No. A114945

CALIFORNIA COURT OF APPEAL

FIRST APPELLATE DISTRICT

DIVISION FOUR

DANIEL AND KATHLEEN SHEEHAN,

Plaintiffs and Appellants,

v.

THE SAN FRANCISCO 49ers, LTD.,

Defendant and Respondent.

After Judgment by the
San Francisco County Superior Court, CGC-05-447679
Honorable James Warren, Judge

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Everyone – man, woman, and child – attending a San Francisco 49ers football game at Monster Park must now submit to a full-body pat-down search as the price of admission to the stadium. They must stand rigid with their arms outstretched at the shoulder while an "event screener" runs his or her hands over and around their backs and down the sides of their bodies and legs. The 49ers' reasons for this mass, suspicionless search program are, in the trial court's view, entirely irrelevant. That is because, as the court ruled below, any fan who buys a ticket knowing that attendance at the game is conditioned on submitting to a pat-down search has necessarily "consented" to it, thereby vitiating at the outset any claim for violation of the right of privacy conferred by Article 1, section 1 of the California Constitution. Because the court held that purchase of a ticket with notice of the search condition is dispositive, it dismissed the case at the demurrer stage without ever engaging in the balancing process mandated by the California Supreme Court's decisions in *Hill*, *Loder*, and *American Academy of Pediatrics v. Lungren*.

That is not the law. Indeed, if the trial court's ruling were permitted to stand, Article 1, section 1 would become a dead letter as applied to the private sector. Theater-goers, basketball fans, or attendees at a rock concert could be compelled to submit to pat-downs, or even more invasive searches, so long as they were provided notice of the search in advance. Department and grocery store customers could be

searched routinely before leaving the store so long as they were notified of the search policy before entering.

The 49ers contend that the marketplace serves as an effective check on search policies by private businesses or organizations that go too far. In enacting the Privacy Initiative under Article 1, section 1, however, the people of California made clear that the protection of individual privacy may not be left to the vagaries of the marketplace. To be sure, the dignitary interest implicated in being forced to endure the unwanted groping of a stranger may, at times, have to give way to other, more important interests. But the constitutional protection afforded that interest cannot be cast aside on the ground that it has been unilaterally subordinated to some commercial transaction.

That is what the 49ers seek to do here. Their constitutional arguments are misguided and wrong for at least the following reasons:

- They mistakenly discount the California Supreme Court's admonition in *Loder*, reaffirmed in *Lungren*, that the three-prong *Hill* test for a prima facie Article I, section 1 claim represents only "threshold elements" intended to screen out insignificant claims of privacy invasion; it does not displace the traditional need to weigh the privacy invasion against the justification advanced for it.

- Article 1, section 1 affords a level of protection to an individual's dignitary interest in avoiding unwanted physical intrusions upon his or her body that is at least as protective as that of the Fourth Amendment.

- The facts alleged in the complaint are more than adequate to set forth a prima facie case under Article I, section 1 because the Sheehans did not agree to submit to the intrusive pat-down searches merely by purchasing tickets for the 49ers' 2006 season; their pursuit of this lawsuit is ample evidence of their adamant objection to the searches.

- By sustaining the 49ers' demurrer and dismissing the case, the trial court short-circuited the careful balancing required of claims involving fundamental privacy rights. The lawfulness of the 49ers' pat-down search policy can only be determined after a trial, on a fully developed evidentiary record, that will allow the court to determine whether the 49ers' asserted justification for their search policy is sufficient to outweigh the intrusion on the Sheehans' constitutionally protected privacy interests.

II. ARGUMENT

A. The Three-Prong *Hill* Test Was Authoritatively Clarified by the California Supreme Court in *Loder* as a Screening Standard for De Minimis Claims, Which Does Not Displace the Well-Established Balancing Standard Requiring a Careful Weighing of the Challenged Privacy Invasion Against Its Offered Justification.

The California Supreme Court's decision in *Hill v. National Collegiate Athletic Association*, 7 Cal.4th 1 (1994), confirmed the reach of Article I, section 1's privacy protection to the realm of private organizations and businesses, and recognized that

citizens of this state have a constitutionally protected privacy interest not just in their interactions with government authority, but also in this additional and important part of their everyday lives as well. *Id.* at 18. ("'Privacy is protected not merely against state actions; it is considered an inalienable right which may not be violated by anyone.'" (Quoting *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829-30 (1976)). *Hill* also articulated the now-familiar three-prong test for an Article I, section 1 prima facie claim: "(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." *Id.* at 39-40.

The California Supreme Court has had occasion twice now to review and clarify *Hill*'s three-prong test, in *Loder v. City of Glendale,* 14 Cal.4th 846, *cert. denied* 522 U.S. 807 (1997), and then in *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307 (1997). While reaffirming this test as the recognized criteria for a prima facie claim, the court in *Loder* emphasized that these criteria did not represent "significant new requirements or hurdles that a plaintiff must meet," and did not displace the traditional standard for adjudicating actionable privacy invasions:

> Accordingly, 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 (emphasis added). In *Lungren*, the court reaffirmed this relationship between the traditional balancing standard and the subordinate screening role of the three-prong *Hill* test, in an extended discussion and approval of *Loder*. *Lungren*, 16 Cal.4th at 330-31.

1. *Loder* and *Lungren* Both Constitute Authoritative Judicial Precedent Clarifying and Restating *Hill*'s Three-prong Prima Facie Test.

The 49ers now attempt to discount *Loder*'s clarification of *Hill* to insignificance, and even advance the contention that neither *Loder* nor *Lungren* constitute meaningful judicial authority, as they represent only lead, plurality opinions. According to the 49ers, *Loder* "does not have the status of precedent and cannot be read to limit, change or otherwise affect the majority opinion in *Hill*." (Resp. Brief, p. 12.)

