

THE NFL'S MANDATORY SEARCH POLICY: ONCE CONSIDERED A FOURTH AMENDMENT VIOLATION, TODAY JUST AN ACCEPTED INCONVENIENCE FOR ENTRY TO THE GAME

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INTRODUCTION

The increased level of security and sophistication of surveillance techniques to help protect the health and well-being of sport spectators has not been produced in a vacuum. The world, as a whole, over the last half-century has been subjected to numerous acts of terror, some of which happened during or in conjunction with a variety of sporting events. One such event that shocked the sporting world at its core is known as the “Munich Massacre”.

The “Munich Massacre,” the name given to the tragedy that occurred during the 1972 Summer Olympic Games in Munich, West Germany, began when eleven Israeli Olympic team athletes and coaches were taken hostage by a militant group with ties to Yasser Arafat’s Fatah organization known as “Black September.” The group, heavily armed, gained access to the Israeli compound by climbing over an unguarded fence surrounding the Olympic Village.¹ By the end of the harrowing twenty-hour ordeal, Black September had killed all the Israeli team members, as well as a West German police officer. Additionally, five of the eight

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¹E. Dreifus, Black September, Jewish Review of Books (2012).

members of the Black September terrorist group were killed by police during a failed rescue attempt.²

Since the Munich Games, sport facilities and events have increasingly been viewed as possible terrorist targets and, as a result, sports leagues, stadium and security managers, and event organizers have reacted by implementing tougher security policies and sophisticated security measures. Spectators and fans have been subjected to a variety of searches, ranging from limited bag searches to video surveillance.³ These advancing security measures are exemplified by one of America's most celebrated sporting events, the Super Bowl.

In 2001, the Super Bowl in Tampa Bay, Florida was nicknamed the "Snooper Bowl," because fans who entered Raymond James Stadium were subjected to face-recognition scanning technology which ran a person's image through a database of known criminals and possible terrorists.⁴ While limited signage outside of the stadium informed fans of the surveillance, they were not aware of the simultaneous use of the images in what has come to be called a "virtual police line-up," and public outrage at the privacy intrusion ensued.⁵

The following year, the City of New Orleans used similar video surveillance during Super Bowl XXXVI held at the Louisiana Superdome with limited public outcry since that year's game took place after the terrorist attacks of September 11, 2001. Fear in the United States at this time was running high, evidenced by the fact that a poll reported that 86 percent of American citizens were in favor of using such technology in public places to scan for terrorists.⁶ By 2006, at Super Bowl XL, new and

² The three surviving terrorists were captured but later released by West Germany. Israel responded with Operation Spring of Youth and Operation Wrath of God, as well as a series of airstrikes and assassinations of those suspected of planning and executing the assault upon the Olympic athletes.

³ C. Claussen, *The Constitutionality of Mass Searches of Sports Spectators*, 16 *J. Legal Aspects Sports* 153 (2006), at pt. 1.

⁴ L. Elmore, *Tampa police made it the Snooper Bowl, but high-tech spying's a low-level sin*, *Street & Smith's Sports Business Journal* (Feb. 12-18, 2001), at 34.

⁵ B. Kappstatter, *Tampa cops recorded every fan's face – Snooper Bowl*, *Daily News* (Feb. 2, 2001), at 1.

⁶ K. Balint, *San Diego police say no to face scanning technology for Super Bowl security*, *The San Diego Union-Tribune* (Jan. 20, 2003), at E1. However, the by the 2002 Winter Olympic Games in Salt Lake City, public fear was subsiding and United

improved three-dimensional holographic technology designed to enhance the capabilities of facial recognition searches was implemented by the City of Detroit in conjunction with the NFL.⁷

Consequently, over the past twenty-five years, sports fans in the United States have moved from being subjected to limited visual inspections of persons and bags for alcohol, contraband, and projectiles,⁸ to physical searches of persons for possible weapons,⁹ to advancing facial recognition technology and requests for their personal identity that may lead to immediate criminal status and background checks.

But as the level of security has become more rigorous, it has also simultaneously and systematically eroded an individual's Fourth Amendment right against unreasonable searches and seizures. As a result, stadium and security managers, leagues, teams, and event organizers have to ask themselves: what is the appropriate legal standard when it comes to searching spectators and guests? Since the events of September 11th brought terrorism to the United States, where privacy is a fundamental freedom that receives constitutional protection, the question thus becomes – what, if any, rights and freedoms are the U.S. sport fans willing to trade for a sense of security when attending a sporting event?

And, if the public is willing to trade civil liberties for safety, the federal and state courts, the gatekeepers and protectors of the populace's constitutional rights, must reach a balance between what privacy advocates worry about – that fear will outweigh the American passion for privacy, and that surveillance of citizens will suffer from 'mission creep' as the comparison databases are broadened and become susceptible to other uses, like catching petty criminals,¹⁰ with that of the government's need to

States Olympic Committee ("USOC") officials there decided not to use a scanning system that had been installed, although the reason the USOC officials gave was that the manufacturer of the system was not an official corporate sponsor of the Games.

⁷ P. Steinback, *Enemy at the Gates*, *Athletic Business* (2006), 30(5), at 36-47.

⁸ USOC Search Policy, 1996 Summer Olympic Games in Atlanta, GA.

⁹ NFL Mandatory Pat-down Policy, see *Johnston vs. Tampa Sport Authority*, 490 F.3d 820, 822 (11th Cir. 2007).

¹⁰ *Uncle Sam and The Watching Eye*, *The Economist* (Sept. 2001). Other forms of citizen surveillance are also cause for concern, including microchip technology that can be implanted under the skin and used to track a person's location, global positioning systems in cell phones and vehicles are used to monitor locations of the user, companies are increasingly tracking website usage of employees and consumers, and

reasonably limit some personal civil rights in an effort to ably protect and provide for the health, safety, and well-being of the citizenry.

This paper will explore the legitimacy and legality of one such security initiative; the NFL's Mandated Pat-Down Policy. We will examine how articles and lawsuits written and decided over a decade ago would fare today since the NFL's policy has been enhanced to include not only a stricter and more invasive body search, but bag and vehicle searches as well. We will explore the notion of whether enough time has passed since the tragic events of September 11th, that fears have been tempered and the citizens of the United States are now ready to reclaim the constitutional rights they gave up so willingly in that horrific day's wake? We will do this by reviewing the concept and what constitutes 'state action', before examining whether a litigant today, who is subjected to the NFL's enhanced search policies, has a viable Fourth Amendment claim as opposed to twenty years ago in light of its various exemptions: exigent circumstances, a diminished expectation of privacy, special needs, and consent (expressed or implied).

After discussing the importance and consequences of the 'unconstitutional conditions doctrine', we will then provide various recommendations in accordance with previous court rulings, with an updated view, so that leagues, teams, stadium and security managers, and event organizers can do everything necessary to lessen the chances of a) being sued, and b) mitigating the likelihood of fan success if they are sued.

I. THE NFL'S ENHANCED SEARCH POLICY

In 2005, the NFL mandated that all thirty-two of its franchises institute a pat-down policy at their stadiums. This directive was based on the NFL's own opinion that its games could be an attractive target for a terrorist attack and, as evidence, used several examples to support its position: the 2004 and 2005 suicide bombings in London and Madrid, an unsuccessful plan to

video surveillance technology is used by businesses and governments in public intersections and public buildings. Federal and local government agencies currently use private data collectors to acquire personal information that would be illegal for them to obtain otherwise (The End of Privacy? 2006).

bomb a soccer venue in Spain, and the NFL's own, unsubstantiated belief that individuals with ties to terrorist organizations had downloaded information about NFL stadiums located in both St. Louis and Indianapolis.¹¹

The NFL's pat-down policy's main focus, at the time, was the detection of improvised explosive devices or IEDs¹² and required fans entering a stadium to "hold his or her arms out to the side, palms up" as screeners "run their hands along the sides of the torso, and down the spine."¹³ The process was considered a search within the meaning of the Fourth Amendment because, as written, it involved the "touching, patting, or lightly rubbing" of an individual.¹⁴ Since the NFL's policy was unarguably a search, it clearly raised Constitutional concerns and other privacy rights of the individuals subjected to the pat-down upon entering a stadium.

