No. 09-215

IN THE

Supreme Court of the United States

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TULANIA SIRENS

FOOTBALL TEAM,

Petitioner,

v.

BEN WYATT;

THE CENTER FOR PEOPLE AGAINST

SEXULIZATION OF WOMEN'S BODIES

Respondent.

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On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

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BRIEF FOR PETITIONER

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Team 10
Attorney for Petitioner

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QUESTIONS PRESENTED

I. Whether a topless mermaid mascot is protected by the First Amendment?

II. Whether the Tulania Sirens Football Team was negligent for an opposing player's injury as a result of an imperfection on the field of its stadium?

STATEMENT OF THE CASE

I. The Course of Proceedings Below

In the spirit of judicial efficiency, the United States District Court for the District of Tulania consolidated two actions involving Ben Wyatt and the Center For People Against Sexualization Of Women's Bodies against The Tulania Sirens Football Team. (R. 12). In the first action, Ben Wyatt and The Center For People Against Sexualization Of Women's Bodies sought to enjoin the Tulania Siren Football Team's use of its mascot (R. 12). In the second action, Ben Wyatt sought to hold the Tulania Sirens Football Team negligent for injuries he incurred during a game at Yulman Stadium (R. 12). The District Court held in favor of The Sirens for the first count, and in favor of Wyatt for the second. (R. 16, 20). The United States Court of Appels for the Fourteenth Circuit reversed the District Court's decision on the first count and upheld its decision on the second (R. 10). To resolve the issues presented in this case, the Supreme Court of the United States granted the Sirens' petition for Certiorari. (R. 1).

II. Statements of Facts

On Thanksgiving Day, The Tulania Sirens Football Team ("Sirens") hosted its division rival the New Orleans Green Wave Football Team ("Green Wave") at its home venue, Yulman Stadium ("Stadium") located Tulania, Tulania. (R. 12). Many members of all ages in the Tulania and New Orleans community watch this rivalry game in person and at home. (R. 12). In order to promote this highly anticipated game, the Sirens mailed pamphlets, which included images of its topless mermaid mascot ("Mascot"), and the location and time of the game (R. 12). The Center for People Against Sexualization of Women's Bodies ("PASWB") expressed their concern with the Mascot. (R. 12). Other members of the Tulania community were offended by the Mascot, and the city of Tulania passed *Sec. 12 Tulania Penal Code* (2019), which stated that, "[e]very person who

knowingly: sends or causes to be sent, or brings or causes to be brought into this state for sale or distribution, or in this state prepares, or publishes, prints, exhibits, distributes, or offers to distribute, or has in his/her possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." (R. 12).

Players from both teams trained tirelessly in anticipation of the rivalry game. (R. 12). One of those players, Ben Wyatt ("Wyatt"), was a critical pawn in the Green Wave's offensive scheme. (R. 17). As a wide receiver, the offense heavily relied on his agility late in games in order to win. (R. 17). Flushed with nerves due to the stakes of this game, Wyatt rushed into the Stadium, and noticed the Mascot depicted on the middle of the field. (R. 12). Wyatt was heavily utilized and forced to log more offensive snaps than the average player because of the Green Wave's dependence on his talents. (R. 17). Just before the start of the game, a player on the Sirens fell approximately 10 feet behind the left side of the end zone, removing a chunk of turf, leaving behind a partially exposed patch of cement in its place. (R. 17). Shortly after the incident, a Sirens staffer placed an orange cone over the missing patch in order to warn both teams of the affected area. (R. 17). After three hard fought quarters, a fatigued Wyatt caught a pass in the back-left corner of the end zone. (R. 17). Subsequently, his force carried him towards the known affected area, and in attempt to avoid stepping over the cone, he made a sharp right turn, and injured his left knee. (R. 17).

III. Standard of Review

The United States Supreme Court will review both matters of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552 (1988).

SUMMARY OF ARGUMENT

This Court should reverse the Fourteenth Circuit's decision on both issues. First, the Mascot does not appeal to morbid interest in nudity or sex; second, the Mascot does not depict patently offensive hard-core sexual conduct; and finally, the Mascot does not lack in serious artistic or political value. Accordingly, this Court should find that the Mascot fails all three required prongs for obscene speech established in *Miller v. California,* and therefore is protected by the First Amendment**.**

On the second issue, Wyatt's negligence claim does not arise under Tulania common law, because determining the scope of the Sirens' duty of care requires interpretation of the NFL Collective Bargaining Agreement and its incorporated documents. Even if this Court finds that both, the Sirens' duty of care exists independent of the CBA and that the Sirens' breached its duty, the injuries suffered by Wyatt were proximately caused by circumstances outside of the Sirens' control.

