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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

The issue presented here is whether Article I, section 1 of this state's Constitution permits the 49ers to condition attendance at their home games on submission to a pat-down search before entry. The Sheehans brought this lawsuit to have the courts resolve that question. While it is true that the Sheehans continued to attend 49ers' games in the meantime—just as the athletes in *Hill* and the employees in *Loder* signed written consents to the challenged drug testing programs—*Hill* and *Loder* leave no doubt that consent, extracted as a condition of participation in a desired activity, is but one factor to be considered. It does not prevent the plaintiff from meeting the threshold requirements for pleading a constitutional privacy claim.

The 49ers ask this Court to overrule its prior pronouncements in *Hill* and *Loder* and to instead adopt a *per se* rule that would end the constitutional analysis before it begins. In the process, they would make Article I, section 1 inapplicable to private parties in all but the rarest of circumstances.

Whether arguing that the Sheehans' complaint does not plead facts sufficient to show the invasion of a legally protected interest, a serious invasion of privacy, or a reasonable expectation of privacy, the 49ers' basic argument is the same: because the Sheehans continued to attend 49ers' home games despite being subjected to the pat-downs, they forfeited their right to challenge the policy. The 49ers' argument is wrong, for several reasons.

First, Article I, section 1 encompasses a legally protected dignitary interest in being free from the unwanted groping of a stranger that results from a pat-down search. The autonomy interests protected by Article I, section 1, including the right of bodily integrity, are not the step-children of the Privacy Initiative. They lie at the core of its protection.

Second, case law establishes that a pat-down search is serious invasion of privacy. The 49ers neither acknowledge nor attempt to distinguish that extensive body of law. Rather, they argue that attending 49ers' games, knowing that attendance must be preceded by having a stranger run his or her hands over one's body, constitutes a "consent" that deprives the pat-down of its invasive nature. That is no more true here than it was in *Hill*, where written consent to drug testing was a condition of participating in NCAA competition, or than it was in *Loder*, where written consent to drug testing was a condition of applying for a job promotion.

Third, the Sheehans have retained a reasonable expectation that they are entitled to attend 49ers' home games free from unjustified privacy invasions. The Article I, section 1 decisions from this Court and the Courts of Appeal leave no doubt that the 49ers do not have the unreviewable power to require submission to a search.

The controlling weight the 49ers would have this Court assign the Sheehans' decision to renew their season tickets is irreconcilable with this Court's established framework for adjudicating Article I, section 1 claims. In *Loder* this

Court made explicit what was implicit in *Hill*: consent is an important factor to be considered, but it does not dictate the result. Neither Article I, section 1 nor more general principles of contract law permit consent to trump a challenge to a practice that violates public policy. *See e.g., Loder v. City of Glendale*, 14 Cal. 4th 846, 886 n.19, *cert. denied*, 522 U.S. 807 (1997); *City of Santa Barbara v. Superior Court*, 41 Cal. 4th 747, 776-77 (2007); *Cramer v. Consolidated Freightways, Inc.*, 255 F. 3d 683, 696 (9th Cir. 2001) (en banc), *cert. denied*, 534 U.S. 1078 (2002).

The 49ers ask this Court to truncate the framework enunciated in *Hill* and refined in *Loder*, ignoring this Court's admonition that the three prima facie elements are to be applied only to weed out "insignificant or de minimis" claims. *Loder*, 14 Cal. 4th at 893. In all other cases, the trial court's charge is to weigh the gravity of the intrusion against the defendant's asserted countervailing interests. Without that balancing process, Californians will be forced to pay for goods and services with their privacy regardless of whether the intrusion serves any legitimate purpose.

When Californians enacted the Privacy Initiative, they chose a different course. They chose to have the courts determine whether privacy invasions by commercial entities were legitimate, rather than leaving their privacy to the vagaries of market economics or the legislative process. The 49ers may prefer that privacy protection reside there. The voters did not.