Since 2005, the NFL has enhanced its search policy on various occasions. In September of 2011, the NFL recommended that the previous limited pat-down be expanded to include "a pat-down of the area from the knees down to the ankles in an effort to identify any concealed weapons."¹⁵ In 2013, the NFL imposed a new, stricter bag policy, wherein fans attending games were only allowed to take into stadiums small purses and handbags; small,

¹¹ Although the FBI later deemed the threats and the downloads not to present a threat to NFL stadiums, these events formed the context in which the NFL decided to request that a pat down policy be enacted at all NFL games. However, according to the Commissioner's Office, terrorist threats were not the only reason this policy was put into effect. "This new requirement is not a result of any specific threat information," NFL Commissioner Paul Tagliabue said, "It is in recognition of the significant additional security that pat downs offer, as well as the favorable experience that our clubs and fans have had using pat-downs as part of a comprehensive stadium security plan." See, Okada, Bryon, (2009, February 6). Pro Football Stadium Security Requires All Fans to Patted Down. Fort Worth Star Telegram.

¹² The Supreme Court has specifically held that a "weapons pat down" is a search within the meaning of the Fourth Amendment, see *U.S. v. Roggeman*, 279 F.3d 573, (C.A.8, 2002).

¹³ NFL Mandatory Pat-down Policy. See *Johnston vs. Tampa Sport Authority*, 490 F.3d 820, 822 (11th Cir. 2007).

¹⁴ A fan that refuses is denied entry into the stadium. See *Johnston v. Tampa Sports Authority*, 530 F.3d 1320, 1325 (11th Cir. 2008).

¹⁵ M. Duell, Groped at the big game: NFL to perform 'enhanced' full-body pat-downs on ALL of America's 17 million football fans, *The Daily Mail* (Sept. 2011), <https://www.dailymail.co.uk/news/article-2037977/NFL-stadium-security-improved-stricter-pat-downs-ankles-up.html>

clear plastic or vinyl bags; and one-gallon plastic freezer bags.¹⁶ And finally, another revision included the search of all cars, trucks, and buses and stated: “All bags and vehicles will be subject to inspection upon entry. Persons that refuse to be patted down and/or refuse to have their bags or vehicle inspected will not be admitted.”¹⁷

II. THE FOURTH AMENDMENT

The Fourth Amendment to the U.S. Constitution prevents the federal government,¹⁸ in brief, from conducting “unreasonable searches and seizures”¹⁹ upon its citizenry. It is an individual’s right and is meant “to safeguard the privacy and security of persons against arbitrary invasions by government officials,”²⁰ and reflects the belief that “searches conducted in the absence of reasonable and particular suspicion were intolerable in a democratic society.”²¹ This Constitutional Amendment also requires that all government searches be reasonable,²² or conducted pursuant to a warrant supported by probable cause.²³

The U.S. Supreme Court has, however, recognized various, limited, circumstances where a search can be considered

¹⁶ K. Belson, N.F.L. Fans Met by Tighter Bag Policy, *New York Times* (Aug. 2013), <https://www.nytimes.com/2013/08/21/sports/football/nfl-fans-met-by-tighter-bag-policy.html>.

¹⁷ Clear Bag Policy, NFL, <http://www.nfl.com/allclear> (last visited Feb. 18, 2021).

¹⁸ This prohibition applies to the States as well. See *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (incorporating the Fourth Amendment against the States via the Due Process Clause of the Fourteenth Amendment.).

¹⁹ U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

²⁰ *United States v. Kincade*, 379 F.3d 813, 851 (9th Cir. 2004).

²¹ *Id.* at 852.

²² *Brigham City v. Stuart*, 126 S. Ct. 1943, 1947 (2006) (noting that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’”). See also *Elkins v. United States*, 364 U.S. 206, 222 (1960) (“What the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures.”).

²³ *Katz v. United States*, 389 U.S. 347, 357 (1967) (“Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions.”).

reasonable based on its nature and surrounding circumstances,²⁴ despite the absence of either a warrant or probable cause.²⁵ These include exigent circumstances;²⁶ a diminished expectation of privacy;²⁷ a special need;²⁸ and an individual's consent, whether expressed or implied.

III. STATE ACTION

For an individual to prove a Fourth Amendment violation, one must first show that the search was conducted by the government (local, state, or federal) or a government actor. In other words, there must be 'state action' in order to move forward on a cause of action against a party for breaching a constitutionally protected right. The Fourth Amendment is meant to verify governmental searches and seizures and governmental searches and seizures alone; therefore constitutional protections do not apply to non-governmental searches and seizures unless the search or seizure can be attributed to the 'state'.²⁹ Although there are no hard and fast rules for determining what is and what is not state action, attribution is considered fair when an individual is either deprived of a constitutionally protected right, or when the depriving individual is himself/herself a state actor.³⁰ Thus, if the plaintiff is unable to prove the presence of state

²⁴ *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) ("The Fourth Amendment commands that searches and seizures be reasonable. What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.").

²⁵ *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (permitting law enforcement officers to make a warrantless entry onto private property in order to fight a fire and investigate its causes); *Ker v. California*, 374 U.S. 23, 40-41 (1963) (authorizing warrantless entry onto private property in order to prevent the imminent destruction of evidence); and *United States v. Santana*, 427 U.S. 38, 42-43 (1976) (allowing warrantless entry onto private property in order to engage in "hot pursuit" of fleeing suspect).

²⁶ *Terry v. Ohio*, 392 U.S. 1 (U.S. 1968).

²⁷ *Bourgeois v. Peters*, 387 F.3d 1303 (11th Cir, 2004) (Border searches and open field searches).

²⁸ *Wheaton v. Hagan*, 435 F. Supp. 1134 (M.D.N.C. 1977) (Airport searches based on a history of bombings and hijackings).

²⁹ *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156 (1978).

³⁰ *Lugar v. Edmondson Oil Company*, 457 U.S. 922, at 937 (1982).

action, then the Fourth Amendment's protections are inapplicable.³¹

It is without a doubt that searches conducted by officials of publicly-owned sporting facilities constitute state action. However, when sports facilities are privately owned, the presence of state action is less obvious. Therefore, stadium and security managers of 'privately-owned' facilities must be aware of the various instances when 'state action' will 'trigger' regardless of ownership. Managers of 'private' facilities must be mindful that when a city or regional sports authority is responsible for implementing or conducting the search, the fact that the authority is a public agency is relevant³² since said search can be interpreted as being conducted pursuant to the public purpose of assisting law enforcement.³³ In addition, if the search is conducted by or merely observed by the police, it may be considered 'state action'.³⁴

Based upon case precedent, it seems that in most instances spectator searches conducted at sporting facilities will 'trigger' 'state action' because the stadiums are either publicly owned, or privately owned and receive some form of public financing, have a police presence, or have security that can be interpreted as being for the purpose of assisting law enforcement.

IV. CHALLENGES TO THE INITIAL NFL'S MANDATED SEARCH POLICY

Before the NFL enhanced its mandatory pat-down policy, three lawsuits challenged the initial policy's constitutionality: In the Matter of Chicago Park District v. The Chicago Bears Football Club,³⁵ In the Matter of Sheehan v. The San Francisco 49ers Ltd.,³⁶ and In the Matter of Gordon Johnston v. Tampa Sports Authority.³⁷

³¹ *Flagg Bros., Inc.*, 436 U.S. at 156.

³² *Johnston*, 490 F.3d at 824.

³³ *Id.*

³⁴ *Id.*

³⁵ *Chicago Parks District v. The Chicago Bears Football Club*, 2006 WL 2331009 (N.D. Ill. Aug 8, 2006).

³⁶ *Sheehan v. The San Francisco 49ers Ltd.*, 201 P.3d 472 (March 2, 2009).

³⁷ *Johnston*, 530 F.3d at 1320.

