sheehans have a right to privacy that entitles them to freedom from unwanted physical intrusions. (AA 105.)

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[5] *See, e.g., American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 323 (1997) (challenge to parental consent requirement for minor's abortion decided following trial involving 31 witnesses); *Loder*, 14 Cal.4th at 857 (challenge to employment-based drug testing decided on 500-page joint statement of facts plus testimony from city officials and expert witnesses); *Hill*, 7 Cal.4th at 13 (challenge to NCAA drug-testing policy decided following bench trial that included expert testimony from "scientists, physicians and sports professionals"); *Smith v. Los Angeles County Bd. of Supervisors*, 104 Cal. App. 4th 1104, 1112 (2002) (challenge to home-visit program as condition of welfare benefits decided following bench trial); *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 183-84 (1997) (challenge to employer drug testing resolved by summary judgment, on record that included extensive deposition and document discovery); *Feminist Women's Health Center v. Superior Court*, 52 Cal. App. 4th 1234, 1238 (1997) (challenge to personally invasive job requirement for health center employee resolved on summary judgment, based on extensive deposition discovery and "multiple declarations").

Their complaint also alleges an expectation of privacy that is reasonable in the circumstances:

> It is reasonable for the Sheehans to expect they will not have to sacrifice this privacy as a condition for participating in public events, including 49ers home games. (AA 105-106.)

Finally, their complaint alleges a substantial invasion of privacy:

> The pat-down searches conducted by the 49ers are unnecessary, intrusive and highly offensive to the Sheehans, and constitute a serious invasion of their privacy.
>
> The Sheehans object to being forced to undergo these suspicionless searches as a condition of retaining their season tickets. (AA 106.)

Thus, the Sheehans are entitled to require the 49ers to put forth facts to justify this substantial invasion of their privacy. Only with a fully developed record can the parties' competing interests be evaluated. See *Loder*, 14 Cal. 4th at 895.[6]

B. Acquiescence After Notice Is Only One Factor in a Privacy Case.

The Sheehans have objected to enduring full-body pat-down searches as a requirement for attending Monster Park home games ever since the 49ers instituted the pat-down policy. In fact, they object so strongly that they sued the

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[6] As this Court observed in *Hill*, included in the balancing test beyond the prima facie elements are the further considerations of whether the party invading a protected privacy interest has a legitimate competing interest in doing so and whether feasible alternative courses are available. *Hill*, 7 Cal. 4th at 40. And though the existence of countervailing interests and feasible alternatives present "threshold questions of law for the court . . . . the relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact." *Id.* at 40 (emphasis added).

49ers seeking an injunction to end the practice. Yet they lost this case on the fiction that they agreed to the search policy. As a result, the courts below short-circuited the careful balancing of interests required in an Article I, section 1 case, treating the Sheehans' supposed "consent" as dispositive.

The lower courts reasoned that customers may always refuse to do business with a company intent on invading their privacy. Putting aside the fact that the company may be, quite literally, the only game in town – as the 49ers in fact are for San Francisco football fans – this market-based approach ignores the will of California voters. As this Court recognized in *Hill*, the Privacy Initiative was intended to check private as well as governmental abuses. In enacting Article I, section 1, the people of California established that the protection of individual privacy may not be left to the vagaries of the marketplace. Consent, extracted as a condition of obtaining goods and services, does not automatically negate the privacy protections of Article I, section 1.

1. The Sheehans Have Never Voluntarily Consented to Body Searches.

The 49ers have argued that once the Sheehans became aware of the mandatory pat-down policy at 49ers home games, their continued attendance constituted "implied consent" to the searches, foreclosing their Article I, section 1 privacy claim. (AA 20.) Coerced acquiescence, however, does not constitute "consent" in any meaningful sense of the word. Such consent, while a factor to be considered in weighing the seriousness of a privacy intrusion against its

justification, is not in and of itself dispositive of an Article I, section 1 claim.

True voluntary consent and the sort of extracted consent asserted by the 49ers and relied upon by the lower courts are fundamentally different concepts. Voluntary consent is a familiar doctrine in search-and-seizure law. It means consent to a search or other privacy invasion that is freely given, i.e., unconstrained by either the coercive show of authority or conditions imposed on its exercise. *People v. Hyde*, 12 Cal. 3d 158, 162 fn. 2 (1974) ("Consent, to be valid, must be free and voluntary"). The sort of extracted consent relied on by the 49ers describes the situation in which an individual receives advance notice of a search as a condition of engaging in some activity and, though objecting to the intrusion, nevertheless submits to it in order not to be barred from the desired activity.

