

IN THE THIRTEENTH JUDICIAL CIRCUIT  
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA  
CIVIL DIVISION

GORDON JOHNSTON,

Plaintiff,

Case No.

Division:

vs.

**INJUNCTIVE RELIEF REQUESTED**

TAMPA SPORTS AUTHORITY and  
HENRY G. SAAVEDRA, in his official  
Capacity as Executive Director of the  
TAMPA SPORTS AUTHORITY,

Defendants.

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**EMERGENCY MOTION FOR PRELIMINARY  
INJUNCTION AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, Gordon Johnston (“Plaintiff”), files this Emergency Motion for an immediate Injunction against Defendants, TAMPA SPORTS AUTHORITY (“TSA”), and HENRY G. SAAVEDRA (“Saavedra”) in his official capacity as Executive Director of the TSA, and submits the following memorandum.

**MOTION AND MEMORANDUM OF LAW**

**I. Introduction**

Pursuant to Florida R. Civ. P. 1.610, the Plaintiff asks this Court to enjoin the Defendants from conducting suspicionless pat-down searches of football patrons at Raymond James Stadium. The Florida Constitution provides: “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated.” Fla. Const. Art. I § 12. The Constitution protects persons from warrantless pat-down searches unless

reasonable grounds exist for thinking them to be armed and dangerous. The exceptions to this rule are narrow and do not exist here. As argued in more detail below, NFL fans should not be forced to abandon their constitutional rights at the stadium gate under the dubious guise of security.

## **II. Facts.**

The Plaintiff Johnston is a high-school teacher of United States history and government, and an ordained minister who resides in Hillsborough County, Florida. He is a Buccaneers season ticket holder. Defendant TSA, a governmental entity, is the owner and operator of Raymond James Stadium, Tampa, Florida. Its offices are located in Hillsborough County, Florida. Defendant Saavedra is the Executive Director of Defendant TSA. He is sued in his official capacity.

Johnston has held season tickets with the Buccaneers since approximately the 2001-02 football season. To obtain season tickets, Johnston had to pay the Buccaneers a seat deposit of approximately \$544.00. Johnston's seat deposit is being returned to him at the rate of 5% a year, for a period of 10 years, with the remainder of the seat deposit being returnable in 2011. If Johnston ceases to be a season ticket holder at any time before 2011, the remaining portion of his season ticket deposit is forfeited. According to the Buccaneers' web site, the waiting list for season tickets is currently over 100,000 people long. Therefore, if Johnston would be forced to give up his season tickets for the 2005-06 season, it would likely to be a very long time before he could obtain season tickets again.

On or around February 20, 2005, Johnston renewed his season tickets for the 2005-06 season at a cost of \$869.20. In addition, he paid \$250.00 for stadium parking. Upon renewal, Johnston received his packet of season ticket information and season tickets. Neither the

renewal information nor the tickets informed Johnston in any way that he would be subject to a pat-down search when attending the Buccaneers games.

On September 13, 2005, the TSA held a special meeting to consider whether to conduct pat-down searches of persons attending NFL games at Raymond James Stadium. The official in charge of stadium security announced that the searches would involve brief pat-downs of only the upper body. At that meeting, the TSA's lawyer stated that, in his legal opinion, the pat-down searches would be unlawful if imposed on season ticket holders without their consent, unless the season ticket holders were offered refunds of their tickets if they objected to the searches.

No evidence was offered of any specific threat to persons attending games at Raymond James stadium, nor was any evidence offered of any specific threat to NFL games in general. When TSA board members asked if any facts warranted a different security analysis than in other post-2001 years when no pat-down searches were deemed necessary, no such facts were presented at the meeting, other than comments to the effect of "All the other stadiums are doing it, and you don't want to be the only one." (In fact, the Cincinnati stadium is not conducting pat-down searches after its prosecuting attorney rendered an opinion that the searches were unlawful.). Notably, in addition to hosting the Buccaneers, TSA's Raymond James Stadium also hosts the University of South Florida's (USF) football games. No pat-down searches are conducted of persons attending the USF games.

Nonetheless, the TSA Board voted to require the searches and has implemented pat-down searches at all Buccaneer games at Raymond James Stadium. TSA hires a security firm that employs all personnel conducting the pat-down searches. At the September 13, 2005 meeting, the board also discussed the additional cost to the taxpayers due to the policy. Due to the need to hire additional personnel to conduct the searches, additional security expenses were estimated at

over \$9,500.00 a game. The Buccaneers and the NFL have refused to pay for the additional expenses, leaving taxpayers to foot the bill.