ARGUMENT

I. The Courts Below Erred In Resolving This Case On Demurrer.

In *Loder*, this Court held that, ordinarily, courts should not determine the merits of an Article I, section 1 claim without considering both the nature of the privacy invasion and its justification. 14 Cal. 4th at 893. The three threshold elements in *Hill* may be used as a basis for dismissing a complaint at the outset only in cases "that 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." *Id.*; *see also id.* at 891 (noting dangers of rule denying ability to challenge practices "that intrude upon privacy interests protected by the state constitutional privacy clause, . . . without balancing the interests supporting the challenged practice against the severity of the intrusion . . . .").

The 49ers respond that a number of cases have been dismissed because the privacy interests at issue—although "hardly trivial"—were not protected as a matter of law. Answer Brief at 24. However, in the cases the 49ers cite, the court either had all the necessary facts before it, *see e.g.*, *International Federation of Professional and Technical Engineers v. Superior Court*, 42 Cal. 4th 319, 335-36 (2007) (case decided based on full evidentiary record, not demurrer); *Leibert v. Transworld Systems, Inc.*, 32 Cal. App. 4th 1693, 1702 (1995) (no legally protected privacy interest where complaint admitted plaintiff's sexual orientation was not confidential), or the underlying legal issue had already been decided in earlier

cases. *See e.g., Heller v. Norcal Mutual Insurance Co.*, 8 Cal. 4th 30, *cert. denied*, 513 U.S. 1509 (1994); *Rosales v. City of Los Angeles*, 82 Cal. App. 4th 419, 429 (2000).

Heller, for example, turned on the fact that there was a well-established rule that those who put their medical condition at issue waive the right to object to the disclosure of private medical information relevant to their claims. Indeed, in *Heller*, the plaintiff did not contend the information at issue was not discoverable; her complaint was that it was communicated to the defendant outside the normal discovery process. This Court found that to be a distinction without a difference: the demurrer was properly sustained because the means of communication did not affect plaintiff's expectation of privacy. *Id.* at 44. [1]

The waiver rule in *Heller* is a narrow one, developed through a balancing of interests in the case law, and applying only in the litigation context. Here the 49ers ask the Court to adopt a sweeping principle, applying in a limitless number of situations, that would preclude any examination by the court as to the nature of the intrusion, its justification, or its effectiveness. *Heller* offers no support for such a rule.

Nor will rejecting the 49ers' proposed rule lead to a flood of frivolous litigation. Medical professionals do need to examine their patients, bankers need

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[1] Similarly, in *Rosales*, a common law invasion of privacy case, plaintiff had no reasonable expectation of privacy because his personnel records ultimately would have been disclosed in discovery. 82 Cal. App. 4th. at 429 (citing *Heller*).

customers' financial data, and seamstresses, shoe sellers, and dance instructors must ordinarily touch their clients. But a banker may not frisk a customer, and a doctor may not demand a patient's stock portfolio. A shoe salesman may legitimately touch a customer's foot; a book seller may not.

The 49ers' examples are precisely the sort of cases this Court had in mind as so obviously lacking in merit "as not even to require an explanation or justification by the defendant." *Loder*, 14 Cal. 4th at 893. The other examples cited above are just the opposite. *Loder* insists that courts distinguish the latter from the former.

II. Physical Body Searches Clearly Invade A Constitutional Privacy Interest.

Although no judge has agreed, the 49ers assert that full-body pat-down searches do not implicate any constitutional privacy interest. They understandably cite no case for this extreme and startlingly insensitive position. Protection from bodily intrusion clearly falls within the ambit of Article I, section 1.

The right to privacy creates a sphere of protection for autonomy as well as information. As the argument supporting the privacy initiative explained to voters:

> The right of privacy is the right to be left alone. It is a fundamental and compelling interest. It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion, and our freedom to associate with the people we choose.

Ballot Pamphlet at 2.[2]

At the center of this protected realm is a person's own body. "The right of privacy guaranteed by the California Constitution, Article I, section 1, 'guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity.'" *In re Qawi*, 32 Cal. 4th 1, 14 (2004), quoting *Conservatorship of Wendland*, 26 Cal. 4th 519, 531-532 (2001). Californians have a constitutional right to refuse medical care, including life-sustaining treatment (*Wendland*), substance abuse rehabilitation (*Pettus v. Cole,* 49 Cal. App. 4th 402 (1996)), and psychotropic drugs (*Qawi*). Moreover, this "fundamental constitutional right" to bodily integrity "is directly and independently enforceable against both private and governmental entities." *Pettus*, 49 Cal. App. 4th at 457. *See also Wendland*, 26 Cal. 4th at 541 n. 10.