A. In the Matter of Chicago Park District v. The Chicago Bears Football Club

The Chicago Park District (CPD), at the time the NFL's initial policy was implemented, was responsible for security and crowd control at Soldier Field, home of the Chicago Bears. After the policy's adoption by the Bears, CPD sought a declaratory judgment wherein it would not be obligated or compelled to abide by the NFL's search policy at Soldier Field because conducting such would be a violation of the game attendees' Fourth Amendment right against unreasonable searches and seizures.

The issue with CPD's position was that the U.S. Supreme Court has unequivocally held that "Fourth Amendment rights are personal" and thus "may not be vicariously asserted."³⁸ The CPD Court acknowledged this principle, stating that it "know[s] that the rights guaranteed by the Fourth Amendment are personal, and may not be asserted vicariously. Rather, they must be championed by the one whose rights were infringed by the government's conduct."³⁹ This Court found that the complaint filed by CPD "seeks to assert a vicarious Fourth Amendment claim, but it lacks standing to do so."⁴⁰ Since the Court found the CPD's complaint centers on this vicarious assertion of a Fourth Amendment claim, it dismissed the matter on the grounds that the CPD lacked standing to pursue a vicarious challenge to the constitutionality of the NFL's pat-down searches at Soldier Field.

B. In the Matter of Sheehan v. The San Francisco 49ers Ltd.

In 2005, the San Francisco 49ers (49ers), in accordance with the NFL's mandated pat-down policy, began inspecting fans before they entered what was then the 49ers' stadium, Monster Park. The pat-down searches were administered by 49ers' personnel; however, San Francisco police were visibly stationed nearby.

Daniel and Kathleen Sheehan (Sheehans), filed suit against the 49ers in California state court, alleging the pat-downs breached their inalienable right to privacy, as provided by

³⁸ Rakas v. Illinois, 439 U.S. 128, 133-34 (1978).

³⁹ U.S. v. Price, 54 F.3d 342, 345 (7th Cir.1995); U.S. v. Melinchuk, No. 05-CR-175C, 2006 WL 508666 at p 5 fn. 4 (W.D.Wis. Mar. 2, 2006).

⁴⁰ Chicago Parks District, 2006 WL 2331009 (N.D. Ill. Aug 8, 2006).

California's "Privacy Initiative".⁴¹ The Sheehans sought a declaratory judgment and injunctive relief, requesting the court to: (1) find the pat-down policy in violation of California's Privacy Initiative; and to (2) enjoin the 49ers from continuing the NFL mandated pat-down policy.⁴²

The Supreme Court of California never addressed the merits of the case because, as the Court found, the entire factual record consisted solely of the complaint and did not establish what were the competing and compelling interests of either party. This Court presumed the NFL, and ultimately the 49ers, adopted the pat-down policy to enhance spectator safety, but the record did not establish this or explain why the NFL believed the policy was appropriate.⁴³ The Court went on to state, "Those who provide private entertainment venues have a substantial interest in protecting the safety of their patrons, but when the security measures substantially threaten privacy rights, courts review the policy for reasonableness under the circumstances. Here, we cannot do so because the record does not establish the circumstances of, or the reasons for, the pat-down policy. The 49ers have not yet given any justification for its policy."⁴⁴

With regards to the claim that Sheehan's privacy rights have been violated, the Court concluded that in order to establish a reasonable expectation of privacy, a plaintiff "must have conducted himself or herself in a manner consistent with an actual expectation of privacy; i.e., he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of the defendant. If voluntary consent is present,

⁴¹ The "Privacy Initiative" refers to Article I, section 1 of the California Constitution. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL CONST. art. I, § 1 (2007) (emphasis added). The section replaced former Article 1, Section 1 in November 5, 1974 and explicitly established the right of privacy as an inalienable right in California. See *Cent. Valley Chap. 7th Step Found. v. Younger*, 157 Cal. Rptr. 117, 129 (Ct. App. 1979).

⁴² *Sheehan*, 201 P.3d at 472.

⁴³ Presumably, the NFL, and ultimately the 49ers, adopted the policy to enhance spectator safety, but the record does not establish this or explain why the NFL believed the policy was appropriate. As evidenced by the circumstance that the pursuit of safety, like the pursuit of privacy, is a state constitutional right, the competing social interest of enhancing safety is substantial.

⁴⁴ *Sheehan*, 201 P.3d at 476.

a [defendant's] conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability."⁴⁵

The Court found, however, that the totality of the circumstances surrounding the consent theory was not established by the record during the lower court proceedings and stated that "although consent is an important factor in determining whether California's constitutional privacy right is being infringed, prior court precedent does not establish a proposition that a person who chooses to attend an entertainment event consents to *any* security measures the promoters may choose to impose no matter how intrusive or unnecessary."⁴⁶ The Court concluded, in quoting *Hill*,⁴⁷ that, "[a]lthough diminished by the athletic setting and the exercise of informed consent, plaintiffs' privacy interests are not thereby rendered de minimis"⁴⁸

The Supreme Court of California determined that given the absence of an adequate factual record further inquiry was necessary to determine; a) that if the NFL intends to search everyone entering a stadium, it is going to have to prove that such is a reasonable act or, if not, that a least restrictive alternative is available, and b) whether or not the Sheehans have an actual expectation of privacy or have manifested by their own conduct, a voluntary consent to a pat-down search.⁴⁹

C. In the Matter of Gordon Johnston v. Tampa Sports Authority

In the matter of *Johnston v. Tampa Sports Authority*,⁵⁰ the Eleventh Circuit found that a spectator, by merely presenting himself or herself at a stadium, whether private or public, consents to a search.

In reaching its conclusion, the Appeals Court found that spectators attending sporting events have a reasonable expectation of privacy because the Fourth Amendment applies to all gatherings, large or small, and personal security rights are

⁴⁵ *Hill v. National Collegiate Athletic Association*, 7 Cal. 4th 1, 43 (1994).

⁴⁶ *Id.* at 43.

⁴⁷ *Id.* at 49.

⁴⁸ *Id.* at 39.

⁴⁹ *Sheehan*, 201 P.3d at 477.

⁵⁰ *Johnston*, 530 F.3d at 1320.

among the most sacred and protected common-law rights.⁵¹ However, the Court found that even when a reasonable expectation of privacy exists, an individual's voluntary consent can make a search valid under the Fourth Amendment and will foreclose analysis of the reasonableness of the search.⁵² Whether voluntary consent has been established is a question of fact determined by examining the 'totality of the circumstances.'⁵³

Using a 'totality of the circumstances' analysis, the Appeals Court listed the following factors to determine the voluntariness of the consent: whether the person is in custody, the existence of coercion, the person's awareness of his right to refuse consent, the person's education and intelligence, and whether the person believes incriminating evidence will be found.⁵⁴ In addition, the Court looked for the existence of expressed or implied consent and considered the following factors: whether the defendant was aware his conduct would subject him to search; whether the search was supported by a 'vital interest', whether the searching officer had apparent authority to search and arrest; and whether the defendant was advised of his right to refuse; and whether refusal would result in a deprivation of a benefit or right.⁵⁵

Based on these enumerated factors, the Appeals Court found that Johnston impliedly consented to the search and therefore the NFL's policy did not violate his constitutional rights. The Court, based upon the "totality of the circumstances" analysis, concluded that Johnston impliedly consented because he was fully aware of

⁵¹ *Terry*, 392 U.S. at 8-9 (affirming personal security rights under Fourth Amendment); *Bourgeois*, 387 F.3d at 1311 (Fourth Amendment provides no exception for large gatherings). See notes 26 and 27.

⁵² *Schneekloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973) (acknowledging consent overrides Fourth Amendment requirement of warrant and probable cause); *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989) (stating long recognized proposition police may search without warrant if they receive valid consent); *State v. Seglen*, 700 N.W.2d 702, 708 (N.D. 2005) (recognizing consent exception to warrant requirement).

⁵³ *Schneekloth*, 412 U.S. at 227; see also *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (defining voluntariness as "free and unconstrained choice" in Fourteenth Amendment context).

⁵⁴ *United States v. Blake*, 888 F.2d at 799, quoting *United States vs. Chemaly*, 741 F.2d 1346, 1352 (11th Cir.1984).