Every bargain, of course, includes some elements of extracted consent in the sense that each party gives up something in exchange for receiving some desired benefit. But some bargains are impermissible. This Court has long held and very recently reaffirmed that a contract, although the product of "consent" may nevertheless be unenforceable when one of its terms violates public policy. *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 777, fn. 53 (2007) ("It is well established that our courts, like those of other states, may, in appropriate circumstances, void contracts on the basis of public policy."); *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 160-61 (2005) (amendment to cardholder agreement may be unenforceable as unconscionable where cardholder would be

deemed to accept changed term if he or she did not close credit card account and where new term is exculpatory contract clause contrary to public policy); *see also* Civil Code section 1668 ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own . . . violation of law . . . are against the policy of the law.").

In short, the existence of "consent" is not determinative when one party objects that a condition imposed by the other party as the price of obtaining goods or services violates public policy. That is most certainly the case here, where the Sheehans contend that the pat-down searches imposed by the 49ers as the price of admission to their football games violates the public policy embodied in Article I, section 1 of the Constitution. *See City of Santa Barbara*, 41 Cal. 4th at 777, fn. 53 ("'[t]he determination of public policy of states resides, first, with the people as expressed in their Constitution . . . .'" quoting *Jensen v. Traders & Gen. Ins. Co.* 52 Cal. 2d 786, 794 (1959)). In determining whether the condition imposed by the 49ers here is permissible, the critical issue is not whether the Sheehans renewed their season tickets knowing of the pat-down condition. Rather, the question is whether Article I, section 1 permits the imposition of that condition – sacrifice of a fundamental constitutional right – as part of the price of attending 49ers games. The answer must await judicial evaluation of the justification for the pat-down searches on a fully developed record.

2. Advance Notice of a Privacy Intrusion Does Not By Itself Negate a Reasonable Expectation of Privacy Under Article I, Section 1.

Hill and *Loder* explicitly hold that acquiescence in the forfeiture of privacy rights in order to obtain some benefit is only one factor in the Article I, section 1 analysis. In fact, the student athletes challenging the NCAA's drug testing program in *Hill* expressly consented to drug testing by signing written forms and participating in NCAA competitions after notice of the search policy. *Hill*, 7 Cal. 4th at 42-43. If the 49ers and the lower courts were correct, that should have been the end of the *Hill* decision. But obviously it was not, as this Court instead proceeded to *reject* the categorical notion that such consent in private-sector settings necessarily precludes any Article I, section 1 violation:

> *Although diminished by the athletic setting and the exercise of informed consent, plaintiffs' privacy interests are not thereby rendered de minimis.* . . . The NCAA's use of a particularly intrusive monitored urination procedure justifies further inquiry, even under conditions of decreased expectations of privacy.

Id., at 43 (emphasis added). As the dissent in this case observed, "a *diminishment* of privacy expectations is not the same as an *elimination* of privacy expectations. Had the court in *Hill* intended to equate notice and subsequent voluntary consent with relinquishment of reasonable privacy expectations, it would have said so. Plainly it did not." *Sheehan*, 62 Cal. Rptr. 3d at 812 (dissent) (emphasis in original).

Rather than constituting the end of the analysis in *Hill*, consent was only the beginning. This Court proceeded, in pages of detailed, fact-based analysis, to

sift through all of the relevant considerations, including the goals of the NCAA's testing program, the efficacy of drug testing in achieving those goals, the significance of the privacy intrusion upon the student athletes, the voluntary, associational nature of the relationship between the athletes and the NCAA, the availability of alternatives less invasive than drug testing, and the significance of the athletes' submission to drug testing after advance notice of the policy. *Hill*, 7 Cal. 4th at 43-57.

In *Loder*, this Court made explicit what was implicit in its analysis of the privacy claim in *Hill.* Addressing a privacy challenge to mandatory drug-testing of city employees for hiring and promotion, this Court directly addressed and rejected the notice and consent theory on which the decisions below are based. *Loder* left no doubt that prior notice of a privacy invasion does not by itself negate a reasonable expectation of privacy:

> Our conclusion with regard to job applicants' reasonable expectations of privacy in relation to medical examinations does not depend upon the circumstances that, in the present case, the city notified job applicants at the outset that a medical examination and drug screening were part of the hiring process and the applicants applied for positions with knowledge of the screening requirement. As the court explained in *Nat. Federation of Fed. Employees v. Weinberger*, (D.C. Cir. 1987) 818 F. 2d 935, 943 [260 App. D.C. 286]: "[A] search otherwise unreasonable cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment . . . Advance notice of the employer's condition, however, may be taken into account as one of the factors relevant to the employees' legitimate expectation of privacy."