This Court has readily found a legally protected privacy interest in bodily integrity in cases brought against private entities, including, of course, *Hill.* Attempting to distinguish *Hill*, the 49ers are left to argue that the Constitution protects against an unwanted *viewing* of the body but not an unwanted *touching*.

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[2] This language is directly borrowed from the seminal article on privacy, Warren and Brandeis, "The Right to Privacy," 4 *Harv. L. Rev.* 193 (1890). *See Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 23-24 (1994). The 49ers wrongly assert that "the right to be left alone" refers "to the long-established right to be free from government interference in their private lives." Answer Brief at 49-50. In fact, Brandeis and Warren argued for privacy protection "against all the world," particularly gossip columnists. The authors' central point was that protecting privacy only against government invasion was insufficient.

Their anomalous position is unsupported by case law, and would render Article I, section 1 doctrinally incoherent.

Alternatively, the 49ers try to categorize *Hill* as an informational privacy case, arguing that *watching* student athletes urinate constitutes information-gathering. This Court plainly understands, as the 49ers apparently do not, that the monitoring in *Hill*—and *Loder*—implicated autonomy, not informational, privacy: "the testing intruded upon a student's interest in 'autonomy privacy' insofar as it required the athlete to provide a urine sample in a monitored setting . . . ." *Loder*, 14 Cal. 4th at 894; *see also Hill*, 7 Cal. 4th at 41 (describing challenge as having important autonomy privacy component, involving both bodily integrity and dignitary interests).

Nor do the pat-downs constitute only a common law battery. Protection against bodily intrusion "is grounded both in state constitutional and common law." *Qawi*, 32 Cal. 4th at 15, citing *Wendland*, 26 Cal. 4th at 531. An unwanted touch is therefore *both* a tort and a constitutional violation. Moreover, the challenge here is to far more than an occasional stray touch. This case involves a systematic, routine, full-body, pat-down *search* of thousands of people. Courts around the country have ruled that a physical search intrudes on the federal Constitution's implicit privacy right,[3] and the California Constitution's express privacy clause is certainly no *less* protective. *Loder*, 14 Cal. 4th at 893.

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[3] See cases cited at 9-10, *infra*.

Californians plainly have a privacy interest in their bodies that is implicated by systematic physical searches: inmates (*Craft v. County of San Bernardino*, 468 F. Supp. 2d 1172 (C.D. Cal. 2006)), elite athletes (*Hill*), employees (*Loder)*—and sports fans.

III. A Pat-Down Search Is A Serious Invasion Of Privacy.

The requirement that a plaintiff plead a serious invasion of privacy "is intended simply to screen out intrusions on privacy that are de minimis or insignificant." *Loder*, 14 Cal. 4th at 895, n. 22. The Sheehans' complaint describes the pat-down at issue here: After being herded through a set of barricades, they are forced to stand rigid, with their arms spread wide, while "Event Screeners" run their hands around their backs and down the sides of their bodies and legs. (AA 105). On a hot September afternoon, at least some 49ers' fans may be frisked clad simply in a T-shirt or a tank top and a pair of light weight slacks.

By any standard, this pat-down search is a serious invasion of privacy. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 16-17 (1968) (describing frisk there as "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."); *United States v. Albarado*, 495 F.2d 799, 807 (2d Cir. 1974) ("Normally a frisk is considered a gross invasion of one's privacy."). A host of courts have reached a similar conclusion in the context of pat-down searches conducted at public arenas:

- *State v. Seglen*, 700 N.W. 2d 702, 709 (N.D. 2005): Warrantless pat-down searches of patrons entering university hockey game were "very intrusive" and not justified in absence of evidence of history of injury or violence.

