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ISSUES PRESENTED

I. Whether the First Amendment extends to a professional sports team who, with nonconsenting families and children present, sought to increase attendance and viewership by unveiling and broadcasting on television an obscene topless mermaid mascot during a Thanksgiving Day game.

II. Whether a professional football team acted unreasonably and thus failed in their duty of care when, before a game, the team elected to fix an exposed patch of concrete on the field by merely placing a small cone near the affected area which caused to a player to slip on the concrete during the game and suffer a season-ending injury.

STATEMENT OF THE CASE

This case comes before the Supreme Court on writ of certiorari. R. 1. Although this case involves two separate actions, both involve incidents surrounding a Thanksgiving Day football game ("game") between the New Orleans Green Wave ("Green Wave") and the Tulania Sirens ("Sirens"), the petitioner in both actions. R. 5. The two claims were consolidated by the Southern District Court of Tulania ("District Court"). R. 5.

The two respondents in this case are Ben Wyatt ("Wyatt") and the People Against Sexualization of Women's Bodies ("PAWSB"). R. 12. PAWSB is a Tulania public interest group which protects women from sexualization and exploitation. R. 12. Wyatt is a professional football player for the Green Wave and suffered a season-ending injury while slipping on a patch of exposed concrete on the Sirens' field. R. 12.

The first claim involves a First Amendment issue which arose after the Sirens, with hundreds of families watching, decided to unveil a topless mermaid as their new mascot. R. 12. Petitioners alleged the mascot was obscene and sought to enjoin its further use. R. 5. The second claim is a negligence suit brought by Wyatt after the Sirens made a second choice not to replace patch of exposed concrete on their football field, resulting in Wyatt's season-ending injury. R. 10.

I. Issue I

In Louisiana, the love of football is as deep-rooted as religion. R. 12. For many in Louisiana, there is no greater tradition than watching their local teams, the Sirens and the Green Wave, play on Thanksgiving Day. R. 12. The Thanksgiving Day game has become a family affair for both teams' fans. R. 12. Each year, hundreds of families pack the teams' respective stadiums to give their children the once in a lifetime opportunity to watch their heroes in action. R. 12. Others huddle around televisions at home, watching every play surrounded by their loved ones. R. 12. This past season, Green Wave and Sirens fans could not contain their excitement as the stars aligned and the Sirens were scheduled to host their divisional rival, the Green Wave, at Yulman Stadium ("stadium") on Thanksgiving. R. 12.

Seeking to capitalize on the electric excitement and anticipation in the air, the Sirens marked Thanksgiving as the game that they would reveal their new mascot. R. 7, 12. In order to further bolster attendance and viewership, the Sirens mailed unsolicited pamphlets to Tulania homes which advertised the unveiling of the new mascot. R. 7, 12. The pamphlet boldly yet cryptically stated, "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" R. 12.

As anticipated, as Thanksgiving arrived, families showed up to the stadium in droves, eager to create memories with their children. R. 12. However, upon entering the stadium, families' excitement turned to horror as the once child-friendly environment was overrun with egregious displays of a mermaid with her breasts fully exposed. R. 12. Unfortunately, despite mermaid's historically elusive nature in the wild, on Thanksgiving, mermaid sightings were anything but rare throughout Louisiana. R. 12. For those in attendance, the mermaid covered the stadium's hallways and alleys. R. 12. For those watching on television, the topless mermaid

slithered into every Tulania and New Orleans home each as mid-field was graffitied with the mascot. R. 12. Even those who chose not to watch the game were subjected to this obscene mascot, as Sirens employees shoved fliers depicting the topless mermaid into the faces of those who walked by the stadium. R. 12.

