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 IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

The issue presented by this case is straightforward: whether Article I, section 1 unqualifiedly permits the San Francisco 49ers to condition entrance to Monster Park on submitting to an intrusive pat-down search. The Court of Appeal held that such a policy is permissible without ever requiring the 49ers to provide any justification or showing of necessity for the searches. By holding that the Sheehans' purported "consent," in and of itself, is enough to defeat a privacy claim under Article I, section 1, the Court of Appeal announced a categorical rule that is utterly inconsistent with the analysis mandated by this Court in its decisions in *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1 (1994) and *Loder v. City of Glendale*, 14 Cal. 4th 846 (1997).

Under *Hill* and *Loder*, submission to an invasion of privacy, whether expressly manifested by signing a written agreement as in *Hill*, or by going forward after being informed of the privacy-invasive condition as in *Loder*, is but one factor to be considered in determining whether the invasion of privacy is permitted by the Constitution. Only where the legal issue has already been resolved by prior case law, or where the privacy claim is so minimal or trivial that it is unworthy of fuller analysis, may the issue be resolved on demurrer without a fact-based analysis, based on a full evidentiary record, that weighs the defendant's justification for the privacy intrusion against its seriousness.

The Court of Appeal in this case established a very different rule—one that is inconsistent with *Hill* and *Loder* as applied by appellate opinions. It unqualifiedly held that private entities may impose any invasion of privacy that they see fit, regardless of its seriousness, and regardless of the absence of justification for the invasion, so long as

individuals have notice of the condition and nevertheless go forward with the proposed transaction. This sweeping rule effectively abrogates the applicability of Article I, section 1 to the private sector by providing commercial businesses with a simple means of rendering its protection inoperative. Petitioners Daniel and Kathleen Sheehan seek review of the Court of Appeal's decision to correct this anomalous and potentially far-reaching result.

II. ARGUMENT

A. The Opinion is Inconsistent With *Loder*.

The Court of Appeal majority disregarded this Court's *Loder* decision, which clarified that *Hill*'s prima facie test is simply a screening device for insubstantial claims. The majority dismissed *Loder* as lacking any precedential significance. The 49ers describe this as "dictum" (Ans. to Petition for Review at p. 8. fn. 6) and then wrongly characterize *Loder* as merely some bland reiteration of *Hill*. (*Id.*, pp. 6-7)

Loder, however, represents an important restatement of *Hill's prima facie* test, as later courts have consistently acknowledged. *American Academy of Pediatrics v. Lundgren*, 16 Cal. 4th 307, 330-31 (1997); *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" (quoting *Loder*, 14 Cal. 4th at 893-94; emphasis in original)); *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.'" (quoting *Hill*, 7 Cal. 4th at 41)); *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F. 3d 1260, 1271, fn. 16 (9th Cir. 1998).

The opinion below simply disregards the constitutional principle that a substantial invasion of privacy needs justification. And that is what this case presents: a suspicionless full-body pat-down search at the entrance gate to a public arena, which, as courts have repeatedly recognized, is a serious affront to bodily integrity.[1] *United States v. Albarado*, 495 F.2nd 799, 807 (2nd Cir. 1974) ("Normally a frisk is considered a gross invasion of one's privacy."); *Wheaton v. Hagan*, 435 F. Supp. 1134, 1146-47 (M.D.N.C. 1977) (random pat-down searches of patrons entering sports arena ruled unconstitutional, noting that such searches can be "'annoying, frightening, and perhaps humiliating'" (quoting *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968)); *State v. Seglen*, 700 N.W. 2nd 702, 709 (N.D. 2005); *Collier v. Miller*, 414 F. Supp. 1357, 1365 (S.D. Tex. 1976); *Gaioni v. Folmar*, 460 F. Supp. 10, 14 (M.D. Ala. 1978) (pat-down searches of patrons attending rock concerts were "very intrusive and not very effective").

Before this decision, all Article I, section 1 cases resolved by demurrer presented privacy claims that were truly de minimis and thus properly disposed of on that basis. *See* Petition for Review p. 12, fn. 8. Moreover, before this decision, no appellate court had upheld a demurrer to an Article I, section 1 claim solely on the ground that the plaintiff had received advance notice of the challenged privacy intrusion and thus had

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[1] As the complaint alleges: "[A]fter being herded through barricades, Daniel Sheehan and Kathleen Sheehan were forced to stand rigid, with arms spread wide. The 49ers screeners then ran their hands around the Sheehans' backs and down the sides of their bodies and their legs." Comp. ¶ 9 (AA 105).

consented to it. The published opinion below, in focusing solely on the Sheehans' supposed "consent," to the exclusion of all else, is therefore strikingly inconsistent with California's privacy doctrine, and will cause confusion in the lower courts.