This remarkable assertion would no doubt come as a surprise to the many California appellate courts that have expressly followed *Loder*'s clarification of the *Hill* three-prong standard in their subsequent Article I, section 1 privacy decisions:

- *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).)

- *Alfaro v. Terhune*, 98 Cal. App. 4th 492, 509 (2002), *cert. denied*, 537 U.S. 1136 (2003) ("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." (Citing *Loder*, 14 Cal.4th at 893).

- *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).)

- *Kraslawsky v. Upper Deck Co.*, 56 Cal. App. 4th 179, 186-87 (1997).

Federal courts adjudicating Article I, section 1 claims in diversity have likewise consistently construed *Loder*'s clarification of the *Hill* three-prong test as authoritative:

- *Leonel v. American Airlines*, 400 F.3d 702, 712 (9th Cir. 2005) ("These [*Hill*] elements do not constitute a categorical test, but rather serve as threshold components of a valid claim to be used to 'weed out claims 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,'" (quoting *Loder*, 14 Cal.4th at 893).

- *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1271, fn. 16 (9th Cir. 1998) ("The California Supreme Court has emphasized that *Hill*

did not 'adopt[]' a sweeping new rule under which a challenge to conduct that significantly affects a privacy interest protected by the state Constitution may be rejected without any consideration of either the legitimacy or strength of the defendant's justification for the conduct." (quoting *Lungren*, 16 Cal.4th at 331, quoting in turn *Loder*, 14 Cal.4th at 893-94).)

Commentators have also understood *Loder* as valid precedent in its restatement of the *Hill* test. *See, e.g.,* 13 Cal. Jur. 3d, Constitutional Law, §224, fn. 2.

The 49ers' argument against *Loder* and *Lungren* as lacking any precedential authority due to their plurality, lead-opinion status misunderstands California law 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).[1] In both *Loder* and *Lungren*, none of the concurring opinions took issue with the lead opinions' clarification of the *Hill* three-prong test, and none were merely concurrences in result. *Loder* and *Lungren* are thus both valid and authoritative precedent on this issue.

There is really no mystery as to why the 49ers are in frank denial over *Loder*, as it demonstrates how seriously awry the trial court went in deciding the Sheehans'

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[1] Both of the cases cited by the 49ers involved just such situations. *Bd. of Supervisors v. Local Agency Formation Commissioner*, 3 Cal.4th 903, 918 (1992) (concurring opinions specifically disagreed with plurality on strict-scrutiny issue); *People v. Karis*, 46 Cal.3d 612, 632 (1988) (two justices merely "concurred in the result" of plurality lead opinion, while remaining justices dissented on specific ground of court's decision), *cert. denied*, 490 U.S. 1012 (1989).

Article I, section 1 claim by focusing entirely and myopically on *Hill*. The demurrer ruling became essentially an adjudication of the second and third prongs of the prima facie test – both of them recognized in *Hill* itself as mixed questions of law and fact – without any evidentiary basis, or any consideration of the elements that make up the necessary balancing analysis.

The 49ers attempt to explain away *Loder* in other ways as well, with an equal lack of success. Thus, the 49ers contend that *Loder* did not actually attempt to clarify or restate the *Hill* three-prong prima facie test at all, but instead addressed some different issue. According to their brief:

> The discussion that appellants cite [from *Loder*] addressed a different issue: whether, *if the three prima facie elements are established*, a court may still reject a claim based on its analysis of those factors alone without considering the government's reasons for the challenged conduct and balancing those reasons against the severity of the intrusion. Chief Justice George opined that *Hill* was not intended to permit a court to avoid the full balancing analysis of all pertinent factors *if the threshold elements are present*. (*Id.* at 891-92.)

(Resp. Brf., p. 1; emphasis in original.)

It is not entirely clear what is actually meant by this. To the extent the 49ers are suggesting that *Loder* did not directly address the three-prong test on its own terms and clarify its limited purpose and function, then the 49ers are mistaken, for that is precisely what *Loder* did. *Loder* was even careful to explain that *Hill*'s description of the third prong as requiring an "egregious" intrusion of privacy interest was not meant to denote anything more than a non-trivial impact on privacy rights, "intended

simply to screen out intrusions on privacy that are de minimis or insignificant." *Loder* at 895, fn. 22.

The 49ers make one further argument against the significance of *Loder,* asserting that because the decision dealt with mandatory drug testing by a government employer, it "accordingly includes no discussion of how the *Hill* factors are appropriately applied to a private party, and it certainly does not purport to overrule the discussion in *Hill* of how the prima facie standards should be applied in a wholly private context." (Resp. Brf., p. 11 (footnote omitted).) This is analytically garbled and wrong. The argument proceeds from the false assumption that there are two different versions of the three-prong prima facie test, one for Article I, section 1 claims against the government, and the other for claims against private organizations and businesses.

Nothing in either *Hill* or *Loder* purports to make the three-prong test apply differently depending on the governmental versus private-party status of the defendant. Had the California Supreme Court intended in *Loder* and *Lungren* to revise or reinvent the three-part *Hill* test only for government actors, it would have said so. There is only one three-prong test. While various circumstances on a case-by-case basis may make it easier or more difficult for the plaintiff to satisfy the test and state a prima facie claim, the test itself is a unitary one.

The 49ers' argument also casually and uncritically assumes that the three-prong test is always more easily met in cases involving privacy intrusion by the

government. Based on the developed body of Article I, section 1 case authority, that is a difficult issue on which to generalize, particularly since cases often involve government agencies acting like private parties, for example, as employers seeking to impose mandatory drug testing for hiring and promotion. Then too, sometimes private parties act like government agencies. This case is a good example of that, as here, 49ers' "event screener" staff conduct full-body pat-down searches of Monster Park patrons in what is fundamentally a law enforcement function, backed up by the immediate presence of the San Francisco police.