⁵⁵ *State v. Iaccarino*, 767 So.2d 470 at 476.

the search, that the screeners did not ‘coerce’ him or threaten him physically or otherwise,⁵⁶ and that he was a well-educated man.

Additionally, the Appeals Court found that the NFL’s search policy supported a ‘vital interest’ by stating that “The NFL and the Buccaneers instituted the policy specifically to guard against mass casualties at NFL games from a potential terrorist attack. We cannot doubt the NFL’s interest in protecting its patrons. The NFL quite clearly instituted the policy with the intent of preventing terrorist attacks and ensuring the safety of persons in the Stadium.”⁵⁷

V. AN ANALYSIS OF THE CONSTITUTIONALITY OF THE NFL ENHANCED PAT-DOWN POLICY

A. *State Action and Sport Facilities*

As stated, for an individual to prove a constitutional violation, one must first show ‘state action’. Therefore, to determine if the NFL’s enhanced search policies violate a person’s Fourth Amendment right, the first question to answer is whether ‘state action’ is present or not.

In the three lawsuits filed challenging the policy’s constitutionality, in the *Matter of Chicago Park District*, the issue of state action was moot because the court found that CPD lacked standing to challenge the constitutionality of the NFL’s pat-down policy being conducted at Soldier Field. In *Sheehan*, the issue was never addressed; however, the court did find that although the searches were being administered by 49ers’ personnel, members of the San Francisco police were visibly stationed nearby. As previously noted, a sport facility must be mindful that if the search is conducted by or merely observed by the police, it may be considered state action.⁵⁸ Because the San Francisco police were stationed nearby, and presumably witnessed the pat-down, one can assume ‘state action’ was present.

Finally, in *Johnston*, the Eleventh Circuit expressly recognized that state action was present by stating, “For the purposes of our analysis of whether or not this warrantless search

⁵⁶ *Johnston*, 530 F.3d at 1324.

⁵⁷ *Id.*

⁵⁸ *Johnston*, 490 F.3d at 820.

was constitutional under the United States and Florida constitutions, we accept the District Court's conclusion that the search was performed by agents of the State."⁵⁹ In addition, the Appeals Court stated that "The Stadium is operated by the Authority, a Florida public entity."⁶⁰

Consequently, in most instances, spectator searches conducted at sport stadiums will likely involve 'state action' because stadiums are either publicly owned or privately owned and receive some form of public financing, have a police presence, or have security that can be interpreted as being for the public purpose of assisting law enforcement.

B. Fourth Amendment and Its Exceptions – Should the NFL's Search Policy Be Considered One of the Exceptions?

The U.S. Supreme Court has consistently held that per the Fourth Amendment "a search conducted without probable cause or a warrant issued upon probable cause is 'per se unreasonable' . . . subject only to a few specifically established and well-delineated exceptions."⁶¹ These recognized, limited, exceptions include: exigent circumstances demanding immediate action that render obtaining a search warrant futile,⁶² circumstances establishing a special need beyond the need for normal law enforcement,⁶³ certain situations that the Court has identified wherein an individual has a diminished expectation of privacy,⁶⁴ and an individual's consent, whether expressed or implied.

1. Exigent Circumstance Exception

The NFL's enhanced search policy does not avail itself to the exigent circumstance exception to the Fourth Amendment. Exigent circumstances are situations that would cause a

⁵⁹ *Johnston*, 442 F.Supp. 2d. 1257 at 1264.

⁶⁰ *Johnston*, 530 F.3d at 1320.

⁶¹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)); accord *United States v. Santa*, 236 F.3d 662, 668 (11th Cir.2000).

⁶² *Terry*, 392 U.S. 1.

⁶³ *Wheaton*, 435 F. Supp. 1134 (Airport searches based on a history of bombings and hijackings).

⁶⁴ *Bourgeois*, 387 F.3d 1303 (Border searches and open field searches).

reasonable person to believe that entry was necessary to prevent either physical harm, the destruction of relevant evidence, or the eventual escape of a criminal suspect. The U.S. Supreme Court has found that, “A variety of circumstances may give rise to the exigency sufficient to justify a warrantless search, including the need to provide an emergency assistant, to engage in ‘hot pursuit’ of a fleeing suspect or to enter a building to put out a fire and investigate its cause.”⁶⁵ Since none of the articulated circumstances are relevant or applicable to the NFL’s enhanced search policy, it could not therefore avail itself to an exigent circumstances exception to a person’s Fourth Amendment right against unreasonable searches and seizures.

2. Special Needs Exception

The California Supreme Court stated in *Sheehan* that “Private entities that present entertainment events, like the 49ers, necessarily retain primary responsibility for determining what security measures are appropriate to ensure the safety of their patrons, subject, when those security measures substantially infringe on a privacy interest, to judicial review for reasonableness.”⁶⁶ The U.S. Court of Appeals, Eleventh Circuit in *Johnston*, found that the NFL’s search policy supports a ‘vital interest’ and that “The NFL and the Buccaneers instituted the pat-down policy specifically to guard against mass casualties at NFL games from a potential terrorist attack”.⁶⁷ The Appeals Court went on to say, “We cannot doubt the NFL’s interest in protecting its patrons. The NFL quite clearly instituted the policy with the intent of preventing terrorist attacks and ensuring the safety of

⁶⁵ *Missouri v. McNeely*, 569 U.S. 141 (2013).

⁶⁶ “[I]n reviewing a private entertainment venue’s security arrangements that implicate the state constitutional right of privacy, the court does not decide whether every measure is necessary, merely whether the policy is reasonable. The state constitutional right of privacy does not grant courts a roving commission to second-guess security decisions at private entertainment events or to micromanage interactions between private parties. ... Private entities that present entertainment events, like the 49ers’, necessarily retain primary responsibility for determining what security measures are appropriate to ensure the safety of their patrons, subject, when those security measures substantially infringe on a privacy interest, to judicial review for reasonableness.”

⁶⁷ *Johnston*, 530 F.3d at 1324.

persons in the Stadium.”⁶⁸ Upon examination and review, these two Courts, the California Supreme Court and the U.S Appeals Court Eleventh Circuit, may be attempting to introduce the concept that the special need exception to the Fourth Amendment should be expanded to now include sport facilities and events.

A special need arises when some unique condition makes compliance with the warrant and probable cause requirements impracticable. In order to be accepted by a court, the purported special need must be both “substantial”⁶⁹and “real and concrete.”⁷⁰ It is not sufficient that the potential harm be severe, yet remote. Once the government has proven the existence of a substantial and concrete special need, it must next show that its special need is so important as to outweigh the intrusion upon the individual’s privacy rights.⁷¹ If the government’s special need in circumventing the warrant process outweighs the individual’s privacy interest, then the court will allow the suspicionless search based on the exception.⁷² However, if the converse is true, and the individual’s privacy interest is greater than the government’s interest in conducting the search, then the court will not recognize a special needs exception.⁷³

Therefore, a mass suspicionless search would be reasonable based on special need and therefore not a Fourth Amendment violation, when the court finds that the purported special need is substantial and real or concrete, and that the public’s interest in allowing the search outweighs the individual’s privacy interests. To date, the U.S. Supreme Court has only found a special need exception in the following narrowly tailored and distinctive

⁶⁸ Id.

⁶⁹ Chandler v. Miller, 520 U.S 305 at 318, (U.S. Ga. 1997).

⁷⁰ Id. at 319.

⁷¹ National Treasury Employment Union v. Von Raab, 489 U.S. 656 at 665-66 (1989). (“Where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.”).

⁷² Id. at p. 665.

⁷³ Id. at p. 665.

situations: airport and courthouse safety,⁷⁴ national border patrol,⁷⁵ fixed road checkpoints for driver verification and sobriety tests,⁷⁶ supervision of parolees and probationers,⁷⁷ and middle and high school student drug testing.⁷⁸

When analyzing whether the special needs exception to the Fourth Amendment should be expanded to include various sport industry properties, the first question to ask is would an attack at an NFL franchises' facility be substantial. The answer to this initial question is an easy one.

