Constitutional Law—Spectator Attending Athletic Event Voluntarily Consents Under Fourth Amendment to Pat-Down Search at Stadium Entrance—*Johnston v. Tampa Sports Authority*, 490 F.3d 820 (11th Cir. 2007)

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures by the government.[1] The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated."[2] If, however, a person consents to a search by a government agent, no Fourth Amendment violation occurs.[3] In *Johnston v. Tampa Sports Authority*,[4] the Eleventh Circuit considered whether a football game spectator consented to a pat-down search by presenting himself at the stadium entrance.[5] The court held the spectator voluntarily consented to the pat-down search because he was aware of the search policy and continued to seek admission into the stadium.[6]

The Tampa Bay Buccaneers (Buccaneers) are a National Football League (NFL) franchise who play their home games in Raymond James Stadium (Stadium).[7] The Tampa Sports Authority (TSA), a Florida public entity, owns and operates the Stadium.[8] The TSA is under agreement with the Buccaneers to provide security for all home games.[9]

1. *See* U.S. CONST. amend. IV (providing rights against unreasonable searches and seizures); Terry v. Ohio, 392 U.S. 1, 9 (1968) (applying Fourth Amendment protections to unreasonable government intrusions).

2. U.S. CONST. amend. IV.

3. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (acknowledging established exception of consent to Fourth Amendment requirements of warrant and probable cause); Davis v. United States, 328 U.S. 582, 593-94 (1946) (holding correct finding of consent precludes judgment on search's reasonableness).

4. 490 F.3d 820 (11th Cir. 2007).

5. *See id.* at 824 (setting forth dispute between Fourth Amendment protections and implemented pat-down searches). The court emphasized that the issue in *Johnston* was not the popular opinion of the pat-down search, but rather whether the pat-down search violated plaintiff Johnston's Fourth Amendment rights. *Id.*

6. *Id.* at 825 (concluding Johnston voluntarily consented to pat-down searches by choosing to attend games).

7. *See* Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1260 (M.D. Fla. 2006) (describing Buccaneers's organization), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007).

8. *See* Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1263 (M.D. Fla. 2006) (detailing TSA's history and purpose), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007). The Florida legislature created the TSA to plan, develop, and maintain sport and recreational facilities for the citizens of Tampa. *Id.* The TSA is responsible for security at the stadium and for making proper rules and regulations for use of the stadium. 490 F.3d at 822.

9. *See* Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1263 (M.D. Fla. 2006) (describing how TSA's role in Stadium operations includes providing security for Buccaneers's games), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007); *see also* Peter Whoriskey, *In Tampa, Fan Sues Over NFL "Pat-Downs*," WASH. POST, Nov. 11, 2005, at A3 (reporting on Buccaneers's and NFL's security policies). The TSA, and in turn tax payers, paid a private security company $7,500 per game to conduct the pat-down screening. Whoriskey, *supra*.

In August 2005, the NFL mandated that all franchises physically search attendees of NFL games.[10] The NFL enacted this policy to protect spectators because it believed NFL stadiums could be likely targets of terrorism.[11] On September 13, 2005, in response to the NFL mandate, the TSA adopted a pat-down policy requiring searches of all spectators attending the Buccaneers's football games.[12]

Gordon Johnston renewed his 2005-06 season tickets before the TSA adopted the NFL's pat-down policy.[13] Johnston became aware of the pat-down policy before the Buccaneers's first home game and called the office of the Buccaneers to complain.[14] After voicing his complaints, Johnson attended several Buccaneers's games at the Stadium; each time Johnson objected to the search at the entrance point, but ultimately submitted to the pat-down in order to attend the games.[15] Johnston, first in Florida state court, then in federal court for the Middle District of Florida, enjoined the TSA and the Buccaneers from continuing the pat-down policy.[16] Johnston's victories were, however, short-

10. *See* Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1260 (M.D. Fla. 2006) (implementing pat-down security policy to identify improvised explosive devices), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007). The search included a visual inspection as well as a physical above-the-waist pat-down by which a screener touched each person's torso, waist, belt-line, and back along the spine. *Id.*

11. *See* 490 F.3d at 822 (summarizing reasons for NFL's search policy). The NFL points to previous suicide bombings, threats made to other sporting events internationally, as well as concerns of terrorist groups downloading information about NFL stadiums in support of its conclusion that NFL stadiums are attractive terrorist targets. *Id.* at 822 n.1.