- *Collier v. Miller*, 414 F. Supp. 1357, 1365 (S.D. Tex. 1976): Pat-down searches at rock concert were "conducted without any definitive basis for suspicion" and were "serious intrusions which can be both annoying and humiliating."

- *Jacobsen v. City of Seattle*, 658 P.2d 653, 674 (Wash. 1983): "We hold highly intensive pat-down searches by police officers of patrons attending rock concerts to be unconstitutional."

- *Wheaton v. Hagan*, 435 F. Supp. 1134, 1146-47 (M.D.N.C. 1977): Random pat-down searches of persons entering municipally owned arena unconstitutional; such searches can be "'annoying, frightening, and perhaps humiliating'" (quoting *Terry v. Ohio*, 392 U.S. at 24-25).

- *Gaioni v. Folmar*, 460 F. Supp. 10, 14 (M.D. Ala. 1978): Pat-down searches of rock concert patrons "very intrusive and not very effective."

- *Jensen v. City of Pontiac*, 317 N.W. 2d 619, 624 (Mich. App. 1982): "A physical pat-down search by a guard is more intrusive than a limited visual search."

- *State v. Iaccarino*, 767 So. 2d 470, 479 (Fla. App. 2000): Pat-down searches of patrons attending "Zenfest" music concert of "questionable" effectiveness and overly intrusive.

The 49ers would have this Court dismiss the seriousness of the invasion, arguing that a stranger systematically running his or her hands over one's body is no different from being jostled at a crowded football game. Answer Brief at 23, 43, 45. But the 49ers' own cases reveal that there is a big difference between being accidentally bumped and deliberately groped.

In *People v. Carlson*, 187 Cal. App. 3d Supp. 6 (1986), the court squarely rejected the claim that, because the defendant was standing in a crowd, he had no

reasonable expectation of privacy when a secret service agent lightly touched him around the waist in order to check for weapons. *Id.* at 17 & n. 5; *accord United States v. Ubiles*, 224 F.3d 213, 214, 219 (3d Cir. 2000). The court then proceeded to balance the degree of intrusion caused by the search against the need to protect presidential candidates, *not* because this was a "no notice" case, *see* Answer Brief at 43, but because the agent's "very light touch" implicated the defendant's reasonable expectation of privacy, thus requiring Fourth Amendment scrutiny. *See id.* at 17.[4]

Nor does *Pioneer Electronics (USA), Inc. v. Superior Court*, 40 Cal. 4th 360 (2007), support the claim that this case can be dismissed without further scrutiny. The issue was whether an opt-in versus an opt-out procedure must be used to obtain consent to release contact information from customers who complained to Pioneer about its products. It was in this context, which, significantly, provided customers an absolute right to withhold consent *without relinquishing any other desired opportunity*, that this Court found that the privacy interest was not so great that it required an opt-in. Here, of course, submission to an intrusive and

[4] Similarly, in *People v. Burns*, 143 Misc.2d 262, 266-267, 540 N.Y.S.2d 157, 159-161 (1989), *aff'd*, 582 N.Y.S. 2d 234 (N.Y.A.D. 1992), the court had no trouble distinguishing the "invasively humiliating" indignity of an intentional pat-down search, which invokes Fourth Amendment protections, from a case in which the defendant accidentally bumped into a police officer in a manner that permitted the officer to recognize that the hard object he came into contact with was a gun.

humiliating pat-down search is required in order to attend 49ers' home games.[5] By no stretch of the imagination can this requirement be dismissed as an insignificant or *de minimis* invasion of privacy.

IV. Notice Of The Pat-Down Searches Does Not Automatically Eliminate A Reasonable Expectation of Privacy.

The 49ers miss the point when they argue that, by going to the games knowing of the pat-downs, the Sheehans forfeited their Article I, section 1 claim. The issue is not whether the Sheehans "consented," but whether Article I, section 1 permits the 49ers to demand that consent as a condition of attending games.