Loder, 14 Cal. 4th at 886, n. 19.

Following *Hill* and *Loder*, all state and federal appellate decisions

addressing claims under Article I, section 1 (until the majority opinion in this case) have rejected the facile notion that informing the public of a proposed intrusive policy is sufficient to defeat a constitutional privacy claim. *See, e.,g, Cramer v. Consolidated Freightways, Inc.*, 255 F. 3d 683, 696 (9th Cir. 2001) ("Nothing in *Hill* suggests that *all* privacy determinations turn on issues of consent." (emphasis in original)), *cert. denied,* 534 U.S. 1078 (2002); *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 193 (1997) (acquiescence after notice is "generally viewed as a factor" in the balancing analysis "and not as a complete defense to a privacy claim"); *Barbee v. Household Automotive Finance Corp.*, 113 Cal. App. 4th 525, 533 (2003) (advance notice of employer prohibition on intra-company relationships "diminished" employee's reasonable privacy expectation, but did not obviate required balancing analysis); *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 162 (1999) (advance notice of employer drug screening "decreased" employee's expectation of privacy, but *Hill* prima facie standard nevertheless satisfied).

The cases cited by the 49ers and the lower courts do not support dismissal of this case on demurrer. *See TBG Ins. Services v. Superior Court*, 96 Cal. App. 4th 443, 451-53 (2002); *Feminist Women's Health Center v. Superior Ct.*, 52 Cal. App. 4th 1234, 1248 (1997). Both are private-sector employment cases in which courts upheld challenged actions that burdened privacy rights because the employer had a valid justification. Neither finds advance notice or implied consent dispositive. In each, the court rejected a claim based on Article I, section

l only after balancing the severity of the privacy intrusion against its justification and considering the availability of alternatives.

In *Feminist Women's Health Center*, a case decided on summary judgment, not demurrer, the employee was dismissed because she refused to demonstrate cervical self-examination to clinic patients. She claimed that the requirement violated her privacy. *Id.* at 1238. She lost her case not simply because she took a job knowing that it would require her to perform this intimate examination but because teaching patients this exam was an integral part of her responsibilities with the Feminist Women's Health Center and of the mission of the Center itself. *Id.* at 1239-40. Had she been a librarian, the case would have turned out differently – regardless of whether the library had notified its applicants in advance that they would be required to demonstrate cervical self-exams to library patrons. The outcome of *Feminist Women's Health Center* depended on the fact that this organization's founding principles emphasize the importance of women actively protecting their reproductive health, and it thus had a valid justification for the privacy intrusion. *Id.* at 1248. Justification is at the other side of the constitutional equation – the balance that occurs *after* a prima facie case has been established – and no justification has occurred in this case yet.

Similarly, in *TBG,* another wrongful discharge case, the employer sought discovery of the contents of plaintiff's company-owned home computer in order to refute his claim that he had not intentionally downloaded the pornography found on his office computer. Plaintiff objected based on privacy grounds. *Id.* at 449.

However, in accepting the company's computer for work at home, plaintiff had agreed that he would use the computer only for business purposes and that the company could monitor his use of its computer in the same way it monitored his use of its office computer. *Id.* at 452-53. The court ruled that the employer had reasonably limited the use of its computer equipment to office business. *Id.* at 451. Had the employer instead notified its employees in advance that it planned to review what they were reading on their privately owned personal computers at home, the case would have been decided differently. *See also, Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 1050-51 (1989) (private employer's mandatory drug and alcohol testing for job applicants upheld against Article I, section 1 challenge based not only on advance notice of testing as job requirement but also on demonstration that testing requirement supported by employer's "legitimate interest in a drug- and alcohol-free work environment.") The decision below is an anomaly that seriously distorts consent doctrine in constitutional privacy law.

3. The Lower Courts' Waiver Theory Would Eviscerate Article 1, Section 1 in the Private Sector.

The 49ers' consent argument boils down to the assertion that the Sheehans are always free to forego attending 49ers games if they do not wish to be subjected to the pat-down searches. The obvious defect in this argument is that it proves too much. If accepted, it would mean that Article I, section 1 would never apply to invasions of personal autonomy by private businesses or organizations, no matter

how egregious and unjustified, since, after all, people can always choose instead not to attend that sporting event or concert, or not to seek that employment position or promotion, or not to shop at that mall, or attend that public protest.

