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COURT OVERTURNS INJUNCTION AGAINST NFL'S STADIUM SEARCH POLICY

(Johnston v. Tampa Sports Authority)

The U.S. Court of Appeals for the Eleventh Circuit in Atlanta today overturned an injunction issued by a trial court against a National Football League (NFL) policy that entails brief searches of all patrons entering NFL stadiums.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case, *Johnston v. Tampa Sports Authority*, urging the appeals court to reject a challenge to the search policy. WLF argued that the searches are "reasonable" within the meaning of the Fourth Amendment and in any event are not subject to the Fourth Amendment because they are being carried out at the direction of private entities.

Today's decision arose in connection with an appeal from a federal district court, which issued a preliminary injunction against such searches at games being played by the Tampa Bay Buccaneers, an NFL team. The search policy was implemented at the start of the 2005 football season. The plaintiff, Gordon Johnston (a Buccaneers season-ticket holder), filed suit and obtained the preliminary injunction after attending the first three games in the fall of 2005. The appeals court ruled that the defendants had not violated Johnston's Fourth Amendment rights because he consented to being searched. Although the search policy continues in effect in other NFL cities, the injunction issued in this case means that no searches have been conducted in Tampa since the third home game of the 2005 season.

"If the decision below had been allowed to stand, it would have significantly impaired the ability of stadium operators to protect their patrons from terrorists and others intent on doing harm," said WLF Chief Counsel Richard Samp after reviewing the appeals court decision. "The district court essentially held that the operators of publicly owned stadiums are constrained from taking effective counter-terrorism measures until *after* there has been at least one successful terrorist attack on an American stadium," Samp said.

The case involves a challenge to a search policy adopted by the Tampa Bay Buccaneers in compliance with an NFL directive that such searches be conducted at all NFL venues. Pursuant to that policy, the Buccaneers required that all patrons entering their stadium in Tampa Bay submit to a brief, non-intrusive pat-down search to determine

whether they are carrying explosive. Stadium personnel were directed that the searches should not extend below the waist. Because the Tampa Bay stadium (unlike many other NFL stadiums) is owned and operated by a public body -- the Tampa Sports Authority (TSA) -- the Buccaneers directed that TSA personnel carry out the search. Pursuant to its stadium lease, the Buccaneers had a contractual right to direct TSA to carry out such searches.

In its brief, WLF argued that the mandated pat-down searches are not "unreasonable" within the meaning of the Fourth Amendment. WLF argued that the searches are minimally intrusive and are more than justified by the very real possibility that terrorist groups will attempt to kill large numbers of civilians by planting a bomb in a football stadium. In support of that argument, WLF cited a number of recent planned terrorist attacks on stadiums and recent statements by terrorist leaders that they hope to plant bombs in locations at which large numbers of American civilians are located.

WLF also argued that the Fourth Amendment has no application to the challenged policy because it was adopted by a private entity (the Buccaneers), and the Fourth Amendment's "search" limitation applies only to government entities. Although the TSA is a government entity, WLF argued that the issue of whether Fourth Amendment "state action" exists turns on whether the policy is *adopted* by a government entity. WLF argued that when the government's sole role is to carry out a search that it is contractually obligated to perform at the request of a private party, its actions do not constitute a "search" subject to Fourth Amendment limitations.

In light of its ruling that Johnston consented to being search, the appeals court did not need to reach the issues of whether the search policy is reasonable and whether it constitutes government action subject to the Fourth Amendment. The appeals court returned the case to the district court for further review. Johnston will be in a position to continue to contest the search policy only if he refuses to be searched at future Buccaneers games -- at which point, he risks being denied access to the games.

WLF is a public interest law and policy center with supporters in all 50 States. It devotes a significant portion of its resources to ensuring that federal, state, and local governments possess the tools necessary to protect the country from those who would seek to destroy it or harm its citizens.

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For further information, contact WLF Chief Counsel Richard A. Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.