Shortly before the September 18, 2005 Buccaneers home game, Johnston learned that the TSA was going to conduct pat-down searches of all patrons. He contacted the Buccaneers to object. He was informed that the Buccaneers would not refund the cost of season tickets for him and other ticket holders who objected to the pat-down policy.

Johnston is not willing to consent to the pat-down searches as a condition of retaining his season tickets, nor is he willing to give up his tickets, which would entail not only losing the cost of season tickets and the remainder of his seat deposit, but also losing his right to renew season tickets and his right to enjoy the Buccaneers games for the remainder of the 2005-06 season.

### **III. Argument**

Injunctive relief is appropriate to prevent the government from performing searches that violate the Constitution. *See Bourgeois v. Peters*, 387 F.3d 1303 (11<sup>th</sup> Cir. 2004) (enjoining mass, suspicionless searches). To warrant a preliminary injunction, Johnston must show four factors: 1) the likelihood of irreparable harm, 2) the lack of an adequate remedy at law, 3) the substantial likelihood of success on the merits, and 4) that granting the injunction would serve the public interest. *Charlotte County v. Vetter* 863 So. 2d 465, 468 - 69 (Fla. 2d DCA 2004) (citing *Snibbe v. Napoleonic Soc. of Am., Inc.*, 682 So. 2d 568, 570 (Fla. 2d DCA 1996)). *See also Islandia Condominium Association v. Vermont*, 438 So. 2d 89 (Fla. 4th DCA 1983). All four factors exist here.

#### **A. Irreparable Harm.**

A preliminary injunction requires a showing of irreparable harm. *Liberty Fin. Mort. Corp. v. Clampitt*, 667 So. 2d 880 (Fla. 2d DCA 1996). An injury is irreparable if it cannot be

undone through monetary remedies. *Neel v. Williams Communication Serv., Inc.*, 638 So. 2d 1017 (Fla. 4<sup>th</sup> DCA 1994). Johnston and other NFL fans are subjected to irreparable harm by being forced to choose between being subjected to an unwanted and unlawful physical search, or losing their right to enjoy the live experience of attending Buccaneers games at Raymond James Stadium. Watching a game on television or listening to it on the radio cannot compare to the experience of watching a game in the home stadium.

**B. No Adequate Remedy at Law.**

Johnston has no adequate remedy at law. Even if he were to receive money damages to compensate him for the monetary value of his tickets, parking passes and seat deposit, mere money damages cannot remedy the loss of the right to enjoy the event. *Cf. State v. Iaccarino*, 767 So. 2d 470 (Fla. 2d DCA 2000) (finding pat-down searches unconstitutional when they would require patrons to forego right to enjoy event if they did not consent to search).

**C. Substantial Likelihood of Success on the Merits.**

Johnston is substantially likely to succeed on the merits. The Constitution prohibits governmental entities from conducting searches without any cause for individualized suspicion. *See Sosa-Leon v. State*, 848 So. 2d 342, 343 (Fla. 2d DCA 2003) (officer must have “articulatable suspicion” that person being searched was armed). *See also State v. Iaccarino*, 767 So. 2d 470 (Fla. 2d DCA 2000) (rejecting pat-down searches at rock concert); *North Dakota v. Seglen*, 700 N.W.2d 702 (N.D. 2005) (finding unconstitutional a pat-down search of a hockey fan). “Warrantless searches conducted by instruments of the state are per se unreasonable unless the searches fall within one of a few specifically-established and well-delineated exceptions.” *Iaccarino*, 767 So.2d at 476 (citing *Katz v. United States*, 389 U.S. 347 (1967)). The government bears the burden of proving that the exceptions exist. *Cf. Reynolds v. State*, 592

So.2d 1082 (Fla.1992). The TSA discussed two of these exceptions when considering the legality of the policy, but a close look at the facts shows that neither exception applies in this case.