Stated baldly, this is the 49ers' position: A private business or organization may avoid the reach of Article I, section 1 merely by providing notice of an intended privacy invasion.[7] Certainly the voters who amended our Constitution in 1972 never anticipated that businesses could eliminate privacy protections by so simple an expedient as announcing in advance that they had no intention of respecting them. As the dissent below correctly notes, the majority's opinion here "effectively relegates to free market forces the acceptable norms of privacy intrusions." *Sheehan*, 62 Cal. Rptr. 3d at 814 (dissent).

C. Fourth Amendment Cases On Mass Physical Searches Of Stadium and Arena Patrons Support the Sheehans' Position Here.

The Fourth Amendment informed the original enactment of the Privacy Initiative by California citizens in 1972, and Fourth Amendment case authority

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[7] The trial court adopted this same basic concept of implied consent, though with an added twist that casts the illogic of the argument as applied here in even sharper focus. According to the trial court, the Sheehans had no standing to continue with their Article I, section 1 claim following the end of the 2005 regular season unless and until they confirmed by amended complaint that they had renewed their 49ers tickets for the 2006 season. Once they had done so, however, the trial court then took this same season-ticket renewal and concluded that it constituted an implied "consent" to the pat-down searches that, by itself, was "fatal" to their claim. The Catch-22 notion that, under Article I, section 1, an individual can either have standing to claim a privacy invasion, or can have an invasion of privacy to claim–but can never have both because the mere act of securing the one nullifies the other–well illustrates the internal inconsistency of the 49ers' consent defense.

remains an important source of insight in the development of Article I, section 1 doctrine, particularly in the area of autonomy privacy. *Hill*, 7 Cal. 4th at 29-30, 54-55; *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 156-58 (1999).

However, the voters passed the Privacy Initiative and added an explicit guarantee to our state Constitution to *extend* the privacy rights recognized in federal rulings. This Court has observed that the protection of privacy under Article I, section 1 is at least as stringent as the Fourth Amendment. *Loder*, 14 Cal. 4th at 893.[8] It is thus anomalous that a challenge to mass, suspicionless body searches under Article I, section 1 would be dismissed at the pleading stage, when similar claims have prevailed under the less protective provisions of the federal Constitution.

Courts applying the Fourth Amendment have repeatedly condemned mass, suspicionless pat-down searches of patrons at stadium and arena events. *Wheaton v. Hagan*, 435 F. Supp. 1134, 1146-47 (M.D.N.C. 1977); *State v. Seglen*, 700 N.W. 2d 702, 709 (N.D. 2005); *Jacobsen v. City of Seattle*, 658 P. 2d 653, 674 (Wash. 1983). These decisions are consistent with Fourth Amendment jurisprudence more generally in recognizing that advance notice of a privacy intrusion does not extinguish an otherwise reasonable expectation of privacy.

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[8] That is why, in *Loder*, this Court first evaluated mandatory drug testing in hiring under the Fourth Amendment and, finding the testing program legal, then proceeded to re-analyze the program under Article I, section 1. This was necessary because Article I, section 1's protection against searches in civil cases is more rigorous than its Fourth Amendment counterpart.

Nissan Motor Co. v. Nissan Computer Corp., 180 F. Supp. 2d 1089 (C.D. Cal. 2002) (plaintiff retained reasonable expectation of privacy in private conversations despite pre-notification that they were subject to recording); *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (employee drug testing program invalid under Fourth Amendment despite prior notice to employees, as notice insufficient to render an unconstitutional privacy intrusion constitutional).[9]

In a number of these stadium and arena cases, courts directly considered and rejected "implied consent" defenses, reaffirming that the government may not demand that an individual acquiesce in the forfeiture of constitutionally protected rights to enter an arena:

- *Nakamoto v. Fasi*, 635 P. 2d 946, 951-52 (Haw.1981) (search of patron's personal effects as condition of entry to municipal arena for rock concert held unconstitutional; a citizen should not be "required to relinquish his constitutional right to be free from unreasonable searches and seizures, in order to be allowed to exercise a privilege for which, incidentally . . . he has paid");

- *State v. Iaccarino*, 767 So. 2d 470, 479 (Fla. Ct. App. 2000) (finding no implied consent where the "failure to acquiesce in a search would result in a deprivation of a patron's right to attend the concert, if not their