ARGUMENT

I. BECAUSE THE MASCOT FAILS TO SATISFY THE REQUIRED ELEMENTS FOR OBSCENE SPEECH, IT MUST RECEIVE FIRST AMENDMENT PROTECTION.

The right to freedom of speech is one of the most sacred and important rights protected by the Constitution. *See Snyder v. Phelps,* 562 U.S. 443 (2011). This Court has emphasized that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Furthermore, First Amendment protections are not limited to the spoken word and have extended to a wide-ranging list of expressions and materials including flag-burning, racist band names, NFL team mascots, and

pornographic magazines. *See Id.* (holding that the Supreme Court has long recognized that First Amendment protection does not end at the spoke or written word)*; Matal v. Tam*, 137 S.Ct. 1744 (U.S. 2017); *Kois v. Wisconsin,* 408 U.S. 229 (1972); *Pro-Football, Inc. v. Blackhorse,* 709 Fed.Appx. 182 (4th Cir. 2018). With that said, materials which are labeled obscene are outside of the First Amendment's purview. *Roth v. United States*, 354 U.S. 476 (1957).

In *Miller v. California*, this Court established that speech will only be considered obscene if (1) the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California,* 413 U.S. 15, 24 (1973). In the thirty-seven years since the *Miller* decision, this Court has consistently emphasized that nudity and obscenity are not synonymous, and on numerous occasions has afforded First Amendment protections to nude material. *See Erznoznik v. Jacksonville,* 422 U.S. 205 (1975); *Jenkins v. Georgia,* 418 U.S. 153 (1974); *Kois*, 408 U.S. 229. Applying the *Miller* test to this case, the United States District Court for the Southern District Court of Tulania properly held that the Mascot was not legally obscene and thus must receive First Amendment protection. This Court should reverse the ruling of the Fourteenth Circuit and find that because the Mascot is not a hard-core depiction of patently offensive sexual conduct, it fails the *Miller* test for obscenity and is protected by the First Amendment.

A. The Mascot Does Not Appeal To A Shameful Or Morbid Interest In Nudity Or Sex.

To satisfy the first prong of the *Miller* test for obscenity, speech must appeal to a shameful or morbid interest in nudity or sex. *Brockett v. Spokane Arcades*, 472 U.S. 491, 498 (1985); *see Hamling v. United States*, 418 U.S. 87, 92-93 (1974) (finding that graphic pictures of individual

and group intercourse, sodomy, and other deviate sexual acts were obscene). Material which provokes normal and healthy sexual desires does not meet the definition of prurient. *Hamling*, 418 U.S. at 93*; see United States v. Various Articles of Merch.*, 230 F.3d 649, 651 (2000) (ruling that magazines which contained numerous photographs of nude persons did not appeal to the prurient interests). A speech's prurient appeal is typically analyzed in light of contemporary community standards. *Miller*, 413 U.S. at 24. In addition, this Court has emphasized that children are not included as part of the community by whose standards obscenity is to be judged. *Pinkus v. United States*, 436 U.S. 293, 297 (1978); *see also Hamling,* 418 U.S. at 107 (specifying that speech is not analyzed based on its effect on a particularly sensitive person or group). The proper contemporary community standard reflects present day ideals and beliefs, which may evolve significantly as society progresses. *Roth,* 354 U.S. at 490. However, some speech may be so far from obscene, that a reviewing court will afford it constitutional protection without requiring any analysis of contemporary community standards. *See Erznoznik v. Jacksonville*, 422 U.S. 205, 213 (1975) (stating that the prohibition of movies depicting nudity violated the First Amendment under any community standard).

The Mascot simply does not appeal to the prurient interests, under any community standard. Any minimal sexual desire that a topless mermaid appeals to falls significantly short of a morbid or shameful interest. In reality, the Mascot more closely resembles a Disney character than any materials labeled by courts as appealing to a morbid or shameful interest in sex. For example, in *Hamling*, this Court held that brochures consisting of graphic pictures portraying intercourse, sodomy, masturbation, and animal porn were obviously hard-core pornography, thus compelling a finding that they appealed to the prurient interests. *Hamling,* 418 U.S. at 92-93. To that end, when material does not depict lewd genitalia or hard-core pornography courts have