12. *See* Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1266-67 (M.D. Fla. 2006) (discussing TSA's process of implementing pat-down policy), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007). The TSA implemented the pat-down search policy solely due to the NFL's mandate. *Id.* at 1267. Before the mandate, and since September 11, 2001, the TSA twice considered a pat-down policy. *Id.* at 1266. Both times, the TSA determined a pat-down policy was unnecessary and decided against its implementation. *Id.*

13. *See* 490 F.3d at 822 (detailing facts giving rise to Johnston's complaint). Johnston had been a Buccaneers's season-ticket holder since 2001. *Id.* The season ticket is considered a revocable license to attend Buccaneers's games at the Stadium. *Id.*

14. *See* Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1261 (M.D. Fla. 2006) (describing Johnston's actions in response to search policy), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007). The Buccaneers informed Johnston that he would not get a refund of his season-ticket price if he chose not to attend games. *Id.* In addition, Johnston would lose his seat deposit if he forfeited his season tickets, and he would be placed at the bottom of the season-ticket waiting list if he chose to purchase season tickets in the future. *Id.*

15. *See* Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1261 (M.D. Fla. 2006) (highlighting Johnston's response to pat-down policy), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007). At the search point, in addition to voicing his objections, Johnston pulled his shirt up to show that he was not wearing any explosive devices. 490 F.3d at 825. Johnston was searched at three home games before a Florida state court granted an injunction halting the pat-down policy. *Id.* at 823-24; *see also* Carrie Weimar, *Got Bucs Tickets? Get a Free Patdown*, ST. PETERSBURG TIMES, June 27, 2007, at 1A (describing Johnston's success in enjoining TSA and Buccaneers in Florida state court).

16. *See* 490 F.3d at 823-24 (tracing prior proceedings of suit); *see also* Thomas W. Krause, *Judges Hear Arguments in Pat-Down Case*, TAMPA TRIBUNE, April 18, 2007, at 3 (analyzing issues leading up to Eleventh Circuit decision); Weimar, *supra* note 15 (summarizing state and federal litigation between Johnston and TSA); Howard J. Bashman, *Did a Federal Appeals Court Avoid Tackling the Real Issues Behind Football Fan's Lawsuit?*, LAW.COM, July 9, 2007, http://www.law.com/jsp/LawArticlePC.jsp?id=1183712795341 (commenting on *Johnston* opinion).

lived.[17] The Eleventh Circuit reversed the district court, lifted the injunction, and held the district court clearly erred when it found Johnston did not consent to the pat-down search.[18]

Spectators attending sporting events have a reasonable expectation of privacy.[19] A spectator's expectation of privacy is reasonable 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.[20] 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.[21] Whether voluntary consent has been established is a question of fact determined by examining the totality of the circumstances.[22] In *United States v. Blake*,[23] the Eleventh Circuit suggested several factors that courts should consider in the totality of the circumstances analysis, including the presence of coercive police procedures, an individual's awareness of a right to refuse, and the individual's level of intelligence and education.[24] Searches conducted without consent, and absent a warrant or individualized suspicion, are per se unreasonable unless they fall into a narrow, judicially tailored, special needs exception.[25]

17. *See* 490 F.3d at 826 (reversing district court upholding of injunction).

18. 490 F.3d at 826 (concluding district court erred in finding Johnston's right to attend games unconstitutionally infringed).

19. *See* Nakamoto v. Fasi, 635 P.2d 946, 950 (Haw. 1981) (indicating constitutional rule prohibiting unreasonable searches and seizures on individuals person and effects); *see also* Benjamin T. Clark, *Why the Airport and Courthouse Exceptions to the Search Warrant Requirements Should Be Extended to Sporting Events*, 40 VAL. U. L. REV. 707, 714 (2006) (stating courts universally recognize individual person's expectation of privacy at entertainment events).

20. *See* Terry v. Ohio, 392 U.S. 1, 8-9 (1968) (affirming personal security rights under Fourth Amendment); Bourgeois v. Peters, 387 F.3d 1303, 1311 (11th Cir. 2004) (concluding Fourth Amendment provides no exception for large gatherings).

21. *See, e.g.*, Schneckloth 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).

22. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (applying totality of circumstances test to determine whether consent voluntary); *see also* Culombe v. Connecticut, 367 U.S. 568, 602 (1961) (defining voluntariness as "free and unconstrained choice" in Fourteenth Amendment context). The *Schneckloth* court acknowledged consent must not be coerced, no matter how subtle the coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

23. 888 F.2d 795 (11th Cir. 1989).

24. *See* United States v. Blake, 888 F.2d 795, 799 (11th Cir. 1989) (listing nonexhaustive factors considered in totality of circumstances test).

25. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973)(citing few clearly defined exceptions to warrant and probable cause requirements of Fourth Amendment); MacWade v. Kelly, 460 F.3d 260, 263 (2nd Cir. 2006) (holding special needs exception applies to subway search thus individualized suspicion and warrant unnecessary). In *MacWade*, riders on New York City's subway system challenged the constitutionality of random suspicionless container searches, claiming it violated the Fourth Amendment. 460 F.3d at 263. The court considered the case under the special needs exception, considering the reasonableness of the search by balancing the need for the search with the offensiveness of the search to the privacy interests involved. *Id.* at

To examine whether consent is truly voluntary in situations where the government conditions a benefit or privilege on the relinquishment of a constitutional right, courts invoke the unconstitutional conditions doctrine.[26] The unconstitutional conditions doctrine prevents the government from conditioning benefits on the relinquishment of a constitutionally protected right.[27] More broadly, the government, as the Eleventh Circuit recognized in *Bourgeois v. Peters*,[28] may not pressure citizens to surrender their rights.[29] The Supreme Court, however, has not provided firm guidance in applying the unconstitutional conditions doctrine, and established rules and principles remain elusive.[30]

Courts have consistently held that pat-down searches by government agents of attendees at large events violate the Fourth Amendment.[31] Some courts have

270-71. The court used the advance notice of the search and the fact that the riders were free to walk away as factors that minimized the search's intrusiveness. *Id.* at 273; *see also* Bourgeois v. Peters, 387 F.3d 1303, 1314-16 (11th Cir. 2004) (invalidating warrantless searches of protestors because no reduced expectation of privacy or "exigent circumstance" present).

26. *See* Bourgeois v. Peters, 387 F.3d 1303, 1324 (11th Cir. 2004) (analyzing whether government requirement of submission to search constituted unconstitutional condition and precluded voluntary consent); Cathryn L. Claussen, *The Constitutionality of Mass Searches of Sports Spectators*, 16 J. LEGAL ASPECTS OF SPORT 153, 159 (2006) (discussing how consent-to-search analysis includes unconstitutional conditions doctrine consideration).

27. *See* Bourgeois v. Peters, 387 F.3d 1303, 1324-25 (11th Cir. 2004) (determining individual's required submission to government search to obtain admission to protest unconstitutional condition). *But cf.* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 3 (2001) (recognizing government conditioning of benefits upon relinquishment of individual right only sometimes unconstitutional).

28. 387 F.3d 1303 (11th Cir. 2004).

29. *See* Bourgeois v. Peters, 387 F.3d 1303, 1324-25 (11th Cir. 2004) (concluding conditioning entry upon government search does not make search consensual). In *Bourgeois*, protestors gathered on public property outside of Fort Benning in Georgia to pressure the government to cut funding to the Western Hemisphere Institute for Security Cooperation. *Id.* at 1306. Citing security concerns, the city forced all participants to submit to a magnetometer search before entering the protest. *Id.* at 1307. As a result of this policy, the protestors challenged the search, claiming it violated the First and Fourth Amendment. *Id.* Although the alleged infractions occurred in the past, the court granted the protestors injunction, concluding the searches were "capable of repetition, yet evading review" and the injunction would cure an immediate threat of injury. *Id.* at 1309-10. When considering the constitutionality of the magnetometer search, the court rejected the argument that the events on September 11, 2001, and a generalized threat of terrorism could restrict the scope of the Fourth Amendment. *Id.* at 1311. The court emphasized the Framers' judgment that the Fourth Amendment protects the people from gradually trading freedom and privacy for additional security. *Id.* at 1312; *see also* Sheehan v. San Francisco 49ers, Ltd., 62 Cal. Rptr. 3d 803, 810-11 (Cal. Ct. App. 2007) (determining unconstitutional conditions doctrine applicable to government entities but not private entities). In *Sheehan*, Daniel and Kathleen Sheehan sued another NFL organization, the San Francisco 49ers. 62 Cal. Rptr. 3d at 806. The Sheehans alleged the 49ers violated their privacy rights in violation of the Privacy Initiative, a California law that protects individual privacy rights against nongovernmental entities. *Id.* at 806. The majority held the Sheehans impliedly consented to the searches and that the unconstitutional conditions doctrine does not apply because the San Francisco 49ers are a private entity. *Id.* at 809, 810.