A. Consent Cannot Save An Unjustified Privacy Intrusion.

If this Court concludes that the pat-downs are unjustified, after weighing *all* the relevant factors, the "consent" the 49ers extracted here will not save them. That consent is no more controlling than was the consent to the prospective release of liability for gross negligence in *City of Santa Barbara v. Superior Court*, 41 Cal. 4th at 776-77; or the amendment to the cardholder agreement in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 172 (2005), or the collective bargaining

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[5] The 49ers and the trial court have also relied on *Hill's* discussion of the interplay between the seriousness of the invasion and the plaintiff's consent in a *common law* invasion of privacy case. That reliance is misplaced. *See* Answer Brief at 44; *compare Hill*, 7 Cal. 4th at 26. *Hill* makes clear that the common law informs but does not govern an Article I, section 1 case, 7 Cal. 4th at 27, and found a serious invasion of privacy despite the existence of written consent. *Id.* at 43; *see also Loder*, 14 Cal. 4th at 854, 896 (also finding a serious invasion of privacy despite express written consent to drug testing by job applicants).

agreement in *Cramer v. Consolidated Freightways, Inc.*, 255 F. 3d at 695-96, which purported to authorize surreptitious videotaping of employees in restrooms in violation of Cal Penal Code § 653n.

The 49ers simply do not address this fundamental point. Nor do they address this Court's clear pronouncement in *Loder* that job applicants' written consent did not deprive them of a reasonable expectation of privacy. 14 Cal. 4th at 854, 886 n.19; *see id.* at 926 (Chin and Baxter concurring and dissenting) (advance notice reduces but does not eliminate reasonable expectation of privacy);[6] *Hill*, 7 Cal. 4th at 37, 43 (requiring consideration of justification for drug testing program, despite written consent); *see also id.* at 60 (Kennard, J., concurring and dissenting: announcing in advance that employees will be subject to periodic strip searches will not defeat employees' otherwise reasonable privacy expectation).

As lower courts, both federal and state, uniformly recognize, consent is a relevant but not dispositive factor in privacy cases. *See, e.g., Cramer v. Consolidated Freightways, Inc., supra*, 255 F. 3d at 695-966 (term in collective bargaining agreement purportedly permitting surreptitious videotaping of employees does not defeat state law privacy claim); *Barbee v. Household Automotive Finance Corp.*, 113 Cal. App. 4th 525, 533 (2003) (plaintiff's

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[6] *Loder's* consent analysis did not turn on the City's status as a government entity. Indeed, the opinion states that the analytic framework applies to governmental and commercial entities. 14 Cal. 4th at 893, n. 21. Lower courts have applied *Loder* without dilution to suits against private entities. *See, e.g., Kraslawsky v. Upper Deck Company*, 56 Cal. App. 4th 179 (1997).

reasonable expectation of privacy not extinguished by notice of employer's prohibition on dating colleagues, but outweighed by employer's justification); *Kraslawsky v. Upper Deck Co.*, *supra*, 56 Cal. App. 4th at 193 (consent generally a factor in the balancing analysis, not a complete defense) (alternative holding); *Smith v. Fresno Irrigation Dist.*, 72 Cal. App. 4th 147, 162 (1999) (advance notice of drug screening does not automatically preclude Article I, section 1 claim).

This Court's recent decision in *Pioneer Electronics* further supports plaintiffs' position. The Court held that voluntary disclosure of contact information to Pioneer did *not* strip complaining customers of an expectation that they would receive notice before that information was further disseminated. 40 Cal. 4th at 372. The customers' disclosure, combined with the fact that they would likely approve of having the information provided to advocates seeking redress for them, reduced that expectation only enough to justify an opt-out rather than a more burdensome opt-in consent procedure. *Id.* Most important, customers suffered no detriment by choosing to withhold consent. Where, as here, plaintiffs can maintain their privacy only at a price, the court must engage in the balancing mandated by *Hill* and *Loder* to determine whether the price imposed is justified.

B. The Validity Of A Privacy Sacrifice Cannot Be Determined In A Vacuum.

The 49ers cite *TBG Ins. Services Corp. v. Superior Court*, 96 Cal. App. 4th 443 (2002) and *Feminist Women's Health Center v. Superior Court*, 52 Cal. App.