refused to label it obscene. *See Erznoznik*, 422 U.S. at 213; *Various Articles of Merch.*, 230 F.3d at 651. In *Various Articles of Merch.*, the Third Circuit Court of Appeals declared that magazines which contained nude photographs did not appeal to the prurient interests, in large part because the photographs did not focus on the genitalia of the people pictured. *Various Articles of Merch.*, 230 F.3d at 654-55. Moreover, in *Erznoznik,* this Court afforded First Amendment protection to movies which depicted nude breasts, pubic areas, and buttocks, even though minors were exposed to the movies. *Erznoznik*, 422 U.S. at 213. The Court underscored that all nudity cannot be deemed obscene, even as exposed to minors, and afforded constitutional protection to the movies without requiring any analysis of contemporary community standards. *Id.* In the present case, the fact that many children watch the Thanksgiving Day football game and likely viewed the Mascot does not compel a finding of obscenity. While the Mascot may be offensive to some, it contains no depiction of pornography or genitalia. Additionally, this court has held that when speech is considered offensive by a subset of the population, regardless of whether children are included in that subset, "the burden falls upon the viewer to avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 211, quoting *Cohen v. California,* 403 U.S. 15, 21 (1973) (emphasizing that the Constitution does not permit the government to decide which types of speech are sufficiently offensive to require protection for the unwilling listener or viewer). Therefore, similar to someone offended by a movie containing nudity shown at a drive-in theater, a Tulania resident who is offended by the Mascot has the responsibility of discarding any pamphlets containing the Mascot and deciding not to enter Yulman Stadium.

However, even if this Court decides that it is necessary to analyze the Mascot under Tulania community standards, this standard will be based on the average person, not on the views of children or particularly sensitive groups. *Pinkus*, 436 U.S. at 297*; Hamling* 418 U.S. at 107. The

Center for People Against Sexualization of Women's Bodies ("PASWB") is undoubtedly more sensitive to the use of a topless mermaid to represent a professional sports term than an average Tulania citizen, and thus their opinion should not be the standard by which the Mascot is judged. The Mascot should be viewed in light of a modern evolving standard, which, as the District Court pointed out, has a growing respect and appreciation for the female body. In today's world, womens' bodies are honored and celebrated, and the breasts of a mermaid should not qualify as an appeal to a morbid interest in nudity or sex.

B. As A Matter Of Constitutional Law, The Mascot Does Not Depict Patently Offensive Hard-Core Sexual Conduct.

Speech must depict hard-core, patently offensive sexual conduct in order to satisfy the second prong of the *Miller* test. *Jenkins*, 418 U.S. at 160-61 (underscoring that it would be "wholly at odds" with the Court's decision in *Miller* to label a depiction of a naked woman obscene). If speech does not contain a lewd exhibition of genitalia, courts have repeatedly refused to declare it patently offensive hard-core sexual conduct. *Id; see also Erznoznik,* 422 at 213 (1975). In *Jenkins,* this Court overturned a defendant's conviction for distribution of obscene materials and emphasized that a film which contained nudity and portrayals of ultimate sex acts did not depict patently offensive sexual conduct. *Jenkins,* 418 U.S. at 160. Additionally, this Court in *Miller* provided two examples of speech of material which could be regulated as patently offensive hard-core conduct: "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; [and] . . . representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller,* 413 U.S. at 25. In accordance with this guidance, only extremely disturbing material has satisfied the second prong of the *Miller* test. *See Id.* (brochures containing men and women engaging in a variety of sexual activities with genitals prominently displayed); *Hamling,* 418 U.S. at 92 (graphic pictures of individual and group intercourse, sodomy, and other deviate

sexual acts); *United States v. Kirkpatrick*, 662 Fed.Appx. 237, 239 (5th Cir. 2016) (videos of the defendant masturbating).

Here, it requires nothing more than a glance at the Mascot to determine that it does not depict patently offensive hard-core sexual conduct. Like the film analyzed in *Jenkins*, the Mascot shows bare breasts, but this Court has made it undeniably clear that nudity alone is not enough to make material legally obscene. In fact, the *Jenkins* Court needed only one viewing of the film in question to conclude that it was not obscene as a matter of constitutional law. *Jenkins,* 418 U.S. at 161. In the present case, this Court should do the same. The Sirens' advertising methods and complaints from members of the Tulania community have no bearing on whether a topless mermaid is patently offensive hard-core sexual conduct. One look at the Mascot is all that is required to recognize that it contains no exhibition of genitalia, lewd or not lewd. *See Brockett,* 472 U.S at 502 (highlighting that whether materials are obscene can be decided simply by viewing them). On the other hand, materials which courts have labeled obscene share almost no similarities with the Mascot. Videos of a grown man masturbating, brochures containing men and women performing intercourse, and graphic pictures of sodomy are entirely distinct from a topless mermaid. *Miller,* 413 U.S. at 25; *Hamling,* 418 U.S. at 92; *Kirkpatrick*, 662 Fed.Appx. at 239. Therefore, because a topless mermaid does not fall within the substantive constitutional limitations for depictions of patently offensive hard-core sexual conduct established in *Miller,* the Mascot must receive First Amendment protection.