The 49ers offer *Heller v. Norcal Mutual Ins. Co.*, 8 Cal. 4th 30 (1994), as a notice and consent case, but it is not. Critical to the result in *Heller* was the pre-existing body of case law and express statutory authorization requiring that plaintiffs in medical malpractice suits disclose their health records. This pre-existing law reflects the judicial and legislative judgment that the public has an important interest in courts properly resolving disputes between doctors and patients, which they can do only if health records are available in litigation. Thus, as the dissent below points out, *Heller* properly resolved the Article I, section 1 claim on demurrer because it was foreclosed by settled law that authoritatively established the justification for the privacy intrusion involved. (Dissent at 5.)

Here, unlike *Heller,* there is nothing similar by way of justification in prior case law that stands behind the pat-down searches imposed on the Sheehans. The 49ers have not demonstrated a legitimate need for their mass, suspicionless search policy, and, according to the allegations of the Sheehans' amended complaint, no legitimate need exists.

B. Coerced Acquiescence in a Privacy Intrusion Does Not Eliminate the Need for Its Justification.

The majority decision rests on the premise that the Sheehans' submission to a pat-down search in order to continue attending 49ers' home games was a product of their own free choice and therefore automatically defeats any Article I, section 1 challenge to

the practice. It is this proposition that lies at the heart of the Court of Appeal's far-reaching departure from the manner in which other appellate courts analyze the existence of a reasonable expectation of privacy.

The fact of the matter is that the majority's underlying premise is simply not true, as shown by the well-pleaded allegations of the Sheehans' amended complaint. The Sheehans have never voluntarily consented to the pat-down searches. They object to them so strongly that they instituted litigation to vindicate their right to attend 49ers home games without being forced to sacrifice their privacy. Thus the issue presented here is not whether the Sheehans "consented" to the condition imposed by the 49ers; the issue is whether Article I, section 1 permits the 49ers to demand such "consent" without first requiring a fact-based appraisal of the justification for the policy balanced against the seriousness of the invasion of this sensitive aspect of bodily integrity.

What the opinion below misunderstands is that true "voluntary" consent only occurs where choice is exercised without coercion or constraint. *People v. Hyde*, 12 Cal. 3d 158, 162, fn. 2 (1974) ("Consent, to be valid, must be free and voluntary.") Constraint can and often does involve extracting consent as a condition of access to goods, services or organized activities. See *Gaioni v. Folmar*, 460 F. Supp. at 14 (consent exception to Fourth Amendment inapplicable to pat-down searches at arena entrance because "defendants cannot condition public access to the Civic Center on submission to a search and then claim those subjected to the search voluntarily consented"); *Collier v. Miller*, 414 F. Supp. 1357, 1366 (S.D. Tex. 1976) ("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."); *Stroeber v. Comm. Veteran's Auditorium*, 453 F. Supp. 926 (S.D. Iowa 1977) (pat-down searches of concert goers as condition of concert admission not authorized by consent exception to Fourth Amendment because the "mere fact that most patrons submitted to search bespeaks more of coercion and duress than voluntariness.")

True voluntary consent can constitute a complete defense to at least certain privacy invasions, for example, police searches under the Fourth Amendment, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). But this doctrine has no application here because the Sheehans' "consent" to the pat-down searches is extracted from them – over their objection – as part of the cost of admission to Monster Park. Such constrained consent is nothing more than induced acquiescence; indeed, the term "consent" in this context is largely fictive.

The significance of this distinction for Article I, section 1 purposes is fundamental. "Consent" based only on an individual's advance notification of a privacy intrusion and submission to it has *never* been deemed sufficient by itself to justify an otherwise unjustified privacy intrusion. Rather, such constrained consent has instead been recognized – over and over again – as constituting only one factor in the analysis, which does not foreclose a privacy claim under the *Hill/Loder* prima facie standard. It must be weighed and evaluated along with all other relevant factors, including the justification for the intrusion, its severity, and the feasibility of alternatives.