Long after the game ended, many in the community remained haunted by the mermaid which was now burned into their eyes and the eyes of their children. R. 7, 12, 14. Many groups within the community, including the PAWSB, let their offenses be heard publicly. R. 12. In an attempt to calm the turbulent waters spawned by the topless mermaid, the city of Tulania passed a law stating 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, publishes, prints, exhibits, distributes, or offers to distribute, or has in his/her possession with intent to distribute or to exhibit to offer to distribute, any obscene matter is guilty of a misdemeanor." R. 12.

After Tulania passed the statute, Wyatt and PASWB filed suit against the Sirens in the Southern District of Tulania alleging the display and dissemination of the mascot was obscene and therefore violated Tulania criminal law. R. 13. The Sirens contended that the mascot was not obscene, and thus protected by the First Amendment's right to freedom of speech. R. 13. In order to resolve the dispute, the District Court applied the three-pronged obscenity test laid out by the Supreme Court in *Miller v. California*. R. 13-16. In its application of *Miller*, despite abundant evidence of widespread community offense, the District Court opined that Wyatt and PASWB failed to prove that, under community standards, a topless mermaid appealed to the prurient interest and was therefore not obscene. R. 16. As a consequence, the District Court found that the mascot was protected by the First Amendment. R. 16.

However, on appeal, the Fourteenth Circuit, reviewing the record and case *de novo*, stated that the "District Court erred in exercising its own, personal judgment in deeming that . . . the image of a topless woman would not be offensive to many members of the public." R. 7. The Fourteenth Circuit further stated that "[w]hether or not the district court *agrees* with the viewers who are offended this this image, there is no legal basis for *protecting* this team's right to make this image an inescapable and constant presence for families who enjoy professional football throughout the country." R. 8. Therefore, the Fourteenth Circuit reversed the District Court's erroneous decision and held that the topless mermaid was obscene and not protected by the First Amendment. R. 8, 10.

II. <u>Issue II</u>

Unfortunately, according to both the District Court and Fourteenth Circuit, the Sirens' decision to parade a topless mermaid around the stadium was not the only harmful decision they made on Thanksgiving. R. 10, 20. Instead, before the game, the Sirens refused to fix an exposed patch of concrete on their field, causing a season-ending injury to Wyatt, the Green Wave's star wide receiver. R. 10, 17.

Before the game even started, a Sirens player dove for a ball and slid on the turf. R. 17. While sliding, the Sirens players' facemask ripped through the turf exposing a large patch of exposed concrete located just ten feet behind the left side of the end zone. R. 17. Despite the Sirens having discovered the exposed concrete before the game, giving their grounds crew plenty of time to patch the turf, the Sirens chose to merely place an orange cone, whose base was not even large enough to cover the affected area, partially over a segment of the concrete. R. 17.

In the middle of the fourth quarter of a close game, Wyatt caught a touchdown pass in back-left corner of the end zone. R. 17. The force of Wyatt running full speed carried him

through the end zone and, unbeknownst to him at the time he was running his route, towards the cone. R. 17. Immediately after catching the touchdown, Wyatt quickly turned towards the back of the end zone and attempted to make a sharp right to avoid the cone by planting his left-foot on the field. R. 17. Unfortunately, instead of planting his left foot on turf, Wyatt planted on tbe segment of concrete that had remained uncovered by the cone. R. 17. As Wyatt's foot slipped out from under him, he and his dreams of finishing the season he had worked so hard to prepare for, came crashing down on the field. R. 12, 17.

Wyatt brought a negligence suit against the Sirens in District Court. R. 12. After the Sirens admitted at trial that it is customary for a grounds crew to be present on game days which could have patched the exposed concrete with sod, the District Court found the Sirens were negligent. R. 19. Subsequently, the Fourteenth Circuit affirmed. R. 20, 10.

SUMMARY OF THE ARGUMENT

This Court should affirm the Fourteenth Circuit's decisions by finding that: (1) the Sirens' use, display, and wide dissemination of a mermaid with breasts fully exposed as a mascot for a professional football team was obscene and thus not protected by the First Amendment; (2) the Sirens were negligent when they made an unreasonable decision to place a cone partially over an exposed patch of concrete on the field instead of patching the affected area which led to a player suffering a season-ending injury.