C. The Mascot Does Not Lack Serious Political Or Artistic Value.

Even if parts one and two of the *Miller* test are satisfied, a court must find that material does not possess serious political or artistic value in order to label it obscene. *Miller*, 413 U.S. at 24 (1973)*; Various Articles of Merchandise,* 230 F.3d 649 (stating that "all three Miller prongs

must be satisfied for a work to be found obscene"). Speech which has the potential to encourage political or social changes will receive First Amendment protection. *Various Articles of Merch.,* 230 F.3d at 658. In *Various Articles of Merch.*, the court found that nudist magazines had serious political value. *Id*. (reasoning that the magazines "championed the nudist lifestyle" and could potentially bring about political change through their publication). Furthermore, this Court emphasized that government or popular approval of speech is irrelevant in analyzing its political or artistic value. *Miller*, 413 U.S. at 34. In fact, it is at the heart of the First Amendment to protect even the most offensive speech. *Matal*, 137 S.Ct. at 1764; *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (holding that nudity has expressive value protected by the First Amendment). In *Matal*, this Court found that a racist band name was protected under the First Amendment and rejected arguments seeking to limit the use of the name for commercial purposes. *Id; see Pro-Football, Inc.,* 709 Fed.Appx. 182 (holding that the *Matal* decision mandated that the same First Amendment protections cover the Redskins NFL mascot).

Here, the first female mascot in professional football has significant potential to encourage political and social change. The celebration of a topless female character as a sign of strength and power could boost important cultural initiatives and other causes of female empowerment. Discussing the potential artistic value of sexual material, this Court in *Miller* recognized that the sexual revolution "may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation." *Miller*, 413 U.S. at 36. Additionally, in *Various Articles of Merch.*, the Third Circuit Court of Appeals found that nudist magazines had serious political value in their celebration of an alternative lifestyle. *Various Articles of Merch.*, 230 F.3d at 659 (comparing the value of nudist magazines to articles criticizing the government). In the present case, the use and promotion of a topless female mascot could diminish the stigma behind

the freedom of the female body, satisfying the political value requirements from *Miller* and *Various Articles of Merch.* Furthermore, the fact that members of the Tulania community express concern over the Mascot has no relevance to its value. *See Pope v. Illinois*, 481 U.S. 497, 501 n.3. (highlighting that material can have serious value even if only a small minority of the population values it). Contrarily, this Court has consistently recognized substantial value in speech that received severe backlash. *See Johnson*, 491 U.S. 397 (ruling that speech which incited a mass outcry of negative responses had serious political value and warranted First Amendment protection); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 403 (1969) (holding that speech which caused an uproar in a public high school must be protected by the First Amendment).

Similarly, the Fourteenth Circuit's contention that "there is no fathomable reason that the mascot for a professional football team should be seemed to have any serious . . . artistic . . . value" is completely unfounded. Millions of Americans decorate their homes, purchase merchandise and tattoo themselves with images of mascots of professional sports teams. To assert that a mascot has no value simply because it promotes a professional team playing America's most popular support is without constitutional merit. First Amendment protections are vast and protect the value in many different examples of speech, including nude conduct, and sports team mascots. *Barnes v.* 501 U.S. at 565; *Pro-Football, Inc.,* 709 Fed.Appx. 182. And as the first ever depiction of a strong female to represent a professional football team, the artistic and inspirational power Mascot could resonate with people in Tulania and across the country.

Therefore, because the Mascot does not appeal to a morbid interest in nudity or sex; depict hard-core patently offensive sexual conduct; or lack serious political or artistic value, the Tulania

Sirens Football team respectfully requests that this Court reverse the decision of the Fourteenth Circuit.

II. THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S ORDER HOLDING THE TULANIA SIRENS FOOTBALL TEAM NEGLIGENT UNDER TULANIA COMMON LAW BECAUSE THE RESOLUTION OF WYATT'S CLAIM REQUIRE INTERPRETATION OF THE NFL COLLECTIVE BARGAINING AGREEMENT AND ITS INCORPORATED DOCUMENTS.