There can be no doubt that a terrorist attack at a live NFL game would be considerable because most NFL stadiums can hold upwards of 60,000 spectators at maximum capacity, which number increases when you include facility workers, players, coaches, and other behind-the-scenes personnel.⁷⁹ Therefore, any attack would be significant based upon the potential number of injuries and the possible loss of life, which together could total hundreds, if not thousands. An attack, whether by the use of an

⁷⁴ *Chandler*, 520 U.S. at 323 (“Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’ – for example, searches now routine in airports and at entrances to courts . . .”).

⁷⁵ See *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973) (holding that vehicle searches of travelers crossing an international boundary may be conducted even if officials do not have any reason to suspect that a given vehicle contains illegal aliens or smuggled objects); *U.S. v. Villamonte-Marquez*, 462 U.S. 579 (1983) (holding that authorities may board any vessel that is in waters that provide “ready access to the open sea” for inspection of documents without suspicion of wrongdoing).

⁷⁶ See *Delaware v. Prouse*, 440 U.S. 649 (1979) stating in dicta that stops of a predetermined number of vehicles at a fixed checkpoint, if done for the primary purpose of verifying driver and vehicle information, would be constitutional); *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (holding that police may establish fixed checkpoints on highways to test for drunkenness and stop all drivers even though police have no particularized suspicion about any one driver).

⁷⁷ See *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (holding that parolees and probationers may be subjected to warrantless searches by the officials responsible for them, without probable cause, provided the search is conducted pursuant to a valid regulation governing the parolee or probationer).

⁷⁸ In *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995), the Supreme Court allowed a public-school district to require suspicionless drug tests of every student that wished to participate in an interscholastic sport. In *Bd. Of Educ. Of Indep. School Dist. No. 92 v. Earls*, 536 U.S. 822 (2002), the Court expanded *Vernonia* to allow random drug-testing of all middle and high school students that sought to participate in any “competitive extracurricular activity,” including band, choir, and clubs such as Academic Team, and Future Homemakers of America

⁷⁹ Soldier Field in Chicago has the lowest seating capacity at 61,500.

IED, chemical weapon, or otherwise, would also cause physical damage to the facility, while also creating a significant impact economically for the NFL, the franchise(s) involved, and the locality surrounding the attacked stadium.⁸⁰

Yet, is the threat of a terrorist attack occurring at an NFL stadium or event ‘real or concrete’ to qualify for a special need exception? The legal standard emphasizes that it is not enough that the potential harm be severe, yet remote. As noted previously, in 2005, the NFL mandated that all thirty-two of its franchises institute a pat-down policy based on its own estimation that its games were an attractive target for a terrorist attack. As evidence, the NFL relied, in part, on a belief that a terrorist organization had downloaded information about facilities located in both St. Louis and Indianapolis. The legal concern with the NFL’s belief, as underscored by the FBI, was that these downloads were previously determined not to be an “actual threat.”⁸¹

Additionally, in *Sheehan*, the California Supreme Court found that “[t]he 49ers have not yet given any justification for its policy”⁸² and remanded the case for further proceedings so the NFL could establish a factual record – which, to date, it has never done. The Court of Appeals Eleventh Circuit in *Johnston* did find, however, that the NFL’s policy supported a “vital interest”, stating that “[t]he NFL and the Buccaneers instituted the pat-down policy specifically to guard against mass casualties at NFL games from a potential terrorist attack.”⁸³ However, the Court’s findings were not predicated on any verified or corroborated evidence submitted

⁸⁰ By way of example, the gaming industry was estimated to suffer a \$1 billion hit from the Las Vegas massacre in October 2017, and the Boston Marathon bombings cost businesses around \$333 million each day the city was shut down following the attack. Please see <https://riskandinsurance.com/stadium-safety/>

⁸¹ Although the FBI later deemed the threats and the downloads not to present a threat to NFL stadiums, these events formed the context in which the NFL decided to request that a pat down policy be enacted at all NFL games. However, according to the Commissioner’s Office, terrorist threat were not the only reason this policy was put into effect. “This new requirement is not a result of any specific threat information,” NFL Commissioner Paul Tagliabue said, “It is in recognition of the significant additional security that ‘pat downs’ offer, as well as the favorable experience that our clubs and fans have had using pat-downs as part of a comprehensive stadium security plan.” See, Okada, Bryon, (2009, February 6). Pro Football Stadium Security Requires All Fans to Patted Down. Fort Worth Star Telegram.

⁸² *Sheehan*, 201 P.3d at 479.

⁸³ *Johnston*, 530 F.3d at 1324.

by either the NFL or the Buccaneers; such finding was based upon the judge's own belief and opinion.

However, there are compelling arguments that the threat of a terrorist attack at an NFL game is of great concern. Such are based, in part, upon the fact that the NFL holds a cultural significance in society and has been somewhat instrumental in the growth and economic prowess of the franchise cities.⁸⁴ Additionally, there is a potential terrorist risk because the NFL represents "a very symbolic target because it is so associated with the globalization of the American economy and the American culture."⁸⁵

But the legal concern when it comes to accepting a *special need* exception to the Fourth Amendment is that these are only hypothetical arguments, based upon suppositions and possibilities, not based upon actual or definite threats involving an NFL franchise or stadium. In other words, can the threat of an attack against an NFL stadium be considered 'real or concrete' from a legal perspective?

For guidance as to what constitutes 'real or concrete,' we look to the U.S. Supreme Court's holding in *Chandler v. Miller*.⁸⁶ In *Chandler*, the Court found that the state of Georgia had no special need that justified requiring a candidate for public office to submit to a drug test.⁸⁷ The Court concluded that the record provided no evidence of drug abuse by elected officials. Instead the reason advanced involved a general sentiment that, since public officials were vested with authority to make public policy, they should fully appreciate the perils of drug use.⁸⁸ This, the Court stated, was insufficient to satisfy the requirement that the threat at issue was "real and simply not hypothetical."⁸⁹ So in essence, guesses, conjectures, general sentiments, and suppositions are not enough;

⁸⁴ K.S. Schimmel, Protecting the NFL/ Militarizing the Homeland: Citizen Soldiers and Urban Resilience in Post-9/11 America, *International Review for the Sociology of Sport* 47, no. 3 (2012): 342, doi:10.1177/1012690211433479.

⁸⁵ R.H. Fallen, et al., Panel I: Legal Issues in Sports Security, *Fordham Intellectual Property, Media and Entertainment Law Journal* 13, no. 2 (April 2003): 366, <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1257&context=iplj>.

⁸⁶ *Chandler*, 520 U.S.

⁸⁷ *Id.* at 309.

⁸⁸ *Id.* at 311.

⁸⁹ *Id.* at 319.

tangible and definitive evidence is needed for a Court to find that a threat is “real and concrete.”

To date, no NFL stadium, franchise, game, or event, including the most celebrated event, the Super Bowl, has yet been the subject of either a terrorist attack or threat of attack. Therefore, if pressed by a court, can the NFL meet its burden to show that a threat against it is real enough to justify denying a person his or her constitutional rights just to attend a football game? Such a burden may be difficult based upon the findings which suggest that “[a]lthough terrorism at NFL football games clearly represents a ‘substantial’ threat to public safety, the NFL has not yet presented evidence that this threat is also real.”⁹⁰

Therefore, since little, if any, real or concrete evidence can be presented, the NFL would have a difficult burden of convincing a court of law (not public opinion) to allow suspicionless searches based upon a special need exemption at NFL Stadiums. All the NFL has, at this time, is merely a “generalized threat of terrorism to large gatherings” which may not be enough to survive a constitutional challenge. At best, any evidence that the NFL has supports a general fear that terrorism could strike in any place where the public gathers. This is insufficient to satisfy the requirements that the threat be “real and not simply hypothetical.”⁹¹

3. Diminished Expectation of Privacy Exemption and Implied Consent

Every citizen of the United States is entitled to and has an expectation of privacy in certain areas or aspects of his or her personal life. But does an NFL fan have an expectation of privacy when entering a stadium? The determinative test to answer this question was established in the U.S. Supreme Court case of *Katz v. United States*.⁹² In *Katz*, the Court held:

The fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home

⁹⁰ D. Roberts, The Constitutionality of the NFL Patdown Policy after Sheehan and Johnston, Case Western Reserve Law Review Vol 58:3 p. 979, 984 (2008).