2. Appellate Cases Applying the *Hill* Three-prong Test in Demurrer Cases Reflect Its Threshold Screening Function.

Consistent with its limited screening purpose, the three-prong *Hill* test has been used to winnow out Article I, section 1 claims on demurrer only in cases where it is evident from the claim as pleaded that a trivial or de minimis intrusion on privacy is alleged. For example, in *Stackler v. Dept. of Motor Vehicles*, 105 Cal. App. 3d 240, 246-48 (1980), plaintiff claimed a privacy violation from the California DMV's requirement that driver's licenses include a photograph of the driver. That case, though it predates *Hill*, is an apt example of a trivial, even frivolous privacy claim properly disposed of on demurrer. Indeed, it is the case cited as an example for this point by the California Supreme Court in *Loder*, 14 Cal.4th at 894. *See also, City of Simi Valley v. Superior Court*, 111 Cal. App. 4th 1077, 1085 (2003) (family members of deranged man killed following armed standoff with police claimed Article I, section 1 privacy violation from police refusal to allow them access to man 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 obtained access to crime victim's mental health records only after first securing court order specifically authorizing their production).

The 49ers have in their respondent's brief located a few additional such cases where Article I, section 1 claims were resolved by demurrer, but they all fall within this same de minimis category as well. *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 where prohibited by 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 mandatory, affirmative duty on school officials to protect and defend students against violation of privacy rights by others).

The 49ers seek to distinguish one particular decision in this group, *Heller v. Norcal Mut. Ins. Co.*, 8 Cal.4th 30 (1994), arguing that it presents a case resolved by demurrer despite the pleading of a "substantial" privacy interest under Article I, section 1. But *Heller* is not actually distinguishable on this basis. There, plaintiff in a 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. The California Supreme Court upheld the disposition of the claim on demurrer, based on the well established law authorizing

discovery of a medical malpractice plaintiff's medical history and the express statutory authority under the Confidentiality of Medical Information Act, Civil Code section 56, et seq., for the exchange of such medical information between treating doctors and liability insurers in malpractice cases. *Id.* 43-44, fn. 4. Thus, *Heller* is a case in which the plaintiff's privacy claim was clearly barred by settled law. In that context, *Hill*'s basic screening function made its disposition by demurrer appropriate.

B. None of the Differences Between Privacy Intrusions by Government Versus Private Organizations or Businesses Identified in *Hill* Bear Upon the Three-Prong Prima Facie Test for an Article I, Section 1 Claim, As All of These Are Instead Factors to Be Weighed and Considered under the Traditional Balancing Standard.

Hill includes a discussion of the differing circumstances often involved in privacy intrusions by government versus a private organization or business: (1) the coercive power of the government, (2) the broader range of choice in commercial and other private contexts, and (3) the associational interest present in private organizational contexts. *Hill*, 7 Cal.4th at 37-39. The 49ers attempt to invoke these considerations as direct support for the trial court's order sustaining their demurrer. There are two problems with this argument. First, the three considerations are either inapplicable here or actually militate in favor of the Sheehans' privacy claim. And second, these considerations, as *Hill* itself explicitly recognized, do not speak at all to the three-prong test for a prima facie case. They are instead elements of the multi-factor balancing test that is applied to adjudicate Article I, section 1 cases once a prima facie claim is recognized.

1. None of the Considerations Recognized in *Hill* as Distinguishing Article I, Section 1's Application to Private Organizations or Businesses Provides Any Support to the 49ers Here.

The first consideration noted by *Hill*, the "coercive power of government authority," is ironically a feature of the pat-down search policy challenged in this case. The searches, though conducted by 49ers event screeners, represent a quintessentially law enforcement activity, commonly conducted by the police as a security measure for admittance to publicly owned or operated venues such as arenas or stadiums, as well as airports and courthouses. Note also that, as the Sheehans allege in their complaint, the pat-down search policy is conducted at Monster Park in the immediate presence of police officers from the SFPD.

The 49ers argue that these circumstances, by themselves, are inadequate to allege a police involvement sufficient to render the pat-down searches a law enforcement operation, such as would trigger protections under the Fourth Amendment in addition to Article I, section 1. Of course, the Sheehans could only allege in their complaint what they knew from their own experience or observations at the time the complaint was filed. It has only since come to light through the published federal court decision in *Johnston v. Tampa Sports Authority*, 442 F.Supp. 2d 1257, 1264, fn. 11 (M.D. Fla. 2006), that the NFL's mandatory pat-down search policy under which the 49ers are conducting their searches includes an explicit directive that NFL teams secure arrangements for the immediate presence of police at entrance points where the searches take place, to assist in or even take over the

searches in individual cases as developing circumstances might warrant. The trial court's order sustaining the 49ers' demurrer has foreclosed the Sheehans from obtaining further evidence of this as a part of the discovery record here.

More to the point, however, and whatever the underlying arrangements between the 49ers, their event screeners, and the SFPD, the searches are conducted in a manner that presents the same situational dynamics as a police checkpoint, with all of the same aspects of coercive authority for the Sheehans and the thousands of other 49ers fans subjected to them.

The 49ers also invoke the second consideration discussed in *Hill*, the theoretically greater range of choice available for individuals dealing with private organizations or businesses. But the Sheehans are not choosing a bank or a grocery store. The reality is that entering Monster Park to watch the 49ers play football represents, both figuratively and literally, the only game in town. The range of recreational alternatives cited by the 49ers, e.g., watching the game at home on television, or even attending instead some entirely different sporting event or entertainment diversion, does more to emphasize the uniqueness and special qualities of attending 49ers home games at Monster Park than it does to belie them. Considering the distinctive recreational value involved in such an experience – one that the 49ers themselves assiduously cultivate in all of their marketing efforts[2] – there

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

> It's one thing to watch it on TV, but it's another thing to be there live,

(continued...)

is here the very same sort of "virtual monopoly" that the court in *Hill* recognized was held by the NCAA in collegiate sports.[3] *Hill*, 7 Cal.4th at 44.