This Court should reverse the Fourteenth Circuit's decision because resolving Wyatt's common law negligence claim requires interpretation of the 2011 NFL Collective Bargaining Agreement and its incorporated documents ("CBA"), and thus should be preempted under Section 301 of the Labor Management Relations Act of 1947, ("LMRA"), and compelled for arbitration. First, the Tulania Sirens Football Club's ("Sirens") duty directly arises from the CBA's terms, as opposed to Tulania common law. Second, determining whether the Sirens breached its duty, as alleged by Wyatt, requires interpretation of the CBA, and thus the claim is "inextricably intertwined" with its terms.

Section 301 of the LMRA governs "[s]uits for violation of contracts between an employer and a labor organization[.]" 29 U.S.C. § 185(a). This Court has understood Section 301 as a "congressional mandate to federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts." *Allis-Chalmers Corp v. Lueck*, 471 U.S. 202, 209 (1985). In *Allis-Chalmers*, this Court concluded that Congress intended to enforce "doctrines of federal labor law uniformly to prevail over inconsistent state rules." *Id.* at 210. As such, this Court held that Section 301 preempts any state law claim where the resolution of that claim is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 220. (holding that the bad faith contract claim asserted under Wisconsin

law required interpretation of the CBA, and therefore underlies any finding of tort liability because the tort claims were inextricably intertwined with the agreement).

Regardless of its nature, if a plaintiff's claim is grounded in the provisions of the labor contract or if it requires interpretation of it, it is preempted. *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1059 (9th Cir. 2007). The *Burnside* inquiry requires this Court to determine whether a state law right is "substantially dependent" on the terms of a collective bargaining agreement by deciding whether the plaintiff's claim can be resolved by "looking to" versus "interpreting" the CBA. *Id*. If the claims' resolution requires "interpretation" of the CBA, then it is preempted. *Id.* at 1061. (holding that a wage claim regarding compensation for travel time existed independent of the terms of the CBA's, and ultimately can be resolved without interpreting the agreements).

A. Section 301 Preempts Negligence Claims That Are Substantially Dependent On The Interpretation Of The NFL Collective Bargaining Agreement.

The 2011 NFL CBA was entered into between the National Football League Players Association ("NFLPA") and the National Football League Management Council ("NFLMC"). The NFLPA, is the sole and exclusive bargaining representative of present and future employee players in the NFL, and the NFLMC is the sole and exclusive bargaining representative of present and future employer member Clubs of the National Football League. *2011 NFL CBA*, Preamble. Here, following the *Burnside* inquiry, this Court should first examine the legal character of the claim alleged and determine whether the rights exist as a matter of state law or if they are inherent in the terms of the CBA.

Tort claims resulting in Section 301 preemption apply not only to individual clubs, but against the NFL as a whole. In, *Duerson v. Nat'l Football League*, the plaintiff brought suit on behalf of a former player, alleging that the NFL was liable for negligently causing his brain damage by failing to fulfil its duty to ensure safety. *Duerson v. Nat'l Football League, Inc.*, No. 12 C 2513,

2012 WL 1658353 at *4 (N.D. Ill. May 11, 2012). To determine the standard of care the defendant was required to meet, the court evaluated the reasonableness of the defendant's conduct. *Id.* at *3-4. Plaintiff's negligence claims were preempted because interpretation of various CBA provisions implicating duties on the clubs to notice and diagnose player health problems revealed that the NFL may exercise a lower standard of care. *Id.*

Similarly, in *Stringer v. Nat'l Football League*, the plaintiff brought negligence claims against the NFL for breaching its duty to exercise reasonable care in publishing "Hot Weather Guidelines" in accordance with the best practices to minimize heat related illness. *Stringer v. Nat'l Football League*, 474 F. Supp. 2d 894, 910 (S.D. Ohio 2007). The court held that determining the duty of care and what was reasonable under the circumstances required interpretation of the CBA because it outlined the qualified team physician's duty to identify and inform players of the risks of their injuries. *Id. see also Smith v. Nat'l Football League Players Ass'n*, No. 4:14 CV01559, 2014 WL 6776306 at *8 (E.D. Mo. Dec. 2, 2014) (holding that plaintiff's claims were preempted because provisions of the CBA on health and safety issues showed that resolution of the claims substantially depended on interpretation of the CBA).