4th 1234 (1997) as supporting their "consent is all" theory. What these cases demonstrate, however, is that the facts make all the difference.

In the *TBG* discovery dispute, for example, it was crucial that plaintiff was supposed to be using a company-supplied home computer only for work-related purposes. The employer was not demanding access to a personal computer that he also used for work. Plaintiff could no more expect privacy for the personal information he wrongfully stored on the company-only computer than for private financial papers he knowingly left in the office of a nosy co-worker.[7]

Nor does *Feminist Women's Health Center v. Superior Court* hold, as the 49ers argue, that Article I, section 1 permits an employer to condition employment on the relinquishment of core privacy rights, regardless of the defendant's justification. The requirement that plaintiff demonstrate "cervical self-examination" was fundamental to the clinic's mission and the plaintiff's job. The court's lengthy analysis, rendered on a summary judgment record, not an appeal from a demurrer, *id.* at 1248, *starts* with the fact that the worker consented to the condition. But it does not end there. Rather, the court emphasized that the "real issue is whether this type of cervical self-examination may reasonably be required of the Center's employees." *Id.* Only after analyzing the nature of the intrusion and the Center's justifications did the court conclude that: "*In balancing these*

[7] Even so , the court was sensitive to plaintiff's privacy concerns, noting that the trial court could fashion an order to protect plaintiff's personal information. *Id.* at 454.

competing interests, we return to plaintiff's consent to demonstrate cervical self-examination as part of her employment agreement with the Center." *Id.* at 1249 (emphasis added).[8]

The Sheehans do not dispute that the Eleventh Circuit reached a contrary conclusion in *Johnston v. Tampa Sports Authority*, 490 F.3d 820 (11th Cir. 2007). This Court should reject that opinion as unpersuasive under federal law and inconsistent with state constitutional doctrine. *Johnston* made no attempt to harmonize or distinguish the numerous Fourth Amendment cases that have condemned mass, suspicionless pat-down searches of patrons at stadium and arena events. *See* AOB at 24-27. The Eleventh Circuit's refusal even to consider the justification for the policy or the availability of feasible alternatives[9] is simply inconsistent with the Article I, section 1 analysis this Court has required under *Hill* and *Loder*.[10]

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[8] The highlighted phrase was omitted from the 49ers' quotation.

[9] Notably, the three courts that have actually considered the evidence all concluded that the Tampa Sports Authority failed to show that the policy was necessary. *See Johnston v. Tampa Sports Authority*, 442 F. Supp. 2d 1257, 1265-68 (M.D. Fla. 2006), *reversed on other grounds*, 490 F. 3d 820 (11th Cir. 2007); *Johnston v. Tampa Sports Authority*, 2005 WL 4947365 at *3 (Fla. Cir. Ct. 2005); *Tampa Sports Authority v. Johnston*, 914 So. 2d 1076, 1080-81 (Fla. Ct. App. 2005).

[10] The other cases the 49ers cite do not support their argument. In *Mathis v. Appellate Department*, 28 Cal. App. 3d 1038, 1041 (1972), the court engaged in traditional Fourth Amendment balancing; it did not treat consent as dispositive. Similarly, this Court considers the surrounding circumstances in evaluating the effect to be given a probation or parole search condition. *Compare People v. Woods*, 21 Cal. 4th 668 (1999) (cited by 49ers) with *People v. Sanders*, 31 Cal. 4th 318, 330 (2003) (search of parolee's residence unreasonable despite existence of search condition). The remaining cases either fall under the "special needs"

V. The 49ers' Remaining Arguments Are Defenses That Must Await Trial.

The 49ers spend a great deal of time arguing that their pat-down condition is reasonable. These arguments, however, are part of the *defendant's* case, to be considered after plaintiff makes its prima facie showing. *Hill*, 7 Cal. 4th at 37-38. Resolving these questions, which is part of the balancing process, requires an evidentiary record. They are not to be decided based on conjecture or unsubstantiated opinion.