The 49ers' effort to garner the *Hill* court's third distinguishing consideration, i.e., the interest of all individuals in voluntary associational relationships and activities, falls flat as well. Try as they might to characterize the thing as some sort of communal exercise, the full-body pat-down search program is instead the result of an NFL mandate to all league teams to impose these searches on their fans, whether the teams, let alone their fans, want them or not. This is actually the furthest thing from genuinely "associational" conduct imaginable.

2. All of the *Hill* Considerations Distinguishing Privacy Intrusions by Businesses or Other Private Organizations Form a Part of the Traditional Article I, Section 1 Balancing Analysis, Not the Three-Prong Prima Facie Test.

But more importantly, and even if any or all of these distinguishing considerations were present here to some degree and supportive of the 49ers, they would have no relevance to this appeal from the trial court's order sustaining the

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[2](...continued)
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).

[3] *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.")

49ers' demurrer, as they have no relevance to the *Hill* three-prong test for a prima facie claim. They all instead pertain to the multi-factor balancing analysis that the court must undertake to adjudicate the case once a prima facie claim under Article I, section 1 has been presented by proper pleading and the court has before it a full evidentiary record. That is made plain by the *Hill* decision itself and the comments of the court introducing these three considerations and discussing them in overview:

> Conduct alleged to be an invasion of privacy is to be evaluated based on the extent to which it furthers legitimate and important competing interests. . . . *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.*
>
> [three considerations then identified and discussed]
>
> These generalized differences between public and private action may affect privacy rights differently in different contexts. If, for example, a plaintiff claiming a violation of the state constitutional right to privacy was able to choose freely among competing public or private entities in obtaining access to some opportunity, commodity, or service, his or her privacy interest *may weigh less in the balance*. In contrast, if a public or private entity controls access to a vitally necessary item, it may have a correspondingly greater impact on the privacy rights of those with whom it deals.

Hill, 7 Cal.4th at 38-39 (emphasis added). Accordingly, whatever presence or weight any of these considerations may have in this case represents nothing that could support the trial court's dismissal of the Sheehans' case on demurrer, and must instead await further development and assessment through discovery and trial.

C. Fourth Amendment Jurisprudence Provides an Important and Continuing Source of Guidance as Persuasive Authority for the Interpretation of Article I, Section 1's Privacy Protection.

As the California Supreme Court has repeatedly recognized, the Fourth Amendment informed the original enactment of the Privacy Initiative by California citizens in 1972, and Fourth Amendment case authority 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).

The 49ers have attempted to dismiss entirely any pertinence or value in Fourth Amendment cases, asserting that they are governed by a different constitutional standard and address inapposite situations involving only government intrusions on privacy. Once again, it is hardly surprising that the 49ers argue everything they can think of to avoid this body of case law, as it stands uniformly against them on virtually every question presented here, from the seriousness of the privacy invasion represented by full-body pat-down searches, to the recognition that genuinely "voluntary" consent requires free and unconstrained choice and "implied" consent requires consideration of the offered justification for the privacy intrusion at issue.

The 49ers are particularly anxious to avoid Fourth Amendment jurisprudence as persuasive authority in light of the many cases consistently invalidating mass, suspicionless pat-down searches at stadium and arena events as a violation of the Fourth Amendment. *Collier v. Miller*, 414 F. Supp. 1357, 1365 (S.D. Tex. 1976); *Wheaton v. Hagan*, 435 F.Supp. 1134, 1146-47 (M.D.N.C. 1977); *Gaioni v. Folmar*, 460 F. Supp. 10, 14 (M.D. Ala. 1978); *State v. Seglen*, 700 N.W. 2d 702, 709 (N.D.

2005); *State v. Iaccarino*, 767 So.2d 470, 479 (Fla. App. 2000); *Jacobsen v. City of Seattle*, 658 P.2d 653, 674 (Wash. 1983). And most importantly, in *Johnston*, the court preliminarily enjoined this very same NFL-mandated pat-down search policy as a Fourth Amendment violation.

But the 49ers' effort to dismiss these Fourth Amendment cases as irrelevant and even "improper," though understandable, is not at all well taken. (Resp. Brf., p. 16.) The California Supreme Court in *Loder* 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. Indeed, the court in *Loder* actually demonstrated this doctrinal relationship in the course of its decision, by first evaluating mandatory drug testing in hiring under the Fourth Amendment and, finding the testing program legal, then proceeding to re-analyze the program under Article I, section 1. This would only have been necessary if the court applied an Article I, section 1 standard that was more rigorous than the Fourth Amendment's, as otherwise there would have been no need to consider both in that sequence.[4]

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[4] *Hill* includes an introductory survey of privacy law generally, which comments in a footnote that Article I, section 1 has never been construed as more stringent than the Fourth Amendment (or its state-law counterpart under Article I, section 13 of the California Constitution) in analyzing searches and seizures by the police. *Hill*, 7 Cal.4th at 30, fn. 9. The court's observation, however, merely restates the familiar principle governing exclusion of evidence in criminal cases. *Id.*, citing *People v. Crowson*, 33 Cal.3d 623, 629 (1983) (which itself distinguishes police surveillance in a civil context). This exclusionary principle is analytically distinct from, and less protective than, the Article I, section 1 standard developed by *Hill* to govern searches in civil cases. As noted, *Loder* reaffirmed this more protective standard, both expressly and through its dual analysis of the Fourth Amendment

(continued...)

D. The Sheehans Have Never Voluntarily Consented to the Full-Body Pat-down Searches as a Condition of Entering Monster Park, and Any "Implied" Consent Represented by Their Awareness of the Search Policy Does Not Vitiate Their Prima Facie Claim for an Article I, Section 1 Violation.