To prove that a professional football team was negligent as alleged herein, a plaintiff must prove that the team had a duty to protect him from injury, the team failed to perform that duty, and the teams' failure to perform that duty proximately caused the injury to plaintiff. *Bush v. St Louis Reg'l Convention*, No. 4:16CV250 JCH, 2016 WL 3125869, at *2 (E.D. Mo. June 3, 2016). In *Bush*, the plaintiff suffered injuries when he slipped on a concrete surface surrounding the field as he tried to slow down out-of-bounds. *Id.* at *1. The plaintiff sought to hold the defendant liable for breaching its duty of care to remove or warn of dangerous conditions in the stadium, and to maintain the playing surface and surrounding areas in a reasonably safe condition. *Id.* The

defendant asserted preemption under section 301 because determining the "scope of the duty," required analysis of the CBA and its incorporated documents. *Id.* at *3-4. The defendant failed to show that interpretation of the CBA was necessary to determine the duty to warn about the 'playing surface' and 'stadium facility.' *Id*. at *4-5. Instead, the court held that the team's duty arises out of the common law duty that sports teams owe its invitees. *Id*.

1. Wyatt's Common Law Negligence Claim Requires Interpretation Of Various CBA Provisions.

Wyatt's claim is substantially dependent on the CBA because ascertaining the scope of the Sirens' duty of care, and whether its breach of that duty caused Wyatt's injuries, requires interpretation of the CBA. To determine the scope of the duty of care owed to its invitee the Court must interpret Article 50 of the CBA to analyze the reasonableness of the conduct by the team to repair the field condition prior to the game. Specifically, this Court should interpret Article 50, Section 1, which establishes a procedure to form a "Joint Committee on Player Safety and Welfare." *2011 NFL* CBA, Art 50 § 1. It explains that the Committee will be established for the purpose of discussing player safety and welfare aspects of playing equipment, playing surfaces, and stadium facilities," that the "Joint Committee may discuss and examine any subject related to player safety and welfare it desires," and lastly that "Committee recommendations will be made to appropriate parties involving the players, clubs, and the leagues". *Id.* Just as the *Duerson* and *Stringer* courts held that the resolution of the plaintiff's claims required interpretation of Article 39, this Court should similarly hold that interpreting Article 50 of the CBA is required to ascertain the reasonableness of the Sirens' conduct in determining that it may exercise a lower standard of care in light of the circumstances.

The opposition's argument from *Bush* that the duty of care exists independent from the CBA is inapplicable to the facts of this case. In *Bush*, the defendant failed to show that

interpretation of the provisions of the CBA were essential to plaintiff's claims. *Bush*, No. 4:16CV250 JCH, 2016 WL 3125869, at *2. The injuries sustained were a result of the stadium's failure to remedy a field imperfection around the entirety of the stadium, which had been present for years prior to this game being held. *Id.* However, here, the injuries from the missing piece of turf resulted from an imperfection in the field that occurred just moments before the games start. Although the *Bush* court held that Article 50 "merely referenced the CBA," here, the Court must interpret this provision to analyze the reasonableness of the field preparations moments before game time, under the guise of the specific duties relevant to "playing surfaces" outlined in the CBA. Because interpretation is required to determine the scope of the duty of care and the reasonableness of the Sirens' conduct in preparing the field before the game, Wyatt's claim is substantially dependent upon the CBA and should be preempted.

B. Compelling Arbitration Under The CBA *And* Its Incorporated Documents.

Similar to the preemption analysis, if the CBA contains a valid arbitration agreement and the plaintiff's claim falls within that agreement's scope, the claim should be compelled and decided under arbitration, as opposed to state law. *See Houston NFL Holding L.P. v. Ryans*, 581 S.W.3d 900, 903 (2019). In *Ryans*, the plaintiff brought suit against the defendant after he sustained injuries, alleging that the team violated its duty of care to provide a reasonably safe field by creating an "unreasonable risk of harm" to the players. *Id.* at 904. The team moved to compel arbitration under Article 43 of the CBA which states,

> Any dispute arising after the execution of the CBA and involving the provision of the CBA, the NFL Player Contract ... or any applicable provision of the NFL Constitution and Bylaws or NFL Rules pertaining the terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the procedure set forth in this Article. . . .

Id. at 905. The court focused on interpretation of the "NFL Rules," which encompasses the NFL Policy Manual for Member Clubs. *Id.* at 910. In the Game Operations section, the "Playing Field Specifications" provides that "[e]ach home club is responsible for ensuring that the playing surface of its stadium is well maintained, safe, meets competitive standards, and is suitable for NFL play." *Id.* Additionally, it requires each club to maintain its field in accordance with the applicable safety standards, to inspect and certify its playing field before every home game, and to characterize the condition of the playing field as a "players safety issue." *Id.* The court held that determining whether the field posed an unreasonable risk of harm to its players required interpretation and application of these NFL Rules, and thus the claim alleged by the plaintiff fell within the scope of Article 43. *Id.* at 911.