Regarding the First Amendment issue, this Court should affirm the Fourteenth Circuit's decision that First Amendment protection does not extend to the Sirens' display of an obscene mascot with exposed breasts. The Sirens' mascot, a mermaid with exposed breasts, was unveiled on Thanksgiving Day to a wide audience of game attendees, many of whom were families and

minors. Prior to the game, the Sirens instituted a promotional campaign where they sent unsolicited flyers and pamphlets bearing the image of the exposed mermaid to Tulania residents, advertising both the upcoming game and the new merchandise depicting the new mascot. The bare-chested mascot deeply disturbed the Tulania community and after the Thanksgiving game, a new law went in to affect regulating the sale and distribution of obscene matter throughout Tulania. Unmoved by community sentiment, the Sirens' continue to display their obscene mascot with impunity.

The Sirens' mascot is obscene. The average person applying contemporary community standards would find that the work: taken as a whole appeals to the prurient interest; depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable Tulania state law, and; taken as a whole, lacks serious literary, artistic, political, or scientific value. As the Sirens' mascot is obscene, commercial speech that violates Tulania law, it should not be afforded First Amendment protection, and this Court should affirm the Fourteenth Circuit's decision to enjoin the Sirens from use and distribution of their obscene material.

Turning to the negligence issue, this Court should affirm the Fourteenth Circuit's decision that the Sirens' were negligent by finding that the Sirens' decision to place a cone partially over an exposed patch of concrete on the field instead of patching the affected area before the game was unreasonable and a breach of the duty of care owed to Wyatt. The Sirens, as owners of the stadium, owed Wyatt, as a legal entrant of the stadium, a duty of reasonable care to discover and eliminate dangerous conditions on the field. Before the start of the game, the Sirens breached their duty when they attempted to remedy a segment of exposed concrete on the field by partially covering the exposed concrete with a cone instead of patching the turf. As the

proximate cause of the Sirens' severely unreasonable decision, Wyatt slipped on the exposed concrete and suffered a season ending injury.

Finally, the Sirens cannot escape liability under the "open and obvious" or "assumption of risk" doctrines. First, the exposed concrete was not an open and obvious danger to Wyatt who had no actual knowledge of the exposed concrete before, much less during the play which caused him to suffer injury. Second, Wyatt cannot be found to have assumed the risk of slipping on a patch exposed concrete on a professional football field is not an "inherent risk" professional football that an athlete is deemed to have assumed when deciding to participate in the game. Therefore, because the Sirens' failure to patch an exposed patch of concrete was a breach their duty of care and was the proximate cause of Wyatt's season-ending injury, this Court should affirm the Fourteenth Circuit's decision and find the Sirens negligent.

STANDARD OF REVIEW

Because there are no material facts at issue in either claim, this Court reviews the lower court's conclusions of law *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 233 (1991) (stating "application of *de novo* review should encourage a district court to explicate with care the basis for its legal conclusions."); *see Miller v. Cal.*, 413 U.S. 15, 15 (1973) (stating that "independent appellate review" is used for "constitutional claims when necessary.").

<u>ARGUMENT</u>

I. The First Amendment does not protect the Sirens' display of an obscene mascot in the form of a mermaid with exposed breasts as First Amendment protection does not extend to commercial speech which utilizes obscene sexual conduct to target both private and public audiences containing minors through interstate channels of media and commerce.

This court should affirm the Fourteenth Circuit's decision and find that the Sirens' mascot is obscene and does not qualify for First Amendment protection under both state and Federal law. The Supreme Court of the United States applies the test laid out in *Miller v. California* to determine whether a work is obscene and therefore not a protected form of expression under the First Amendment. 413 U.S. 15 (1973). In order to show that a work is obscene, the Respondent must show "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest…(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Id. at 16. The *Miller* Test is applicable to both federal and state law. Smith v. U.S., 431 U.S. 291, 299-300 (1977).