Implied consent to a privacy intrusion is a recognized and potentially significant consideration in the ultimate determination of whether the intrusion constitutes a violation of Article I, section 1. Yet, implied consent has never been held – at least until the trial court's decision below – to exclusively determine whether a privacy claim satisfies the three-prong prima facie test of *Hill*. The unprecedented nature of the trial court's ruling is only one telling indication that its analysis went astray, having failed to recognize that consent is only one factor among many that bears not upon the prima facie test for an Article I, section 1 claim, but instead on the multi-factor balancing standard that ensues in the analysis.

It is important for these purposes to distinguish between actual "voluntary" consent and "implied" consent, as they are fundamentally different concepts. "Voluntary" consent is a familiar doctrine in search-and-seizure law, and 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."). Under the Fourth Amendment, truly "voluntary" consent can serve to

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[4](...continued)
and Article I, section 1 challenges at issue.

validate an otherwise unconstitutional search or seizure. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

In this case, there is and was no "voluntary" consent by the Sheehans to the 49ers' pat-down search policy. The Sheehans have always objected to the policy, and to subjecting themselves to full-body pat-down searches as a requirement for attending Monster Park home games since the start of the 2005 regular season.[5]

"Implied consent," on the other hand, describes the situation in which an individual receives advance notice of a search or other privacy intrusion as a condition of receiving some benefit or engaging in some activity and, though objecting to the intrusion, nevertheless submits to it in order not to be barred from that benefit or activity. Here, the only kind of consent involved is implied consent, as the Sheehans, despite objecting to the pat-down searches, have nonetheless submitted to them in order to continue attending 49ers home games.[6]

Implied consent, as all of the Article I, section 1 cases either demonstrate or explicitly declare, is at most a factor that does not speak to, let alone defeat, an

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[5] The 49ers assert repeatedly that the Sheehans are attempting to establish an unqualified legal "right" to attend a professional football game, or a right to "dictate their own terms of attendance at a privately sponsored event." (Resp. Brf., p. 1.) Not at all. The Sheehans simply argue for the right to watch 49ers home games at Monster Park without having their protected privacy interests under Article I, section 1 violated as they walk through the entrance gate.

[6] The 49ers hopelessly confuse these two distinct doctrines, describing "voluntary" consent as "a person's voluntary participation in an activity that he knows is conditioned on a search," and "implied" consent as a person's "proceed[ing] after receiving notice of the search requirement." (Resp. Brf., p. 27.)

otherwise properly pleaded prima facie claim of Article I, section 1 violation. Implied consent is instead merely one of a number of considerations that must be weighed and balanced in the adjudication of the claim, based on a fully developed evidentiary record. *Hill*, 7 Cal. 4th at 42-43; *Loder*, 14 Cal. 4th at 886, fn. 19; *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 at 193 (notice and implied consent is "generally viewed as a factor" in the balancing analysis "and not as a complete defense to a privacy claim").

1. *Hill* Itself Establishes That Implied Consent Is Not an Absolute Defense to All Article I, Section 1 Claims.

The 49ers in their respondent's brief continue their implied consent arguments made below, asserting again that any individual who interacts with a private business or organization knowing in advance that some privacy intrusion will be imposed as a condition has impliedly consented to it – no matter how egregious the intrusion may be and no matter how unjustified in purpose. According to the 49ers, such implied consent necessarily vitiates both the individual's reasonable expectation of privacy and the seriousness of the privacy invasion, thus foreclosing a prima facie claim for violation of Article I, section 1 in every case.

The 49ers, if nothing else, are clear in asserting this absolutist and far-reaching theory of implied consent. (Resp. Brf., pp. 29-30.) As the 49ers would have it, Article I, section 1 would never apply to the private sector, except arguably in cases

where the privacy invasion is either surreptitiously committed or forcibly imposed. In *all* other situations, they argue, the "transactional" nature of the relationship will preclude any constitutional privacy protection. That is not the law.

Hill, which the 49ers treat as the ultimate authority on Article I, section 1's application to private entities, plainly demonstrates that implied consent is not a bar to privacy claims. The court there found that the plaintiff student athletes had given implied consent to drug testing by participating in NCAA competitions after notice of the search policy. *Hill*, 7 Cal.4th at 42-43. According to the 49ers, and the trial court below, this should have been the end of the *Hill* court's analysis. But obviously it was not, as the Supreme Court instead proceeded to *reject* the 49ers' categorical notion that implied 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). Thus, rather than constituting the end of the analysis, implied consent was taken instead as only the beginning, as the court then proceeded, in pages of detailed, fact-based analysis, to sift through all of the relevant considerations, including: the purpose underlying the NCAA's testing regime; the efficacy of the testing in serving that purpose; the significance of the privacy intrusion upon the student athletes involved; the voluntary, associational nature of the

relationship between the athletes and the NCAA; the availability of less invasive alternatives to testing; and the significance of whatever implied consent can be derived from the advance notice of the testing regime the athletes were provided. *Hill*, 7 Cal.4th at 43-57.

2. The 49ers' Absolutist Implied Consent Theory Is Also Unsupported by Any Other Case Authority, Including *TBG* and *Feminist Women's Health Center*.

The 49ers are not only unable to find anywhere in *Hill* the categorical holding they impute to it, they are equally at a loss to locate any such holding in the few appellate cases they also mistakenly cite for this purpose, including *TBG Insurance 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).[7] Neither of these cases provides support for the 49ers' absolutist theory of implied consent.