30. *See* Berman, *supra* note 27, at 3 (highlighting inconsistencies in Supreme Court's unconstitutional conditions doctrine application); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416-17 (1989) (stating Supreme Court's unconstitutional conditions doctrine "riven with inconsistencies").

31. *See* State v. Seglen, 700 N.W.2d 702, 709 (N.D. 2005) (emphasizing intrusiveness of pat-down search

reasoned that the individual's consent to the pat-down search was not, in fact, voluntary.[32] Other courts held that it was unconstitutional for the government to condition public access on a pat-down search and then claim the attendee voluntarily consented.[33]

In *Johnston v. Tampa Sports Authority*, the Eleventh Circuit reversed the district court's decision and allowed the TSA to resume pat-down searches of spectators.[34] The court held that the TSA's search did not violate the Fourth Amendment.[35] The Eleventh Circuit considered the totality of the circumstances and concluded that Johnston voluntarily consented to the pat-down searches.[36] The Eleventh Circuit never analyzed the reasonableness of the pat-down search policy because it held that the district court erred in finding Johnston's consent was involuntary.[37]

In concluding Johnston voluntarily consented to the pat-down search, the Eleventh Circuit considered the *Blake* factors.[38] The court reasoned that Johnston was fully aware of the search and willingly chose to submit to it.[39]

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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. *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).

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

33. *See, e.g.*, Bourgeois v. Peters, 387 F.3d 1303, 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 inherently coercive when public access to arena conditioned upon it); Collier v. Miller, 414 F. Supp. 1357, 1366 (S.D. Tex. 1976) (invalidating security policy where access to arena conditioned on 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).

34. 490 F.3d at 825-26 (determining district court clearly erred in finding Johnston did not consent).

35. *Id.* at 825-26 (holding Johnston consented to search thus no infringement of constitutional right).

36. *Id.* at 825 (considering voluntariness of Johnston's consent under totality of circumstances test and *Blake* factors).

37. *See id.* at 826 (omitting consideration of reasonableness of pat-down searches after determining Johnston voluntarily consented); *cf.* Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1262 (addressing both reasonableness of pat-down searches and whether Johnston voluntarily consented), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007).

38. 490 F.3d at 825 (relying on *Blake* to determine voluntariness factors).

39. *See id.* at 823, 825 (describing ways TSA notified attendees, including Johnston, of pat-down search policy). The TSA issued press releases to the media, placed a posting on the Buccaneers's website, and sent a mailing directly to season-ticket holders announcing the initiation of the pat-down policy. *Id.* at 823. In addition, cars entering the stadium before games received notices, loud speakers played recorded announcements of the policy, and multiple locations along common walking routes had postings describing the policy. *Id.*

The court noted that the screeners did not coerce Johnston or threaten him physically or otherwise and that Johnston was a well-educated man fully aware of his right to refuse the search.[40] To quell concerns of an unconstitutional condition, the court distinguished between having a right to attend the game and having a privilege to attend the game.[41] The ticket, a revocable license, gave Johnston a mere privilege, which could be terminated at the Buccaneers's discretion.[42]

In *Johnston v. Tampa Sports Authority*, the Eleventh Circuit strayed from the apparent judicial consensus and delivered a blow to the Fourth Amendment.[43] The court failed to consider whether the search policy was reasonable and instead decided the case under the consent exception.[44] The court's conclusion that Johnston voluntarily consented to the pat-down search is contrary to the holdings of other federal and state courts.[45] Further, the determination of consent in *Johnston* is incongruent with the language, spirit, and holding of its own decision just three years earlier in *Bourgeois*.[46] The earlier *Bourgeois* decision cautioned that allowing mass suspicionless searches could lead to searches at a variety of large events, including sporting events, contrary to the Fourth Amendment's requirement of "searches based on evidence-rather then potentially effective, broad, prophylactic dragnets . . . ."[47] Under the unconstitutional conditions doctrine, the *Bourgeois* court analyzed the government's conditioning of access to a public event upon submission to a search, regardless of whether the individual relinquished a right or a privilege; the *Johnston* court's emphasis on the spectator's mere privilege to attend the game and failure to consider the unconstitutional condition implications of conditioning Stadium access upon consent to a pat-down search runs contrary

40. *See id*. at 825 (applying *Blake* factors to Johnston's conduct).