For example, the 49ers' status as a private entity has no relevance to whether the Sheehans have adequately pleaded their claim. That circumstance is considered only in determining whether the pat-down policy is justified. *Id.* at 38. The outcome depends on the evidence. Similarly, there is a dispute over the coercive nature of the pat-downs. *See* AOB at 30-31. Its resolution requires a factual record.

The associational interests recognized in *Hill* as affecting the balancing process were those of the NCAA's members, not those of the fans. Whether there is any meaningful associational interest implicated here—and the weight to be given that interest—must also await a trial.

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exception applicable to airport and courthouse searches or rely on the unique characteristics of a military base. *See, e.g., Gilmore v. Gonzales*, 435 F.3d 1125 (9th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 929 (2007); *McMorris v. Alioto*, 567 F.2d 897 (9th Cir. 1978); *Morgan v. United States*, 323 F.3d 776, 781-82 (9th Cir. 2003); *but compare People v. Hyde*, 12 Cal. 3d 158, 162 fn. 2 (1974) (declining to rely on consent in upholding airport searches).

Finally, the 49ers' argument that the private sector offers "choices and alternatives," Answer Brief at 15, is not self-evident. *See* AOB at 30 (discussing the unique attributes of attending 49ers' games). Nor is their dismissal of the games as "only entertainment." Watching live professional sports, like going to a movie, strolling through a farmers' market, or attending a concert, is part of American life. As the 49ers would have it, only those willing to pay for attendance with their privacy are entitled to partake if the event operator so decrees.

CONCLUSION

The 49ers' position in this case is unmistakable: commercial businesses may evade accountability under Article I, section 1 through the simple expedient of providing advance notice of their planned invasions of customer or employee privacy. Once such notice is given, the only available choices are to submit to the privacy invasion, no matter how unreasonable or unjustified, or go elsewhere to do business or find employment.

The 49ers attempt to assure this Court that the marketplace or the legislature can be counted on to remedy any abuses that may flow from this sweeping rule. But the voters of California decided differently. They concluded that their privacy was too precious—and too vulnerable—to be controlled by market forces and that the legislative process could not always be relied upon to

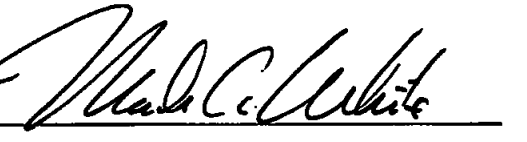
protect their privacy rights. Because they viewed privacy as a right of constitutional dimension, they enacted Article I, section 1.

California's constitutional doctrine protects both the right of privacy and the legitimate needs of private entities. It requires the court to weigh the justification for the defendant's actions against the nature of the privacy intrusion to reach a fact-specific result. California courts have been sensitive to the important, competing interests at play. What the cases do not permit however, and what Article I, section 1 forbids, is a rule that enables private entities to dictate—free from judicial scrutiny—the terms upon which they will deal with others in matters affecting basic rights of privacy.

Dated: May 9, 2008

Respectfully submitted,

CHAPMAN POPIK & WHITE LLP

By: 

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WORD COUNT CERTIFICATE
(Cal. Rules Ct. 204(c)(1))

The text of this brief consists of 4,858 words as counted by the Microsoft Word 2002 word processing program used to generate the brief.

Dated: May 9, 2008

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By: 
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CERTIFICATE OF SERVICE

I, Denise Brasher, 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 May 9, 2008, I served the following document: **REPLY BRIEF ON THE MERITS** on the parties involved addressed as follows:

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San Francisco, CA 94111

Clerk of the Court to Judge Warren
San Francisco Superior Court
400 McAllister Street
San Francisco, CA 94102

Clerk of the Court
First Appellate District, Division Four
Court of Appeal
350 McAllister Street
San Francisco, CA 94102

_____ **BY PERSONAL DELIVERY**: The within document(s) were served by hand in an envelope addressed to the addressee(s) above on this date.

__✔__ **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail, at San Francisco, California.

_____ **BY OVERNIGHT DELIVERY**: I caused each envelope affixed with a prepaid overnight airbill to be deposited in a box regularly maintained by Federal Express or California Overnight.

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 May 9, 2008.

Denise Brasher