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[9] *See also People v. Chapman*, 36 Cal. 3d 98, 112 (1984) (under California Constitution Article I, section 13, reasonable expectation of privacy in telephone records not eliminated by prior notice that telephone company may share them with law enforcement), *disapproved on other gds., People v. Palmer*, 24 Cal. 4th 856, 861-64 (2001).

ticket cost as well");

- *Gaioni v. Folmar*, 460 F. Supp. 10, 14 (M.D. Ala. 1978) (the "simple answer" to the contention that challenged searches fell within the consent exception "is that defendants cannot condition public access to the Civic Center on submission to a search and then claim those subjected to the searches voluntarily consented");

- *Jensen v. City of Pontiac*, 317 N.W. 2d 619, 621 (Mich. Ct. App. 1982) (football stadium search policy of carry-in bag visual inspections justified by demonstrated public necessity, but not by implied consent of patrons; "the consent exception, when used in circumstances such as those present here, is of questionable constitutionality.").

In *Collier v. Miller*, 414 F. Supp. 1357 (S.D. Tex. 1976), a challenge was made to a written policy imposing searches of large purses and pockets of patrons for cans and bottles at auditorium events. The court sustained the challenge, finding all of the potential Fourth Amendment exceptions, including consent, inapplicable under the circumstances:

> First, if public access to Hofheinz Pavilion or Jeppesen Stadium is conditioned on submission to a search, that submission would be coerced and hence not consensual . . . . Moreover, the Supreme Court has ruled that: "[T[he rule is that the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution."

Id. at 1366 (citations omitted).

Similarly, in *Stroeber v. Commission Veteran's Auditorium*, 453 F. Supp.

926 (S.D. Iowa 1977), a challenged rock concert pat-down policy for male patrons with bulky clothing or large pockets and physical search of purses was held unconstitutional, despite an argument that patrons impliedly consented to the search policy by subjecting themselves to it. As the court observed, "[t]he mere fact that most patrons submitted to search bespeaks more of coercion and duress than voluntariness." *Id.* at 933.

The rationale of these cases fully applies in the private-sector Article I, section 1 context as well.[10] The 49ers have extracted a waiver from football fans of their constitutional right to bodily integrity as the price of admission to Monster Park. The voters who added Article I, section 1 to the state constitution required that courts evaluate the justification for such privacy intrusions. This safeguard for a fundamental constitutional right cannot be obviated by the simple expedient of notice and the fiction of consent.

The importance of evaluating the competing interests implicated in a case like this, and in having an evidentiary record that informs that evaluation, are illustrated by the federal district court's decision in *Johnston v. Tampa Sports*

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[10] The Sheehans recognize that in *Johnston v. Tampa Sports Authority*, 490 F.3d 820 (11th Cir. 2007), the Eleventh Circuit reached a conclusion very similar to that reached by the courts below in this case. The Eleventh Circuit's decision, however, suffers from the same analytical flaw that undercuts the lower courts' decision here. By focusing only on the issue of "consent," the court ignored the issue that lies at the heart of this case: whether the Constitution permits defendants to *condition entrance* to the stadium on submitting to a search. The cursory analysis that characterizes the Eleventh Circuit's decision in *Johnston* and the court's failure to address the existing body of federal law in this area deprives the decision of any persuasive value.

Authority, 442 F. Supp. 2d 1257 (M.D. Fla. 2006), *reversed on other grounds*, 490 F. 3d 820 (11th Cir. 2007). Like this case, *Johnston* challenges the constitutionality of pat-down searches at NFL football games. Defendant Sports Authority sought to justify the pat-down policy on the theory that NFL games present an attractive target for terrorists. The district court, after holding an evidentiary hearing that included expert testimony (*Johnston*, 442 F. Supp. 2d at 1260, 1266), concluded that the Sports Authority had failed to show that the asserted threat was "real" rather than merely "hypothetical," and thus failed to establish the "concrete danger" required to satisfy the special needs exception to the Fourth Amendment. *Id.* at 1266-69. Whether some other court would agree with this assessment is, for present purposes, beside the point – although the two state court opinions that had earlier considered the need for the pat-downs reached the same conclusion. *See Johnston v. Tampa Sports Authority*, 2005 WL 4947365 (Fla. Cir. Ct. 2005); *Tampa Sports Authority v. Johnston*, 914 So. 2d 1076, 1080-81 (Fla. Ct. App. 2005). The significant issue here is whether the asserted justification for the searches at Monster Park is sufficient to outweigh the invasion of the Sheehans' privacy interests. That question, involving evidence, cannot be resolved on demurrer.