First, the government may conduct warrantless searches when special circumstances exist, such as in courthouses and airports, that justify searches to prevent weapons or explosives from being taken into zones of known danger.<sup>1</sup> These searches must be calculated to meet a specific threat. But here, the TSA has shown no evidence of any specific threat, other than a general statement that terrorists would like to target NFL games due to their popularity.<sup>2</sup> Indeed, the absurdity of the Defendants' policy is underscored by their failure to implement a similar policy before University of South Florida football games at the very same facility. If terrorists seek to target a large gathering of people, it hardly matters whether it is a college football game or a professional football game. As the Eleventh Circuit has poignantly stated, "September 11, already a day of immeasurable tragedy, cannot be the day liberty perished in this country." *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11<sup>th</sup> Cir. 2004).

The Second District Court of Appeal, in *Iaccarino*, distinguished searches in venues like rock concerts from those in airports and courthouses, where the dangers are greater and the searches are more effectively targeted to the harm. *See id.* at 478 (citing *Gaioni v. Folmar*, 460 F. Supp. 10 (M.D. Ala. 1978)). Further, courthouses and airports rely primarily on non-invasive searching techniques, such as magnetometers; the analysis is quite different when physically

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<sup>1</sup> *See, e.g., Shapiro v. State*, 390 So. 2d 344 (Fla. 1980).

<sup>2</sup> When the NFL decided in 2005 to require all NFL teams to conduct pat-down searches of fans attending football games, it did so not based on any particular threat, "but rather an effort to have the additional security for NFL fans at games that hand searches provide." *See "Stadium Pat-downs Nixed," Cincinnati Enquirer*, Oct. 1, 2005 (quoting NFL commissioner Paul Tagliabue) (available on the Internet at <http://news.enquirer.com/apps/pbcs.dll/article?AID=2005510010361>).

invasive pat-down searches are involved. *See Wilkinson v. Forst*, 832 F.2d 1330, 1340 (2d Cir. 1987) (allowing magnetometer searches but enjoining mass pat-down searches at Klu Klux Klan rally, even in light of history of numerous weapons being brought to rallies in the past).

The same distinction applies here. The pat-down searches implemented by the TSA are inadequate as a meaningful deterrent to the threat of suicide bombers carrying explosives into a stadium. The searches, although invasive, are cursory; indeed, they have to be, for conducting thorough searches of over 65,000 people at once would likely take so long that very few would make it through the gates in time for kickoff. Indeed, the massing of people awaiting searches at the gates can actually create a more target-rich environment than if they were moving swiftly through the entryways. Further, the TSA has announced in advance to would-be terrorists that the searches will be of the upper body only. Moreover, no pat-down searches are found necessary for patrons attending University of South Florida football games at the same stadium, sometimes the same week as a Buccaneers game. In short, the TSA cannot show that the pat-down searches are a calculated, effective response to a narrow, specified threat. Therefore, the TSA has not met its burden of proving that the “special needs” exception applies.

The second exception mentioned by the TSA’s lawyer at the September 13, 2005 meeting was the doctrine of implied consent. Again, the TSA bears the burden of proving that patrons have voluntarily consented to the searches. *Faulkner v. State* 834 So. 2d 400, 403 (Fla. 2d DCA 2003) (citing *Reynolds v. State*, 592 So. 2d 1082 (Fla.1992) and *Norman v. State*, 379 So.2d 643, 647 (Fla.1980)). “When the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority.” *Iaccarino*, 767 So.2d at 476 (Fla. 2d DCA 2000) (citing *Florida v. Royer*, 460 U.S. 491 (1983)).

*Iaccarino* is a controlling case quite on point. In *Iaccarino*, patrons entering a “Zenfest” concert were forced to undergo pat-down searches.<sup>3</sup> The Second District ruled the searches unconstitutional, rejecting the government’s theory of implied consent. The court ruled that the requirements for implied consent are (1) “whether the defendant was aware that his conduct would subject him to a search,” (2) whether a “vital interest” supports the search, (3) the apparent authority of the officer to conduct the search, (4) “whether the defendant was advised of his right to refuse,” and (5) “whether refusal would result in a deprivation of a benefit or right.” *Id.* (citations omitted). In *Iaccarino*, the Second District Court of Appeal ruled there was no implied consent when the “failure to acquiesce in a search would result in a deprivation of a patron’s right to attend the concert, if not their ticket cost as well.” At the September 13, 2005 meeting, the TSA’s counsel acknowledged the problem, stating that it was his legal opinion that the searches could violate the constitution if season ticket holders would not receive refunds. A Buccaneers representative at the meeting stated that the Buccaneers would not refund ticket prices, a position corroborated when Johnston called the Buccaneers office to complain and was told he would not receive a refund. Despite these representations, the TSA nonetheless voted to implement the policy.