Feminist Women's Health Center was a wrongful discharge action, in which plaintiff alleged that she was improperly terminated as a health worker at a women's medical clinic for refusing to demonstrate cervical self-examination to patients. *Id.*,

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[7] The best the 49ers can manage is to cite *Hill*'s observation that advance notice can result in "diminished" privacy expectations, 7 Cal. 4th at 42-43, and similar comments from other cases. *Smith v. Fresno Irrigation District*, 72 Cal. App. 4th 147, 162 (1999) (advance notice of employer drug screening "decreased" employee's expectation of privacy); *Ingersoll v. Palmer*, 43 Cal.3d 1321, 1346 (1986) (advance notice of police sobriety checkpoints "reduces the intrusiveness" as a factor supporting their Fourth Amendment validity); *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). Needless to say, all of this falls woefully short of meaningful authority for the 49ers' argument.

52 Cal. App. 4th at 1244. Although plaintiff had been specifically advised of this job requirement at the time of hiring, and had even signed a written acknowledgment that it was part of her employment duties, the appellate court did not base its affirmance of summary judgment for the defendant employer solely, or even primarily, on that ground. Instead, the court reviewed the entire record of evidence supporting the various elements of the traditional balancing standard, including the severity of the privacy intrusion, the justification by the employer for imposing it as a job requirement, and the availability of less intrusive alternatives:

> The *real issue* is whether this type of cervical self-examination may reasonably be required of the Center's employees. In other words, the seriousness of the privacy invasion leads us to the third part of the *Hill* test: consideration of the Center's countervailing interests and the feasibility of the alternatives proposed by plaintiff.
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> * * *
>
> Considering the Center's expansion since its inception some 20 years ago, it was not unreasonable for Hasper [the Center's executive director] to infer that new clients were drawn to the candid knowledge and intimacy imparted by the Center's unique methods, of which cervical self-examination was one. The Center also could reasonably conclude that the alternative methods of self-examination proposed by plaintiff would have stifled such candor.
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> * * *
>
> *In balancing these competing interests*, we return to plaintiff's consent to demonstrate cervical self-examination as part of her employment agreement with the Center. . . . [W]e believe the facts as disclosed in the trial court give rise to the following inferences only: The requirement that health workers perform cervical self-examinations in front of other females *is a reasonable condition of employment* and does not violate the health worker's right to privacy where the

> plaintiff's written employment agreement evidences her knowledge of this condition and agreement to be bound by it.

Id. at 1248-49 (emphasis added).

TBG was another wrongful termination action, in which the Article I, section 1 privacy issue arose not as part of the plaintiff's claim but instead in the context of a discovery dispute over the defendant employer's request to review plaintiff's business computer he had been issued for home use. Plaintiff's termination was based on his violation of defendant's strict prohibition on in-office use of its computer system to access pornographic internet websites. *Id.*, Cal. App. 4th at 446. Plaintiff denied that he had engaged in that activity, and the defendant then sought access to the computer he had been issued for home use, to determine whether it showed similar activity. Plaintiff at that point asserted that he had placed personal files on the business computer at home, for which he claimed an Article I, section 1 privacy protection against compelled discovery. The trial court denied defendant's motion to compel, but the court of appeal issued a writ of mandate vacating that order and directing the discovery sought. *Id.*, at 447-48.

The appellate court began by noting that the information on the computer "is indisputably relevant" to the issues in the case, and went on to rule that no Article I, section 1 privacy interest could be asserted because plaintiff did not have a reasonable expectation of privacy in any private files he had placed on the computer. 96 Cal. App. 4th at 448, 453. The court found that the employer had notified plaintiff at the time he was issued the computer for home use that he was prohibited from placing

any private information on it, and further that the computer would be subject to periodic monitoring to enforce the prohibition. Plaintiff even signed a written agreement acknowledging these restrictions and rules, though he proceeded to violate them by placing personal information on the home computer – and then sought to use this violation as a shield against litigation discovery, sought by his employer in defense of his wrongful discharge claim. *Id.* at 452-53.

The court's analysis, however, was not based entirely on consent, either express or implied through advance notice, but also considered other circumstances of plaintiff's conduct, including the legitimacy of the employer's rules for computer use according to "accepted community norms." *Id.* at 450. The court's discussion of this factor examined in detail the widespread restriction on personal use of computer systems throughout the business community, and examined as well the underlying justification for those restrictions, both from an insurance and civil liability standpoint. *Id.* at 451. It was in this context that the court evaluated the significance of consent:

> To state the obvious, no one compelled Zieminski or his wife or children to use the home computer for personal matters, and no one prevented him from purchasing his own computer for his personal use. With all the information he needed to make an intelligent decision, Zieminski agreed to TBG's policy *and* chose to use his computer for personal matters. By any reasonable standard, Zieminski fully and voluntarily relinquished his privacy rights in the information he stored on his home computer, and he will not now be heard to say that he nevertheless had a *reasonable* expectation of privacy.

Id. at 453 (emphasis in original). Accordingly, *TBG*, like *Feminist Women's Health Center*, represents a case in which the court carefully considered all relevant circumstances, including the justification for the asserted privacy intrusion through the litigation discovery sought; the justification for the employer's original restrictions on personal use of the computer; and the consequently reduced, indeed negligible, expectation of privacy that plaintiff had in the personal information he nonetheless stored on the computer in violation of his agreement.

3. The 49ers' Implied Consent Theory Also Finds No Support in Fourth Amendment Case Authority, Nor from Strained Business-World Analogies.