1. Wyatt's Common Law Negligence Claim Should Be Compelled For Arbitration Because It Requires Interpretation Of The NFL Rules On Game Day Field Conditions.

Moreover, Wyatt's negligence claim falls within the scope of Article 43, entitled "Non-Injury Grievances" because establishing the duty of care owed to Wyatt requires interpretation of the NFL Rules. In *Ryans*, the court focused on interpretation of the "NFL Rules," and held that the plaintiff's claims fell within the scope of Article 43 because determining whether the field posed an unreasonable risk of harm to its players required interpretation and application of the NFL Rules. *Ryans*, 581 S.W.3d at 911. Similarly, here, in order to determine the reasonableness of the team placing a bright orange cone over the missing turf to alleviate the harm, this Court must interpret the NFL Rules, which provides certain specifications, recommended practices and safety standards required by each individual club when maintaining its field. The NFL Policy Manual requires each Club to designate one person to oversee and serve as the point of contact for the Game Day Operations department, in addition to coordinating needed follow-up with the league

addressing any field, stadium or operational issue that arises. *NFL Policy Manual For Member Clubs: Game Operations Manual*. Further, the league sends a Football Operations Representative to each game to check field conditions before game time. *Id.* Just as the *Ryans* court held that the plaintiff's claims required interpretation of the NFL Rules, this Court should similarly hold that Wyatt's claim falls within the scope of Article 43 of the CBA because determining the reasonableness of the Sirens' conduct requires interpretation of the League and Club duties related to field conditions.

Thus, because the Sirens' duty of care directly arises from the CBA and the incorporated NFL Rules, this Court should preempt the claim under section 301, and should compel the claim for arbitration.

III. EVEN IF THIS COURT DETERMINES THAT WYATT'S COMMON LAW NEGLIGNECE CLAIM IS NOT PREEMPTED, THE TULANIA SIRENS FOOTBALL TEAM DID NOT BREACH ITS DUTY OF CARE IN PREPARING THE FIELD FOR PLAY.

Wyatt is barred from recovering under the Tulania common law because Wyatt assumed the risk of participating in the game for over three quarters, after the Sirens adequately gave notice to its invitees of the danger located on the field by placing a bright orange cone over its place. However, even if this Court finds that the Sirens breached its duty of care, the subsequent injury was a result of the Green Wave's over usage of Wyatt throughout the week of practice, and during the game, and thus his fatigue was the proximate cause of the injury.

Under traditional negligence law, the plaintiff must establish that the defendant had a duty to protect the plaintiff from injury, the defendant failed to perform that duty, and the defendant's failure proximately caused the injury to the plaintiff. *Green v. Arizona Cardinals Football Club LLC*, 21 F.Supp.3d 1020 (E.D. Mo. 2014); *see also L.A.C., ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 257 (Mo. banc 2002). In the workplace, a common law duty requires

that an employer maintain a safe working environment, not expose employees to unreasonable risks of harm, and warn the employees about the existence of dangers of which they could not reasonably be expected to be aware. *See Carman v. Wieland*, 406 S.W.3d 70, 76-77 (Mo. App. 2013). The scope of that duty in the workplace is measured by whether a reasonably prudent person would have anticipated danger and provided against it. *Smith v. Dewitt & Assocs.*, 279 S.W.3d 220, 224 (Mo. Ct. App. 2009)

A. The Sirens Did Not Breach Its Duty Of Care Because Under the Primary Assumption Of Risk Doctrine, Wyatt Assumed The Risk Of Injury By Participating In The Game.

A plaintiff voluntarily assumes the risk of participating in an athletic competition and accepts the danger of a known or appreciated risk when they 1) comprehended the actual danger, and subsequently 2) intelligently acquiesced in it. *See Sheppard v. Midway R-1 School Dist.*, 904 S.W.2d 257, 264 (Mo. App. 1995). In *Sheppard*, the plaintiff brought suit against the defendant alleging that the defendant's long jumping pit was unreasonably dangerous because it was inadequately prepared for competition. *Id.* at 259. The court held that the jury instructions did not accurately explain to the jury that in order to side with defendant, they must find that plaintiff comprehended the actual danger and intelligently acquiesced in it. *Id.* Similarly, in *Martin v. Buzan*, the plaintiff brought suit for damages for injuries sustained after she collided with the defendant at homeplate during a co-ed softball game. *Martin v. Buzan*, 857 S.W.2d 366-67 (Mo. App. 1993). The court held that the defendant was not negligent because the collision was an inherent risk of the game, and thus fell within the "primary" assumption of risk doctrine. *Id.* at 370. The court reasoned that if the risks of the activity are perfectly obvious or fully comprehended, a plaintiff's consent is implied from the act of electing to participate and defendant has performed his or her duty.