Hill was such a case, and the majority decision below is irreconcilable with *Hill* in this basic respect. Indeed, in *Hill*, the student-athletes were required to sign written

consent forms acquiescing in the challenged drug-testing as a condition of participation in NCAA sports. *Hill*, 7 Cal. 4th at 9, 11. Yet, this Court held that such notice and consent was not dispositive, and proceeded to engage in a full balancing analysis of the challenged drug testing program on a fully developed evidentiary record.[2]

Similarly, this Court in *Loder* explicitly rejected the notion that plaintiffs' decision to apply for the jobs in question, despite their prior knowledge of the drug testing condition, precluded them from challenging the condition. A "search otherwise unreasonable cannot be redeemed by a public employer's exaction of a 'consent' to the search as a condition of employment." *Loder*, 14 Cal. 4th at 886, fn. 19 (quoting *National Federation of Fed. Employees v. Weinberger*, 818 F. 2nd 935, 943 (D.C. Cir. 1987)).[3]

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[2] The 49ers twice cite to *Hill* for the proposition that "voluntary consent" vitiates a reasonable expectation of privacy. *See* Answer to Petition for Review at 1-2, citing *Hill*, 7 Cal. 4th at 26; *id.* at 4, citing trial court's citation of *Hill*, 7 Cal. 4th at 26. The cited text, however, is discussing the elements of a common law, not constitutional, invasion of privacy claim. This Court was quite clear that, in the context of an Article I, section 1 claim, a reasonable expectation of privacy, although diminished by the exercise of informed consent, is not thereby rendered de minimis. *Hill*, 7 Cal. 4th at 43; *accord Loder*, 14 Cal. 4th at 886, fn. 19. It is but one factor to be considered. *Loder*, 14 Cal. 4th at 886, fn. 19.

[3] Nothing in *Loder* supports the 49ers' claim that the Court's pronouncement on this point was limited to public employers.

The other cases invoked by the 49ers and by the majority below rejected Article I, section 1 claims only after balancing the severity of the privacy intrusion against its justification and considering the availability of alternatives. For example, the employee in *Feminist Women's Health Center v. Superior Ct.*, 52 Cal. App. 4th 1234, 1248 (1997), lost her case not because she took a job knowing that it would require her to demonstrate cervical self-examination to clinic patients, but because teaching this intimate health examination was an important part of her responsibilities with the Feminist Women's Health Center. 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 particular health center's founding principles emphasize women's ability to protect their reproductive health, and it thus had a valid justification for the privacy intrusion. 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 Ins. Services v. Superior Court*, 96 Cal. App. 4th 443, 451-53 (2002), the employer reasonably limited the use of its computer equipment to office business. Had the company notified its employees in advance that the boss planned to review what the workers were reading on their 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 was supported by employer's "legitimate interest in a drug-free and alcohol-free work environment.")[4] The decision below is an anomaly, and one that, if unreviewed by this Court, will stand consent doctrine in constitutional privacy law on its head.

C. The 49ers' Status as a Private Entity Is Part of the Traditional Balancing Analysis.

The 49ers emphasize the differences between governmental and private entities. (Ans., pp.19-21) Although *Hill* noted potential distinctions between privacy intrusions by businesses and by the government, the arguments put forward by the 49ers are both premature and unpersuasive. First, and foremost, generalized differences between privacy intrusions by government versus commercial businesses do not belong in the prima facie analysis at all. As *Hill* itself explicitly recognized, these are, instead, considerations that form a part of the traditional balancing analysis that must proceed, on a fully developed record, for all Article I, section 1 privacy claims that satisfy the prima facie standard. *Hill,* 7 Cal. 4th at 38-39.

Moreover, the 49ers' arguments that their status as a private entity changes the balance are unpersuasive on their face. As alleged in the complaint, the pat-down

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[4] Every other Article I, section 1 case addressing the significance of consent implied from advance notice of a privacy intrusion has held such consent to be only one factor in the balancing analysis. *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 193 (1997) (notice and implied consent is "generally viewed as a factor" in the balancing analysis "and not as a complete defense to a privacy claim"); *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); *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).

searches at Monster Park include a coercive aspect not frequently encountered in customers' dealings with private businesses, because the searches are conducted in the immediate presence of San Francisco police officers. While California courts have recognized that private security guards do not act as agents of the state for Fourth Amendment purposes, that hardly means that police-monitored pat-down screenings at stadium entrance gates would not present to the average fan the same law-enforcement dynamics as a police checkpoint.

Second, while customers normally have a greater range of choices in the private sector, that is not true in this case, since the 49ers control public access to a unique benefit, the opportunity to attend 49ers home football games. The range of recreational alternatives cited by the 49ers, e.g., watching the game at home on television, or even attending some entirely different sporting event or entertainment diversion instead, does more to emphasize the uniqueness and special qualities of attending 49ers home games at Monster Park then it does to belie them. Considering the distinctive recreational value involved in such an experience, there is here the very same sort of "virtual monopoly" that the court in *Hill* recognized was held by the NCAA in collegiate sports. *Hill*, 7 Cal. 4th at 44.