⁹¹ *Chandler*, 520 U.S., at 995.

⁹² *Katz*, 389 U.S., at 347.

or office, is not a subject of Fourth Amendment Protection. But what he seeks to preserve as private, even in area of accessibility to the public, may be constitutionally protected.⁹³

This Court went on to state, “[w]enever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures.”⁹⁴ With its holding, the Court took an important step and recognized privacy as a central meaning of the Fourth Amendment.⁹⁵ In addition, and most importantly, Justice Harlan’s concurring opinion laid out what has come to be known as “the right to be left alone,”⁹⁶ while also articulating the following two-prong test as a way to determine what behavior constitutes a search: “first that a person have exhibited and actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable.”⁹⁷ If both requirements are met, then the behavior is deemed to be a violation of an individual’s Fourth Amendment right. This reasonable expectation of privacy test is now the baseline used to determine how and when the Fourth Amendment is to be applied,⁹⁸ and the standard by which most searches are judged.

In *Sheehan*, the California Supreme Court found that “a ‘reasonable’ expectation of privacy is an entitlement founded on broadly based and widely accepted community norms”⁹⁹ and that “Customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy.”¹⁰⁰ In addition, the Court stated that “[a] plaintiff’s expectation of privacy in a specific context must be objectively reasonable under the circumstances, especially in light of the

⁹³ Id. at 351-352.

⁹⁴ Id. at 359 (quoting *Osborn vs. United States*, 385 U.S. 323, 330 (1966)).

⁹⁵ D. Alphan, *Changing Tides: A Lesser Expectation of Privacy in the Post 9/11 World*, 13Rich. J.L. & Pub. Int. 89 at 100, (2009).

⁹⁶ *Katz*, 389 U.S., at 350; see also at 361 (Harlan, J., concurring).

⁹⁷ Id. at 361.

⁹⁸ E. Sundby, “Everyman” ‘s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen? 94 Columbia L. Rev. 1751, 1758 (1994). (Asserted that the Fourth Amendment as a privacy- focused doctrine has not fared well in modern times and no longer fully captures the values at stake.)

⁹⁹ *Hill*, 7 Cal. 4th, at 36.

¹⁰⁰ Id. at 36.

competing social interests involved.”¹⁰¹ As per the Sheehans’ specific claim that their privacy rights have been violated, the Court found that “although diminished by the athletic setting and the exercise of informed consent, plaintiffs’ privacy interests are not thereby rendered de minimis”.¹⁰²

What is interesting, and somewhat concerning from a legal viewpoint, is that since the California Supreme Court’s findings in *Sheehan*, wherein the NFL’s pat-down policy’s main focus was the detection of improvised explosive devices or “IEDs,”¹⁰³ the NFL has expanded its search mandate to include “a pat-down of the area from the knees down to the ankles in an effort to identify any concealed weapons”,¹⁰⁴ implemented a new and stricter bag policy,¹⁰⁵ and now includes not only the search of individuals, but that of all cars, trucks, and buses entering the stadium.¹⁰⁶ Can this enhanced policy survive the *Katz* two-prong privacy test?

To satisfy the first prong of the test, an NFL spectator must have a reasonable expectation of privacy upon entering a stadium. There is a strong argument that a fan does so because the Fourth Amendment applies to all gatherings, large or small, and personal security rights are among the most sacred and protected common-law rights.¹⁰⁷ In addition, courts have consistently held that pat-down searches of attendees at large events violate the Fourth Amendment.¹⁰⁸ Note, however, that these cases involved pat-

¹⁰¹ *Id.* at 26-27.

¹⁰² *Id.* at 39.

¹⁰³ The Supreme Court has specifically held that a “weapons pat down” is a search within the meaning of the Fourth Amendment, see *U.S. v. Roggeman*, 279 F.3d 573, (C.A.8, 2002).

¹⁰⁴ M. Duell, Groped at the big game: NFL to perform ‘enhanced’ full-body pat-downs on ALL of America’s 17 million football fans, *The Daily Mail* (Sept. 2011), <https://www.dailymail.co.uk/news/article-2037977/NFL-stadium-security-improved-strict-pat-downs-ankles-up.html>.

¹⁰⁵ K. Belson, N.F.L. Fans Met by Tighter Bag Policy, *New York Times* (Aug. 2013), <https://www.nytimes.com/2013/08/21/sports/football/nfl-fans-met-by-tighter-bag-policy.html>.

¹⁰⁶ All Clear, NFL.com, <http://www.nfl.com/allclear> (“All bags and vehicles will be subject to inspection upon entry. Persons that refuse to be patted down and/or refuse to have their bags or vehicle inspected will not be admitted.”).

¹⁰⁷ See *Terry*, supra notes 26 and 27 (affirming personal security rights under Fourth Amendment); *Bourgeois v. Peters*, 387 F.3d 1303, 1311 (11th Cir. 2004) (Fourth Amendment provides no exception for large gatherings)

¹⁰⁸ See *State v. Seglen*, 700 N.W.2d 702, 709 (N.D. 2005) (emphasizing intrusiveness of pat-down search in concluding pat-down, without consent, violates

downs and visual inspections. The new enhanced NFL policy includes a vehicle search, which some may consider is even more intrusive or invasive.

Second, per *Katz*, an NFL spectator's expectation needs to be one that society is prepared to recognize as reasonable. Kimberly Schimmel, in her article *Major Sports Events and the Global Threats/Responses*, cites the negative effects to liberty and free movement in and around major sports events:

Congratulations local citizens! Your city has just won the right to host the next major sport event! ... Oh, and you can also expect to be surveilled, digitally scanned, corralled, barricaded, patted-down, have your city permanently reconfigured and militarized, your traffic patterns altered, and your domestic legal structures ignored. Enjoy the games!

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Additionally, Tim Keown, a writer for ESPN, echoes these concerns by describing the general discontent and irritation with attending NFL games because the “hassle/ cost/ indignity/ danger of attending” games diminishes the positive atmosphere provided to fans.¹¹⁰

The above may be true, but the question is – does society as a whole agree with the fans who believe that their privacy rights are being violated when pat downs are required before being allowed to enter a stadium to watch a sporting event? Yes, it may be an

Fourth Amendment); *Jacobsen v. City of Seattle*, 658 P.2d 653, 657 (Wash. 1983) (en banc) (holding police officers' intensive pat-down search of patrons at rock concert unconstitutional); cf. *Jensen v. City of Pontiac*, 317 N.W.2d 619, 624 (Mich. Ct. App. 1982) (allowing visual search of containers by security guards at municipally operated stadium, but suggesting pat-down searches would be unconstitutional). In *Jensen*, the court balanced the public necessity of visually searching the patrons and their property for foreign objects that could be thrown to injure others with the limited intrusiveness of the search. *Id.* The court contrasted the limited visual search with more invasive searches such as physical pat-downs. *Id.*; see also Posting of Greg Skidmore to Sports Law Blog, <http://sports-law.blogspot.com/2005/10/pat-downs-at-sports-arenas-necessary.html> (Oct. 26, 2005 10:02 EST) (highlighting major cases addressing government searches at sporting arenas).

¹⁰⁹ K.S. Schimmel, *Major Sport Events and Global Threats/Responses*, 1 *Criminal Justice Matters* 88 (June 2012): 20, doi:10.1080/09627251.2012.695502.

¹¹⁰ T. Keown, *Check Your Dignity at the NFL Door*, *ESPN: Entertainment and Sports Programming Network* (Sept. 20, 2011), <http://m.espn.go.com/wireless/story?storyId=6996681&lang=ES&wjb=>.

inconvenience to be corralled, barricaded, video scanned and surveilled – but isn't that just the cost of feeling safe as you watch your favorite team pummel its opponent?