41. *See id*. at 824 n.5 (noting ticket establishes privilege, not right to attend games).

42. *See* 490 F.3d at 824 n.5 (distinguishing case from *Bourgeois*).

43. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 289 (1973) (Brennan, J., dissenting) (arguing relaxed consent standard inhibits Fourth Amendment); Jacobsen v. City of Seattle, 658 P.2d 653, 657 (Wash. 1983) (en banc) (noting suspicionless and intensive pat-down searches at stadium would damage "understanding of constitutional guaranties"); *supra* notes 31-33 and accompanying text (examining precedent for pat-down searches); *see also* Clark, *supra* note 19, at 720-21 (suggesting courts uniformly invalidate spectator consent to pat-down searches absent exigent circumstances); Claussen, *supra* note 26, at 158-60, 164 (predicting courts would hold mass suspicionless pat-down searches of sporting-event spectators unconstitutional).

44. *See* 490 F.3d at 822 (concluding Johnston consented to searches).

45. *See supra* notes 31-33 and accompanying text (highlighting cases invalidating implied consent and conditioning of access to public land on search); *see also* Clark, *supra* note 19, at 721 (citing case law demonstrating courts' unwillingness to find consent in searches at entertainment events); Claussen, *supra* note 26, at 160 (determining precedent does not allow pat-down searches).

46. *Compare* Bourgeois v. Peters, 387 F.3d 1303, 1310 (11th Cir. 2007) (holding government's mass suspicionless and warrantless magnetometer search policy violates Fourth Amendment), *with* 490 F.3d at 825-26 (concluding Johnston consented to pat-down search without consideration of policies constitutionality). By finding consent existed despite Johnston's objections, the court left Johnston with no apparent legal means to challenge the search itself. *See* Bourgeois v. Peters, 387 F.3d 1303, 1310 (11th Cir. 2007).

47. *See* Bourgeois v. Peters, 387 F.3d 1303, 1311-12 (11th Cir. 2004) (holding mass, suspicionless searches violate Fourth Amendment).

to the *Bourgeois* precedent.[48]

Previous to *Johnston*, courts held that implied consent based upon silence or a failure to object is not voluntary consent under Fourth Amendment standards.[49] In *Johnston*, however, the Eleventh Circuit concluded that despite Johnston's affirmative conduct objecting to the pat-down, he still voluntarily consented to the pat-down by seeking admission into the Stadium.[50] This interpretation of consent is drastically different than the Supreme Court's notion of voluntary consent: "consent free from express or implied duress or coercion."[51] Johnston's choice is the result of a demand by state agents to either submit to the search or be denied entrance to the Stadium.[52] In comparison, when New York City imposed suspicionless searches on subway riders, who also had notice and were given the same option of either submitting or not entering, the Second Circuit Court of Appeals did not maintain that the subway riders consented to the search, thereby waiving their Fourth Amendment challenge, but rather, the court analyzed the reasonableness of the searches.[53]

In its decision, the Eleventh Circuit failed to adequately consider constitutional privacy rights.[54] The consent finding precluded analysis of the search's reasonableness and the special needs exception, where factors such as the individual's reasonable expectation of privacy, the intrusiveness of the search, the level of suspicion, and the state interest are considered.[55] This is the very type of analysis the Eleventh Circuit conducted in *Bourgeois* but omitted

48. *Compare* Bourgeois v. Peters, 387 F.3d 1303, 1324-25 (11th Cir. 2004) (concluding required submission to search is an unconstitutional condition, especially when violating constitutional rights), *with* 490 F.3d at 824 n.5 (distinguishing Johnston's privilege to attend games from *Bourgeois* protestors' right to access public lands).