Here, Johnston, along with other season ticket holders, purchased his tickets and parking pass with no notice whatsoever that he would be subject to pat-down searches. The Buccaneers office told him that if he failed to acquiesce in the pat-down searches, he would receive no refund of his season tickets, a significant loss. Further, abandoning his season tickets would

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<sup>3</sup> *Iaccarino* is also noteworthy in its ruling that off-duty officers were state actors, even though they were hired to benefit the interests of a private concert promoter. The security personnel performing the pat-down searches at Raymond Stadium are state actors too. First of all, they are employees working for the security firm hired by the TSA, a governmental entity, to carry out the TSA’s duty to provide security for the stadium. Second, they are paid for with public funds.

subject him to loss of the remainder of his seat deposit – not to mention that with a waiting list of approximately 100,000 people for season tickets, it could take years, if ever, for him to obtain season tickets again once he was deprived of his renewal rights as a current season ticket holder. Even more to the point, Johnston is being forced to consent to the searches or be deprived of his contractual right to enjoy the Buccaneers games. Under the Second District Court of Appeals analysis in *Iaccarino*, this forced consent is not a valid consent. *See also Bourgeois v. Peters*, 387 F.3d 1303 (11<sup>th</sup> Cir. 2004) (rejecting implied consent doctrine as an unconstitutional condition).

A case that analyzes the issues in a modern context is *North Dakota v. Seglen*, 700 N.W.2d 702 (N.D. 2005). Seglen, a student, was patted down entering a college hockey game. He was caught for underage possession of alcohol when a university police officer found a beer in his pocket. The North Dakota Supreme Court ruled the search unconstitutional, distinguishing the intrusiveness of pat-down searches from acceptable searches of purses and containers. *Id.* at 709 (citing *Jensen v. City of Pontiac*, 317 N.W.2d 619 (Mich. App. 1982) (ruling search constitutional when visual inspection of purse was minimally obtrusive and appropriate to deter patrons from bringing throwable objects into stadium)). The *Seglen* court also distinguished cases involving courthouses and airports, rejecting the argument that sports games and rock concerts warranted the same precautions. *See Seglen*, 700 N.W. 2d at 707 (citing *Jacobsen v. City of Seattle*, 658 P.2d 653 (Wash. 1983)). The court also rejected the “after 9/11, everything’s different now” argument, quoting *Bourgeois*: (“While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment’s protections in any large gathering of people...the Fourth Amendment embodies a value judgment by the Framers

that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security.”) *Bourgeois*, 387 F.3d at 1311-12.

Here, there is no showing of any particularized threat or danger requiring mass pat-down searches. The most threatening remark at the meeting came from the NFL spokesman who said, in essence, “Every other stadium is doing it. You don’t want to become the most inviting target.” In fact, at least one other city is refusing to conduct the pat-down searches: The Cincinnati stadium is not conducting pat-down searches after the local prosecuting attorney stated the searches violated the Fourth Amendment. See “*Stadium Pat-downs Nixed*,” Cincinnati Enquirer, Oct. 1, 2005 (available on the Internet at <http://news.enquirer.com/apps/pbcs.dll/article?AID=2005510010361>).

In short, Johnston has shown a substantial likelihood of success on the merits.

#### **D. Public Interest.**

The final factor to consider is public interest. Public interest supports, even requires, granting an injunction. First of all, large numbers of people are being subjected to the unconstitutional searches. Second, taxpayers’ money is being used to pay for the searches. The cost of hiring the additional personnel to conduct the searches (men searching men, and women searching women), is estimated at over \$9,500 a game. The Buccaneers and the NFL refuse to pay for the additional cost incurred by the policy that they imposed upon the TSA. Taxpayers should not be forced to pay for unlawful searches.

### **CONCLUSION**

As set forth above, the Plaintiff will be irreparably harmed if the injunction is not entered; Plaintiff is likely to succeed on the merits of his claim; any potential harm to Defendant is *de minimus*; and the public interest is best served if the Court enters the injunction.

For the foregoing reasons, Plaintiff asks this Court to enter an injunction directing the TSA to immediately cease conducting suspicionless pat-down searches at Raymond James Stadium, and to award such other relief as this Court may deem fair and equitable.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Defendants as part of the initial process in this cause.

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Attorney