Or is it too much? Has the NFL gone too far when it enhanced its policy to include not only a search of the upper body for IEDs, but an additional weapons search from the knees to the ankles? Is its stricter bag policy, wherein fans are only allowed “small, clear plastic or vinyl bags or one-gallon plastic freezer bags”, asking too much? And finally, is the search of all cars, trucks, and buses something society would agree is a reasonable intrusion upon someone's privacy right just so he or she can view a game? All while keeping in mind that a refusal of any of the above mandates will result in not being allowed to enter the stadium, even though a very expensive game-day ticket has been purchased.

What the NFL has done over time is condition the spectator to believe that what they are experiencing is only a minor, inconsequential imposition – a relatively non-intrusive breach of a constitutional right. Initially it only subjected a fan to limited, visual inspections of persons and bags for alcohol, contraband, and projectiles.¹¹¹ But gradually, over time, the league and facilities have incrementally increased the infringements to that of body and weapons searches,¹¹² to bag searches, to that of facial recognition and other forms of scanning, to requests for personal identification which could lead to immediate criminal status and background checks and finally to that of unwarranted searches of vehicles, all as prerequisites for entry to the stadium.

Capitalizing on the fears exasperated by the events of September 11th, what these sports entities have done is succeed in training the sport fan, in very slow incremental stages, so that now these escalated intrusions are just expected norms. Spectators have become so accustomed to and acclimated with these encroachments on their civil liberties that they now have unquestionably a “diminished expectation of privacy” when attending a sporting event. The people have stood by and watched as their Fourth Amendments rights have slowly been “Mission Creeped” away by the NFL, all in the name of safety. And this has

¹¹¹ The initial search policy of the 1996 Summer Olympic Games in Atlanta, GA.

¹¹² NFL Mandatory Pat-down Policy, see *Johnston*, 490 F.3d at 820, 822.

been what the NFL has been counting on from the beginning, but not because it is concerned for the spectator's security, but rather because it wants to shield and protect itself from litigation.

By slowly and systematically enhancing its pat-down policy, the NFL may have succeeded in its quest to legitimize and insure itself against any and all lawsuits attacking the enhanced policy's constitutionality on Fourth Amendment grounds. The NFL, by subjecting its fans to an increasing series of visual and body searches, video scans, and other privacy "breaches", has created the "expected norms" for spectators when they enter a stadium or event. For its own benefit, the NFL has slowly and systematically acclimated its fanbase to these various infringements, so that these relatively minor breaches on civil liberties, increased subtly over time, are valid and possibly lawful because a spectator is now left with a "*diminished expectation of privacy*" when attending a sporting event.

4. Consent to a Pat-Down Search – Expressed or Implied

Fourth Amendment rights, like many of the other constitutional rights, may be waived, and one may consent to a search of his person or premises by those who have not complied with the Amendment.¹¹³ The U.S. Supreme Court has insisted, however, that the burden is on the government or government actor to prove the voluntariness of the consent¹¹⁴ and awareness of the right of choice.¹¹⁵ Reviewing courts must determine, on the basis of the totality of the circumstances, whether consent has been freely given or has been coerced.

The California Supreme Court held that in order for the plaintiffs to establish a reasonable expectation of privacy claim "he or she must not have manifested by his or her conduct a voluntary consent to the invasive actions of the defendant. If voluntary consent is present, a [defendant's] conduct will rarely be deemed 'highly offensive to a reasonable person' so as to justify tort liability."¹¹⁶ The Court found, however, that the totality of the

¹¹³ *Amos v. United States*, 255 U.S. 313 (1921); *Zap v. United States*, 328 U.S. 624 (1946); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

¹¹⁴ *Bumper v. North Carolina*, 391 U.S. 543 (1968).

¹¹⁵ *Johnson v. United States*, 333 U.S. 10, 13 (1948).

¹¹⁶ *Hill*, 7 Cal. 4th, at 43.

circumstances surrounding the consent theory was not established by the record during the lower court and remanded the case back for further proceedings.

The U.S. Appeals Court, Eleventh Circuit, however, found unequivocally that all NFL spectators have a diminished expectation of privacy and that based upon this diminished expectation, they implicitly and voluntarily consent to a search by availing themselves at the gates of a stadium. Therefore, since the spectator has voluntarily consented to the search, the NFL's policy does not violate his or her constitutional rights. The Court, like the California Supreme Court, based its decision upon the "totality of the circumstances" analysis, but concluded that a plaintiff in this matter, being a well-educated man, implicitly consented because he was fully aware of the search, that the screeners did not "coerce" him or threaten him physically or otherwise.¹¹⁷ This Appeals Court found that the Plaintiff consented to the search, even though he repeatedly objected and filed a lawsuit seeking a declaratory judgment to end the practice. This Court's interpretation is drastically different from previous U.S. Supreme Court's findings as to what constitutes consent, where such must be "free from duress or coercion."¹¹⁸

In the U.S. Appeals Court's legally truncated voluntary consent finding, it failed to analyze the reasonableness of the search, while also failing to adequately consider an individual's reasonable expectation of privacy, the intrusiveness of the search, the level of suspicion, and the NFL's interest in conducting the search. Instead, the Court based its finding on the fact that advance notice was provided to the ticket-holder and that these advanced notices included "preseason notice, pregame notice, and notice at the search point itself."¹¹⁹

Following this logic, if prior notice of the search is present and the public can choose between acquiescence to the search or

¹¹⁷ *Johnston*, 530 F.3d at 1324.

¹¹⁸ Compare *Johnston v. Tampa Bay Sports Authority*, 490 F.3d at 825 (concluding *Johnston* not coerced into submitting to pat-down search by his willingness to enter the stadium), with *Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (requiring consent not to be coerced, no matter how subtle), and *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (claiming confession not voluntary when compulsion of any nature helps propel the confession).

¹¹⁹ *Johnston*, 530 F.3d at 1325.

declining the benefit, the court does not have to consider the constitutionality of the search or the expected level of privacy. The U.S. Appeals Court, through its decision, has implied that all an entity has to do to avoid violating a person's constitutional rights, is to put up a sign in advance, and by doing so, all of your legal liability and exposure will fade away.

Through its holding, the U. S. Appeals Court Eleventh Circuit weakened the Fourth Amendment. The Court ignored the plaintiff's objections and gave insufficient weight to the coercion implicit in requiring submission to a search in order to obtain entrance into the stadium. The Court also failed to consider the reasonableness of the search policy under proper Fourth Amendment standards – one such standard being the unconstitutional conditions doctrine. Per the unconstitutional conditions doctrine, consent is not voluntary or implied if the government conditions receipt of a right or a benefit on the relinquishment of a constitutional right.¹²⁰

5. The Unconstitutional Conditions Doctrine

No legal precedent has ever been established that supports the proposition that a person who chooses to attend a sporting event consents to *any* security measures that a league, team or other promoter may choose to impose. In fact, federal and state courts have consistently held that searches of attendees at large events violate the Fourth Amendment.¹²¹ Some courts have reasoned that the individual's consent to the pat-down search was not, in fact, voluntary.¹²² While others, however, have held that it

¹²⁰ *Bourgeois v. Peters*, 387 F.3d 1303, 1324 (11th Cir.2004) (citing *Adams v. James*, 784 F.2d 1077, 1080 (11th Cir.1986)); *Iaccarino*, 767 So.2d at 479.

¹²¹ *State v. Seglen*, 700 N.W.2d 702, 709 (N.D. 2005) (emphasizing intrusiveness of pat-down search in concluding pat-down, without consent, violates Fourth Amendment); *Jacobsen v. City of Seattle*, 658 P.2d 653, 657 (Wash. 1983) (en banc) (holding police officers' intensive pat-down search of patrons at rock concert unconstitutional); cf. *Jensen v. City of Pontiac*, 317 N.W.2d 619, 624 (Mich. Ct. App. 1982) (allowing visual search of containers by security guards at municipally operated stadium, but suggesting pat-down searches would be unconstitutional). In *Jensen*, the court balanced the public necessity of visually searching the patrons and their property for foreign objects that could be thrown to injure others with the limited intrusiveness of the search).