The 49ers' effort to put *Hill's* third distinction between state and private actors on their side of the scales—the 49ers' interest in setting the rules for entrance to their football games -- ignores the fact that the full-body pat-down search program results from an NFL mandate to all league teams, which are required to impose these searches on their fans, whether the teams, let alone their fans, want them or not.

In sum, what the 49ers construct in their answering brief is a premature and one-sided version of a balancing analysis, which makes unsubstantiated assumptions about the lack of police involvement in the search program, the security needs of Monster Park as a public venue, the alternative pleasure of attending a baseball game, and the subjective wishes of the 49ers and of other 49ers fans. The Court of Appeal majority committed the same mistake. All of this must await the development of a factual record. Until then there is nothing to balance. (Dissent at 7.)

D. The Opinion Eviscerates the Protection that Voters Wanted for Privacy in the Commercial Sector.

The Court of Appeal's published opinion will immunize a range of informational and substantive privacy intrusions. The petition for review included an illustrative range of cases in which private entities could, with impunity, infringe fundamental privacy interests, from disclosure of financial information to coerced agreements on childbearing, under the principle established by the majority opinion. The 49ers have no response to this. They simply assert that these are different cases. But the far-reaching principle established in this case will remove constitutional protections for privacy and allow a whole host of troubling results.

As the dissent below recognized, permitting commercial businesses to license their own invasions of customer privacy by simply announcing in advance their intention to commit them will substantially negate Article I, section 1's application to the private sector. No longer will courts have the authority under *Hill* to require that significant invasions of personal privacy be justified by legitimate need. Instead, for all intrusions into privacy by the private sector, excepting only intrusions that are forcible or

surreptitious, it will be enough for a commercial business to simply post a sign at its business entrance: "No Article I, section 1 Privacy Interests Allowed Beyond This Point." Any customer proceeding past such a notice could no longer require that the entity justify the privacy invasion in court, no matter how severe.

But that is not what the citizens of California expected or intended when they overwhelmingly passed the Privacy Initiative to establish this constitutional protection against both governmental and private-sector privacy intrusions alike. Determinations of whether and to what extent personal privacy interests can be subordinated to competing security or other interests by private businesses or organizations are not to be left to the vagaries of the marketplace. These determinations must instead be made by the courts, in cases where a full evidentiary record allows a weighing and evaluation of all relevant considerations. Here instead, as the dissent correctly notes, the majority's opinion "effectively relegates to free market forces the acceptable norms of privacy intrusions." (Dissent at 6.)

The 49ers try to justify this result, claiming that commerce can only work if constitutional protection is loosened from the private sector. Apart from the fact that the California voters rejected that argument more than 30 years ago, it is simply untrue. The 49ers claim that a doctor needs to touch her patient, a banker needs to obtain a customer's financial data, and that doctors and bankers should not have to face lawsuits for doing their jobs. That is true. Doctors and bankers have not faced Article I, section 1 lawsuits for those acts. But what about the banker who frisks the customer and the doctor who demands the patient's stock portfolio? California voters wanted to ensure that, if

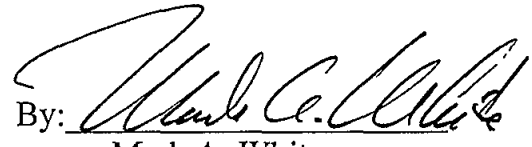
necessary, courts would protect privacy in those contexts—even if the bank and doctor had issued prior notice. The opinion below precludes courts from fulfilling that obligation.

III. CONCLUSION

The opinion below dramatically rewrites *Hill's* prima facie standard for Article I, section 1 claims by disregarding its limited screening function, and also rewrites well-established doctrine as to the role played by consent under Article I, section 1 in a way that virtually erases its application to the private sector. The Sheehans respectfully request that the Court review this important constitutional case.

Dated: September 27, 2007

CHAPMAN, POPIK & WHITE LLP

By: 

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

The text of this brief consists of 3,306 words as counted by the Corel WordPerfect 9.0 word processing program used to generate the brief.

Dated: September 27, 2007 CHAPMAN, POPIK & WHITE LLP

By: 
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CERTIFICATE OF SERVICE

I, Sandra Richey, 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 September 27, 2007, I served the following document: Reply in Support of Petition for Review on the parties involved addressed as follows:

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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 27, 2007.

Sandra Richey