The 49ers argue that implied or "conditioned" consent, as they term it, has been upheld as validating suspicionless searches in the Fourth Amendment context. (Resp. Brf., p. 25.) But what the 49ers neglect to acknowledge is that these cases all derive from situations in which courts have found not only implied consent but also an underlying justification for the searches imposed – something entirely lacking in this case on the present record. These Fourth Amendment suspicionless search cases all involve two familiar situations: security screening at airports and at courthouses. The justification in each instance is the well documented history of actual terrorist acts and other violence at those public places. *Collier*, 414 F.Supp. at 1362; *Nakamoto v. Fasi*, 635 P.2d 946, 953 (Haw. 1981). Courts in the past have consistently resisted efforts to extend what has become known as the airport/courthouse exception to the Fourth Amendment for suspicionless searches to

other situations, including specifically sporting events and concerts at public venues such as stadiums and arenas. *Collier*, 414 F.Supp. at 1362 (mass, pat-down searches of concert goers unreasonable and not legally justified by the "airport and courthouse" search exception); *Ringe v. Romero*, 624 F.Supp. 417, 423 (W.D. La. 1985) (declining to find search of bar patrons as falling within the "airport and courthouse exceptions"); *Seglen*, 700 N.W. 2d at 709 (searches of patrons entering hockey arena suspicionless and illegal, despite terrorist attacks of September 11); *Bourgeois v. Peters*, 387 F.3d 1303, 1311-12 (11th Cir. 2004) (magnetometer searches of participants in public protest not justified by September 11 attacks).

Equally unavailing to the 49ers is their invocation of such consensual privacy intrusions as a bank requiring access to a loan applicant's credit report before application approval, or a doctor's insistence on access to a patient's medical chart to responsibly diagnose and treat a patient's illness. The 49ers assert that without consent, "all of these actions might be subject to challenge under the Privacy Initiative." (Resp. Brf., p. 31.) But these familiar situations bear no relation to the 49ers' pat-down search policy, and otherwise offer nothing useful to the analysis. The obvious problem with these analogies has everything to do with the legitimate need underlying the information requests and consequent privacy intrusions they posit.

As every loan applicant understands, a bank is entitled to evaluate a borrower's creditworthiness in considering a loan application. As every medical patient understands, a treating doctor needs access to the patient's medical history, and indeed

has a professional responsibility to secure and consider it. The 49ers, in contrast, have no adequate justification for the mass, suspicionless pat-down searches they now conduct for home games at Monster Park, at least according to the allegations of the Sheehans' amended complaint. What the 49ers' cited examples of these consensual privacy intrusions end up demonstrating is that genuine implied consent – in the real world as in the law – entails not just advance notice of a privacy invasion but an underlying justification for it as well, something that was not, and could not have been, adjudicated by the trial court below on demurrer.

4. The Doctrine of Unconstitutional Conditions Provides Important Teaching on the Qualified Significance of Implied Consent in Cases Involving Private-Sector Article I, Section 1 Violations.

The 49ers devote an entire section of their respondent's brief to arguing that the doctrine of unconstitutional conditions applies only to cases involving governmental attempts to condition benefits or services on relinquishment of constitutional rights. But the 49ers entirely miss the significance of these cases, as they fail to appreciate that the *rationale* underlying the doctrine of unconstitutional conditions fully applies in the private-sector Article I, section 1 context as well.

The doctrine holds that the government cannot require that an individual consent to giving up otherwise constitutionally protected rights, such as freedom of speech under the First Amendment or autonomy privacy under the Fourth Amendment, as a condition of receiving some government-provided benefit or service. *Collier v. Miller*, 414 F. Supp. at 1366. Numerous state and federal courts

have directly invoked the doctrine in cases where suspicionless pat-down searches were imposed by government authority as a condition of entry to sports events or concerts at publicly operated stadiums or arenas. *Nakamoto*, 635 P.2d at 951-52; *Stroeber v. Commission Veteran's Auditorium*, 453 F.Supp. 926, 933 (S.D. Iowa 1977); *Gaioni v. Folmar*, 460 F. Supp. at 14. The federal district court in *Johnston* found the NFL-mandated pat-down search policy a clear example of an unconstitutional condition:

> Defendants contend the pat-down search is constitutional because Plaintiff consented to the search by repeatedly attending NFL games knowing in advance that he would either be subjected to a pat-down search or denied entry to the Stadium. . . . This type of implied consent, where the government conditions receipt of a benefit (attending the Stadium event) on the waiver of a constitutional right (the right to be free from suspicionless searches), has been deemed invalid as an unconstitutional condition . . . . Plaintiff's property interest in his season tickets and his right to attend the games and assemble with other Buccaneers fans constitute benefits or privileges that cannot be conditioned on relinquishment of his Fourth Amendment rights.

Johnston, 442 F.Supp. 2d at 1271.

This underlying rationale applies with equal force here. The 49ers have sought to condition entry to Monster Park to attend the team's home football games on relinquishment by the Sheehans and other fans of their constitutional right to be free from serious and unjustified invasions of their autonomy privacy under Article I, section 1 – and they have sought to legitimize this condition solely on the basis of

"consent." As the unconstitutional conditions cases reflect, however, such constrained consent is no legal excuse at all.[8]

E. The Sheehans' Privacy Interest in Avoiding Full-Body Pat-Down Searches Is Fundamental, Not Minimal, and the 49ers Have Presented No Evidence Justifying This Serious Privacy Invasion as a Legitimate Security Measure at Monster Park.

The 49ers once again advance the contention that full-body pat-down searches represent so minimal an intrusion upon personal autonomy as to not even implicate a legally protected privacy interest under the three-prong *Hill* test. The contention seeks to portray the Sheehans as fastidious and hyper-sensitive fans. But judges around the country have shared their view that a pat-down search is both intrusive and degrading, and a serious violation of personal autonomy under any circumstances, including at entrance gates to stadiums, arenas, and similar venues. *Collier*, 414 F. Supp. at 1365 (pat-down searches were "serious intrusions which can be both annoying and humiliating"); *Seglen*, 700 N.W. 2d at 709 (pat-down searches were

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[8] A very recent decision by the Court of Appeal in *People v. Superior Court*, 143 Cal. App. 4th 1183 (2006), suggests that the doctrine of unconstitutional conditions is directly applicable to cases involving private entities that seek to condition benefits or services on forfeiture of constitutional rights. There, a student at Santa Clara University, a private institution, was charged with possession of marijuana based on evidence seized from his dormitory room in a warrantless search. In opposition to the student's motion to suppress, the District Attorney argued that the student's housing contract with the university included a provision authorizing nonconsensual warrantless searches of his room by the police. *Id.* at 1205-06. Although the appellate court overturned a suppression order on other grounds, it unequivocally rejected this contractual-consent argument as an unconstitutional condition, noting "that such purported advance consent to warrantless police searches would be an illegal waiver of defendant's constitutional rights under the Fourth Amendment." *Id.* at 1208.