49. *See supra* note 32 and accompanying text (addressing cases holding implied consent to pat-down search at stadium entrance invalid); *see also* Clark *supra* note 19, at 718 (describing courts' skepticism in finding implied consent for searches at entertainment events); Claussen, *supra* note 26, at 159 (highlighting cases where spectator's implied consent does not meet Fourth Amendment free and voluntary standard). *But see* Sheehan v. San Francisco 49ers, Ltd., 62 Cal. Rptr. 3d 803, 809 (Cal. Ct. App. 2007) (holding implied consent, under California state law, when tickets renewed after pat-down policy announcement).

50. 490 F.3d at 825 (holding Johnston consented despite objections).

51. *Compare* 490 F.3d at 825 (concluding Johnston not coerced into submitting to pat-down search by his willingness to enter stadium), *with* Schneckloth 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).

52. *See* Johnston v. Tampa Sports Authority, 442 F. Supp. 2d 1257, 1260 (M.D. Fla. 2006) (stipulating those who refuse pat-down denied entry), *rev'd per curiam*, 490 F.3d 820 (11th Cir. 2007).

53. *See* MacWade v. Kelly, 460 F.3d 260, 275 (2nd Cir. 2006) (concluding subway searches serve public need and minimally invasive search reasonable given threat of terrorism); *see also* Bashman, *supra* note 16 (arguing finding of consent in *Johnston* noteworthy compared with no finding of consent in *MacWade*).

54. *See infra* notes 56-59 and accompanying text (analyzing failure of *Johnston* court to consider spectator's privacy rights).

55. *See supra* note 25 and accompanying text (discussing factors used to evaluate search conducted without warrant or probable cause).

in *Johnston*.[56] By the *Johnston* court's reasoning, if advance notice of the search is present and the public can choose between acquiescence to the search or declining the benefit, the court does not have to consider the constitutionality of the search or the expected level of privacy.[57] By extension, this reasoning permits a government agent to pat-down, or even deep-cavity search, an individual so long as the person acquiesced.[58] Likewise, an individual's entry into a public location where there is no constitutionally protected right to enter can be conditioned upon a search.[59]

In *Johnston v. Tampa Sports Authority*, the Eleventh Circuit considered whether a spectator, who presents himself at a football stadium entrance, consents to a suspicionless pat-down search. The court held that the pat-down search was constitutional because the spectator voluntarily consented to the search. In reaching this conclusion, the Eleventh Circuit weakened the Fourth Amendment by redefining voluntary consent. The court ignored Johnston's objections to the pat-down and gave insufficient weight to the coercion implicit in requiring submission to a pat-down search in order to obtain entrance into the stadium. As a result, the Eleventh Circuit failed to consider the reasonableness of the pat-down search policy under its prior Fourth Amendment standards.

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56. *Compare* 490 F.3d at 825 (determining consent to pat-down search requires finding searches constitutionally valid), *with* Bourgeois v. Peters, 387 F.3d 1303, 1314-16 (11th Cir. 2004) (analyzing search in light of established Fourth Amendment principles when search conducted without warrant). Others have also noted this dichotomy. *See e.g.*, Claussen, *supra* note 26, at 160-64 (comparing warrantless search analysis in *Bourgeois* with the *Johnston* district court's analysis).

57. *See* 490 F.3d at 825 (concluding inquiry after determining voluntary consent to search and no constitutional right to enter stadium); *see also* Sheehan v. San Francisco 49ers, Ltd., 62 Cal. Rptr. 3d 803, 815 (Cal. Ct. App. 2007) (Rivera, J., dissenting) (providing situations where consent to search would trump constitutional privacy rights).

58. *See* Sheehan v. San Francisco 49ers, Ltd., 62 Cal. Rptr. 3d 803, 815 (Cal. Ct. App. 2007) (Rivera, J., dissenting) (arguing if consent ends judicial inquiry then distinctions between pat-down and strip searches disappear).

59. *See* Bourgeois v. Peters, 387 F.3d 1303, 1311 (11th Cir. 2004) (drawing favorable comparison between searches at large public protests and certain sporting events); Sheehan v. San Francisco 49ers, Ltd., 62 Cal. Rptr. 3d 803, 814 (Cal. Ct. App. 2007) (Rivera, J., dissenting) (failing to find distinction between search at football stadium or at grocery store); *see also* Claussen, *supra* note 26, at 162 (suggesting *Bourgeois* court's analysis of searches at large public gatherings applicable to events at stadiums).