¹²² *Wheaton v. Hagan*, 435 F. Supp. 1134, 1147 (M.D.N.C. 1977) (determining nature of stadium search policy precluded any voluntary consent to search); *State v.*

was unconstitutional for the government to condition public access on a pat-down search and then claim the attendee voluntarily consented.¹²³

When deciding whether or not a spectator's consent is considered voluntary in situations where the government conditions a benefit or privilege on the relinquishment of a constitutional right, courts invoke the "unconstitutional conditions doctrine". Under this doctrine, a court must analyze the conditioning of access to a public event upon submission to a search, regardless of whether the individual relinquished a right or a privilege and was established to prevent the government or government agent, from conditioning benefits on the relinquishment of a constitutionally protected right.¹²⁴ In other words, the government may not pressure citizens to surrender their rights.

This doctrine is somewhat troubling for the NFL. In both cases filed prior to the NFL's policy enhancement in 2011 and 2013, *Sheehan* and *Johnston*, a claim was made that conditioning entrance to the stadium on submitting to the NFL's pat-down policy was unconstitutional and placed the fan in a precarious position; "[s]ubmit to the search or never attend an NFL football game."¹²⁵

In its dissent, the California Supreme Court briefly touched on this doctrine when it recognized that the plaintiffs faced a classic "Hobson's choice" when it came to either submitting to the pat down or to not entering the stadium. However, before discussing the issue further, the Court remanded the case to the lower court so that additional evidence could be provided. "This

Seglen, 700 N.W.2d 702, 709 (N.D. 2005) (invalidating consent when no evidence of individual's affirmative conduct to signify consent present).

¹²³ *Bourgeois*, at 1324-25 (11th Cir. 2004) (holding no consent where exercise of First Amendment rights contingent upon submission to search); *Gaioni v. Folmar*, 460 F. Supp. 10, 14 (M.D. Ala. 1978) (holding consent to search is inherently coercive when public access to an arena is conditioned upon it); *Collier v. Miller*, 414 F. Supp. 1357, 1366 (S.D. Tex. 1976) (consent to search); *Nakamoto v. Fasi*, 635 P.2d 946, 951-52 (Haw. 1981) (concluding conditioning access to facility on submission to search or relinquishment of paid privilege unlawful).

¹²⁴ *Bourgeois*, at 1324-25 (11th Cir. 2004) (determining individual's required submission to government search to obtain admission to protest unconstitutional conditions).

¹²⁵ *Roberts*, supra note 90, at 989.

case should be going back where each of the sides can come up with evidence.” The court added, “We simply do not have that at this point in the proceedings.”¹²⁶

The U.S. Appeals Court Eleventh Circuit, however, found that “[t]he District Court erred in its application of the unconstitutional conditions doctrine because in this case the condition for entry was imposed by the NFL and the Buccaneers, both private entities, not the government.”¹²⁷ In other words, no state action exists; therefore the unconstitutional conditions doctrine is not applicable because, without a finding of state action, there can be no violation of a person’s constitutional right. However, again in this instance, the conclusion of the U.S. Appeals Court Eleventh District is flawed. It’s flawed because, interestingly, it is inconsistent with the Court’s own findings. The U.S. Appeals Court found state action was present when it stated: “[t]he Stadium is operated by the Authority, a public entity,”¹²⁸ and that “[t]he Authority grants the Buccaneers, a franchise of the NFL, use of the Stadium pursuant to a Stadium Agreement. The Agreement provides that the Authority remains responsible for the stadium security during the Buccaneers’ games . . .”¹²⁹ The Court reiterated its finding when it stated, “[f]or the purposes of our analysis of whether this warrantless search was unconstitutional under the United States and Florida constitutions, we accept the District Court’s conclusion that the search was performed by agents of the State.”¹³⁰

For this Court to initially find state action and then turn around and claim that even though it exists, because the mandate was imposed by a non-governmental entity, i.e. the NFL, a person’s constitutional rights are not applicable is absurd, bordering on the ridiculous. What this Court is allowing for is a scenario where any search could be considered outside the reaches of a constitutional challenge because all a state actor would need to do is have a third, non- governmental actor, conduct the search. This would lead to a situation whereupon a police officer or other

¹²⁶ *Sheehan*, 201 P.3d, at 479.

¹²⁷ *Johnston*, 530 F.3d at 1329.

¹²⁸ *Id.* at 1320.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1326, citing *Johnston*, 422 F. Supp. 2d at 1264.

government official could randomly search an arbitrary person for no reason and without probable cause, and the search would be considered legal because a non-governmental bystander told him or her to conduct the search. The police officer/government official's defense to the unauthorized search would be simple – "Well, they told me to." And just like that, it's not a violation of a person's constitutional rights.

Fortunately for the NFL, as it continually enhances its own pat-down policy, it may avoid the consequences of the unconstitutional conditions doctrine because the doctrine has "[n]ever been fully explained by the U.S. Supreme Court. Furthermore, when making an exception to the doctrine, U.S. Supreme Court usually simply ignores the doctrine."¹³¹

VI. THE NFL'S ENHANCED SEARCH POLICY AND THE FUTURE OF THE FOURTH AMENDMENT:

A. Create Consent

After analyzing the court cases and articles discussing the constitutionality of the NFL's search policy, both prior to and after the series of enhancements, the U.S. Appeals Court, Eleventh Circuit clearly suggests what the NFL and its thirty-two franchises need to do in order to mitigate the chances of being sued and the likelihood of success if a lawsuit is filed. That suggestion is to create the illusion of consent.

NFL teams must create policies and protocols which give the impression that the fan entering a stadium consented to the search. The U.S. Appeals Court's holding that spectators voluntarily consent to the pat down because they knew about it in advance has given the NFL unprecedented leeway when it comes to implementing stricter and more invasive search policies as a condition of entry. Based upon the *Johnston* court's ruling, the following policies could be implemented at every NFL franchise stadium which will protect it from liability:

- i. Post the NFL's mandatory pat down policy on its website.

¹³¹ R. B. Standler, *Doctrine of Unconstitutional Conditions in the United States* (2005), www.rbs2.com/duc/pdf.

- ii. Provide notice of the NFL's mandatory pat-down policy with each season ticket package.
- iii. Provide ample signage of the NFL's mandated pat-down policy at the entrance to the stadium and throughout the parking area.
- iv. Provide signage of the NFL's mandated pat-down policy at each entrance gate.
- v. Provide a reasonable refund policy for fans that wish to return their season tickets after they learn of the policy or for fans that learn of the policy once they arrive at the stadium.

B. The Fourth Amendment?

In 2005, with fears of the September 11th tragedy still fresh in the minds of every United States citizen, the NFL instituted its initial pat-down policy. This policy was found by judges and legal scholars to be that of nothing more than a minor, relatively non-intrusive breach of a constitutional right that fans consent to by presenting themselves at a sports venue.

Since then, the NFL has slowly and systematically increased this so-called non-intrusive breach to include not only the search of a fan's upper body for IEDs, but also an additional weapons search from the knees to the ankles. It has also implemented a stricter bag policy and authorized the search of all cars, trucks, and buses entering the stadium's parking area. All of which are required for being allowed to view the game, with any refusal resulting in non-admittance.

As the fear of terrorism continues, along with the manipulation which fans the flame of such fears, so has the public's need to feel safe. This need has inadvertently allowed for the erosion of civil liberties that were once held so sacred by the people. After almost two decades of pat downs, searches, video scans, and other privacy "breaches", the people have become so immune and impervious that these infringements have become 'expected norms.' Sports fans have become so accustomed to and acclimated with these encroachments that they now, arguably, have a 'diminished expectation of privacy' when attending a sporting event.

In the United States, where privacy is a fundamental freedom that receives constitutional protection, the question thus becomes for the American public – what, if any freedom(s) are fans and spectators willing to trade for a sense of security. And if the public is willing to trade civil liberties for safety, the federal and state courts, as the gatekeepers and protectors of the populace's constitutional rights, must reach a balance between privacy rights, with that of the need to reasonably limit some rights in an effort to ably protect and provide for the health, safety and well-being of the citizenry. All the while keeping in mind what one of our country's most respected forefathers, Benjamin Franklin, stated, "they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."¹³²

¹³² B. Franklin, Historical Review of Pennsylvania: Motto (1759).