D. Any Distinctions Between State and Private Action are Irrelevant to the Prima Facie Case.

This Court has observed that the analytic privacy framework may apply differently in cases involving state action as opposed to commercial activity. *Hill*,

7 Cal. 4th at 858-59. As a general (but not universal) proposition, consumers have a wider range of choices when dealing with private businesses than with government, and usually the government is more coercive than private entities in imposing its policies. The 49ers invoked these generalized differences between state and commercial behavior to support dismissal of this case on demurrer. However, these considerations are irrelevant to the prima facie case. *Hill* establishes that any distinction between private and state action should be assessed at the justification stage – the other side of the constitutional equation, reached only after a prima facie case is stated:

> Judicial assessment of the *relative strength and importance of privacy norms and countervailing interests* may differ in cases of private, as opposed to government, action.

Hill, 7 Cal.4th at 858 (emphasis added); *see also id.* (noting that some factors "may weigh less in the balance" when considering differences between public and private action in evaluating the defendant's justification). Accordingly, the weight to be given to the 49ers' status as a private entity, whatever that weight may be, does not support dismissal of the Sheehans' case on demurrer, and must instead await further development and assessment through discovery and trial.

Moreover, the unusual nature of this case, involving attendance at professional football games and police-monitored pat-down searches, blurs conventional lines between private and governmental authority. The theoretically greater range of choice available for individuals dealing with private businesses does not exist here. The Sheehans are not choosing a bank or a bakery in a

flourishing marketplace. The reality is that entering Monster Park to watch the 49ers play football represents, both figuratively and literally, the only game in town. Considering the distinctive recreational value involved in watching a live professional football game at the home stadium – one that the 49ers themselves assiduously cultivate in all of their marketing efforts[11] – the 49ers have the sort of "virtual monopoly" that this Court recognized in the similar context of NCAA collegiate sports.[12] *Hill*, 7 Cal.4th at 44.

Moreover, the challenged policy has a coercive feature unusual in the private sector. The searches, though conducted by 49ers event screeners, represent a quintessentially law enforcement activity, commonly conducted by the police as a security measure for admission to publicly owned or operated venues such as arenas or stadiums, as well as airports and courthouses. Indeed, the pat-down search is conducted at Monster Park in the immediate presence of police officers

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[11] According to the 49ers' own website:

> It's one thing to watch it on TV, but it's another thing to be there live, celebrating every touchdown with thousands of screaming fans, tailgating with family and friends, and chanting 'De-fense' to pump up your favorite player. *Unless you go, you'll never know.*

http://www.49ers.com/tickets/season.php?section=Tickets (emphasis in original).

[12] *See* Rosenbaum, Thane N., *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. Miami Law Rev. 729, 784 (1987) ("Popular thinking in this area assumes that the product market of professional football, for instance, is so unique, that there are no reasonably interchangeable substitutes that consumers will accept as an alternative for Sunday afternoon games.")

from the SFPD. While the ultimate significance of these facts awaits resolution based upon a full evidentiary record, it is worth noting that this is not a privacy challenge to a garden-variety practice in a competitive commercial market.

VI. CONCLUSION

The California Constitution promises state residents that their privacy will be secure. This Court has been vigilant in enforcing that promise. Because of Article I, section 1, and this Court's solicitude for the rights that it confers, Californians retain control over their bodies, their intimate decisions, and their personal information, to the greatest extent possible in a complex society in the 21st Century. This constitutional protection for personal privacy, which has now existed for 35 years, has not impeded commerce.

The Constitution's primary safeguard against privacy erosion is judicial oversight: privacy intrusions must be justified by important public interests in court. In this case, the Sheehans have challenged intrusive, offensive searches of their bodies. The case should return for a trial, where a court may evaluate the justification for the 49ers' mass, suspicionless search program.

Dated: December 21, 2007 CHAPMAN, POPIK & WHITE, LLP

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WORD COUNT CERTIFICATE
(Cal. Rules Ct. 14(c)(1))

The text of this brief consists of 7,091 words as counted by the Corel WordPerfect 9.0 word processing program used to generate the brief.

Dated: December 21, 2007

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PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within entitled action. My business address is Chapman, Popik & White, 650 California Street, 19th Floor, San Francisco, California, 94108.

On December 21, 2007, I served the following document:

APPELLANT'S OPENING BRIEF

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Sandra Richey

Sandra Richey