Under the primary assumption of the risk doctrine, Wyatt is barred from recovery because after the Sirens took appropriate measures to rectify the unsafe playing field, he comprehended the danger, and intelligently acquiesced in it by continuing to play in the game. In *Sheppard*, even though the long-jumping pit in question was inadequately prepared, the court stated that defendant would not be liable if the plaintiff had observed the dangerous conditions, and impliedly consented to the dangers through continued participation. *Sheppard*, 904 S.W.2d at 259. Additionally, in *Buzan*, plaintiff's injuries during a collision at home plate were an inherent risk of the game and the risk of injury was obvious and fully comprehended by the plaintiff's participation in the activity. *Buzan*, 857 S.W.2d at 370. Similarly, here, not only did the Sirens appropriately and obviously place a bright orange cone over the affected area moments before game time, but Wyatt observed and further appreciated the risk by voluntarily electing to participate for greater than seventy-five percent of the game before the injury occurred. Just as the *Sheppard* and *Buzan* courts held that the plaintiffs should be barred from recovery under the primary assumption of the risk doctrine, this Court should similarly hold that the Sirens did not breach its duty of care because Wyatt assumed the risk by appreciating the danger prior to and during the game, and impliedly consented to the risk through his participation in a majority of the game.

B. Assuming *Arguendo* That The Tulania Sirens Football Team Breached Its Duty Of Care, It Did Not Proximately Cause The Injuries Wyatt Suffered.

To determine whether the failure to exercise one's duty of care was the proximate cause of the injury, this Court has held that proximate cause should be defined as "any cause which, in natural or probable sequence, produced the injury complained of." *CSX Transp. Inc. v. McBride*, 564 U.S. 685, 689 (2011); *see also Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (holding that the lower court did not err in ruling that the Captain's *extraordinary* negligence was the sole and proximate cause of the injuries suffered). This Court has harped on the lack of any

clear-cut definition of "proximate cause." *McBride*, 564 U.S. at 701. However, it stated that common-law formulations include, the "immediate" or "nearest" antecedent test; the "efficient, producing cause" test; the "substantial factor" test; and the "probably," or "natural and probable" consequence test. *Id.*

Here, the Club's upkeep of the field did not proximately cause Wyatt's injuries because Wyatt's self-inflicted fatigue directly resulted in the abnormal sidestep around the area behind the end zone, and thus directly caused the injury to occur. In 2018, a study was conducted on NFL injuries in the post 2011 CBA era.[1] It revealed that excessive short-term acute workloads can lead to fatigue, overwhelming fitness, and an increase in risk of injury. *Id.* The study classified "Conditioning-Dependent Injures," against "Non-Conditioning Dependent Injuries," ultimately showing that soft-tissue knee injuries fall under the Conditioning-Dependent label. *Id.* Here, leading up to the important division rival game, Wyatt had been "training tirelessly" and was "flushed with nerves." As a focal point of the Green Wave offense, Wyatt was on the field more times than not. In fact, the team was dependent on his "agile feet" as a "critical pawn in the offensive scheme." Just as the empirical data indicates that over usage directly causes knee injuries in the NFL, here, the evidence indicates that Wyatt was used more than the average offensive player, which leads to deterioration of one's stamina through the course of a football game. Taking into account all of these considerations, Wyatt's argument that the Sirens' upkeep of the field was the "proximate cause" of his injury is without merit. Wyatt's knee injury "occurred in a natural or probable sequence" stemming directly from his tireless training leading up to the game, and his over usage throughout the course of the contest.

[1] ZACHARY O. BINNEY, KYLE E. HAMMOND, MITCHELL KLEIN, MICHAEL GOODMAN, A. CECILE J.W. JANSSENS, DEP'T OF EPIDEMIOLOGY, ROLLINS SCHOOL OF PUBLIC HEALTH, EMORY UNIVERSITY; DEP'T OF ORTHOPEDICS, EMORY UNIVERSITY SCHOOL OF MEDICINE, NFL INJURIES BEFORE AND AFTER THE 2011 CBA 3 (2018).

Thus, even if this Court finds that the Sirens breached its duty of care, Wyatt's claim must fail because his injuries were proximately caused by extraneous factors that were outside the control of the Sirens.

CONCLUSION

For the aforementioned reasons, the Tulania Sirens respectfully request that this Court reverse the Fourteenth Circuit's Decision on both issues.

Respectfully submitted,

Team 10
Counsel for the Tulania Sirens Football Team