"very intrusive"); *Wheaton*, 435 F. Supp. at 1146 (pat-down searches can be "'annoying, frightening, and perhaps humiliating'" (quoting *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968)). This very same NFL-mandated pat-down search program as implemented by the Tampa Bay Buccaneers was condemned in *Johnston* as a "'serious intrusion upon the sanctity of the person'" (quoting *Terry v. Ohio*, 392 U.S. 1, 17 (1968)), far more invasive than purse and package searches, police dog sniff searches, and magnetometer searches. *Johnston*, 442 F.Supp. 2d at 1264, 1270.

The 49ers claim that *People v. Carlson*, 187 Cal.App. 3d Supp. 6 (1986), stands as authority for their argument that a pat-down search offers no more than a minor intrusion into privacy interests. But *Carlson* actually does not speak to this issue at all. There, a Secret Service agent, guarding presidential candidate Senator Gary Hart as he walked a rope line at the Democratic National Convention, seized a gun from a would-be assassin hidden in the crowd after identifying the suspect and "very light[ly] touch[ing]" him "around his waist." *Id.* at Supp. 22. The court found that this intrusion was "minimal," and quoted the Secret Service agent's testimony that he had specially planned such searches "so that it would not bother the people who received it." *Id.* Indeed, the maneuver was "usually done without the subject's awareness of the search. . . ." *Id.* at Supp. 12. The Sheehans, in contrast, were well-aware of the full-body pat-down searches conducted by the 49ers, searches that – far from representing contact so surreptitious and minimal as to be unnoticeable –

required the Sheehans to stand with their arms spread wide while event staff ran their hands down and around their bodies.

The 49ers also argue that the pat-down search policy is justified as a necessary and effective security measure against potential terrorist threats to Monster Park.[9] In the trial court below, the 49ers sought to establish this by citing to an FAA no-fly regulation for certain theme parks and professional sports venues, and by invoking also the terrorist attacks against the Olympics at Munich in 1972 and at Atlanta in 1996. Now, on appeal, and with the *Johnston* decision in the interim having determined that no meaningful terrorist threat supports the NFL pat-down policy as implemented at any league stadium, the 49ers have devised a different approach: dispensing with any effort to present any evidentiary justification at all.

Instead, the 49ers now argue that their intentions in implementing the mass, suspicionless pat-down search program should be presumed to be well meaning, and that their benign intentions alone should suffice to legitimize it. According to the 49ers, the pat-down search policy is "a security measure to enhance the safety of persons attending 49ers games," this purpose is "important," and nothing more by way of justification is required for an Article I, section 1 privacy violation under *Hill*. (Resp. Brf., p. 43.) It is a remarkable proposition of law, and one completely alien not only to *Hill* but to the entire developed body of Article I, section 1 jurisprudence.

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[9] Again, this issue is not part of the prima facie test: it is a factual inquiry at the other end of the balancing equation.

What is required to sustain a privacy intrusion against an Article I, section 1 challenge is proof – with evidence – that the intrusion is imposed in order to accomplish some important purpose that has a demonstrated reality and that is effectively served by the intrusive conduct. *Hill*, 7 Cal.4th at 40 ("A defendant may prevail in a state constitutional privacy case by negating any of the three [prima facie] elements . . . or by pleading *and proving*, as an affirmative defense, that the invasion of privacy is justified because it *substantively furthers* one or more countervailing interests." (emphasis added).)[10] Otherwise, constitutional privacy protection could be overridden merely by generalized, unsubstantiated fear, a concern that was addressed by the federal district court in *Johnston*:

> A finding of "special needs" based on evidence that supports only a general fear of terrorist attacks would essentially condone mass suspicionless searches of every person attending any large event, including, for example, virtually all professional sporting events, high school graduations, indoor and outdoor concerts, and parades. While a generalized threat of terrorism in this country and around the world is well documented, on this record, the TSA has not presented evidence that the threat of a terrorist attack on an NFL stadium is "concrete" or "real."

442 F.Supp. at 1269.

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[10] The evidentiary record developed for these purposes is often extensive. *See, Hill*, 7 Cal.4th at 13 (bench trial decision supported by expert testimony from "scientists, physicians, and sports professionals"); *Loder*, 14 Cal.4th at 857 (trial court decision supported by 500-page joint statement of facts plus testimony from city officials and expert witnesses); *Feminist Women's Health Center*, 52 Cal. App. 4th at 1238 (summary judgment supported by extensive deposition discovery and "multiple declarations").

VI. CONCLUSION

The trial court erred in deciding that the Sheehans' renewal of their season tickets for 2006 constituted voluntary consent to the continuing pat-down search policy, as nothing about that renewal nullifies their reasonable expectation of privacy in the circumstances, nor serves to render the pat-down searches anything less than a continuing and serious intrusion of their constitutionally protected privacy interests.

The Sheehans have properly pleaded facts sufficient to satisfy each element of the *Hill* three-prong test for an Article I, section 1 privacy claim. Whether the pat-down search policy can be justified by the 49ers as a legitimate and effective security measure against a meaningful threat of terrorist attack on Monster Park, which cannot be adequately addressed by less-invasive procedures, should now be the subject of discovery and trial.

The order sustaining the general demurrer and dismissing the Sheehans' amended complaint should be reversed.

Dated: December 19, 2006 CHAPMAN, POPIK & WHITE LLP

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