Tulania law describes sexual conduct as "every 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, 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." Sec. 12 Tulania Penal Code (2019). Additionally, Tulania law echoes federal law, Titles 18 U.S.C. 1460-70, which prohibit the possession with intent to sell or distribute obscenity, to send, ship or receive obscenity, to import obscenity across state boarders for purposes of distribution.

Here, the Sirens professional football team engaged in the display, distribution, and sale of unprotected, obscene speech for commercial benefit when they decided to both promote and reveal their new mascot, a mermaid with exposed breasts, during their Thanksgiving Day game against the Green Wave. Prior to the game, the Sirens sent unsolicited pamphlets to Tulania homes which both depicted and advertised the unveiling of the new mascot, a bare-breasted mermaid, and encouraged the sale of items which depicted the mascot to both adults and minors. The community immediately responded with strong public sentiments that the mascot appealed to a prurient interest, and consequently enacted Sec. 12 Tulania Penal Code (2019).

Unphased by the community's immediate and negative response to this violation of community standards, the Sirens proceeded to unveil an interactive, live mascot that engaged in patently offensive conduct, which due to being bare-chested, was sexual in nature. The use of this mascot was done solely to excite, involve, and entertain an audience for commercial gain. However, unlike other mascots, the Sirens exploited the exposed female body as the source of entertainment both on and off the field, and through multiple interstate channels of commerce, much to the discomfort of the attendees and viewers both young and old.

Therefore, because Wyatt can clearly establish that the Siren's mascot meets the guidelines of obscene expression, this Court should affirm the decision of the Fourteenth Circuit and hold that the Siren's mascot is obscene and unprotected by the First Amendment and thereby enjoin the Sirens from further displaying and promoting their new mascot.

A. <u>The average person, applying contemporary Tulania community standards would find that the Sirens' mermaid mascot, taken as a whole, appeals to the prurient interest.</u>

The District Court erred in its application of the *Miller* Test when it substituted its own belief about community standards disregarding public sentiment. A judge may act as a finder of fact in civil proceedings involving obscenity. *Alexander v. Virginia*, 413 U.S. 836 (1973). However, the court's determination should defer to the local community standards and its impact on an average, "reasonable" person. *Smith v. U.S.*, 431 U.S. 291, 309 (1977); *Penthouse Intern., Ltd. V. McAuliffe*, 610 F.2d 1353, 1363.

Because sex, nudity, and obscenity are not synonymous, a reviewing court must, look at the context of the material, as well as its content "taken as a whole." *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). Nudity specifically may have a different impact, and may or may not be obscene, its nature varying according to the part of the community it reaches and how it is used or displayed. *Roth v. U.S.*, 354 U.S. 484, 495 (1957) ("The line dividing the salacious or pornographic from literature or science is not straight and unwavering. Present laws depend largely upon the effect that the materials may have upon those who receive them…The conduct of the defendant is the central issue, not the obscenity of a book or picture…the materials are thus placed in context from which they draw color and character.") As stated by *Roth*, present laws depend upon the *effect* materials have upon those who receive them. *Id.*
Thus, while community standards do not necessarily follow changes in a State's statutory law, a state statute can be used as relevant evidence of evolving community standards. *Smith*, 431 U.S. at 310. Additionally, the prurient interest requirement is adjusted to social realities and assessed in terms of the sexual interests of the intended and probable recipient group. *Hamling v. U.S.,* 418 U.S. 87, 129 (1974).

Here, there is compelling evidence that the Sirens' mascot, taken as a whole, violated Tulania's contemporary community standards as material appealing to the prurient interest.

Tulania immediately drafted and executed a state statute after the Sirens' mascot unveiling in response to public outcry. R. 12. This statute made the sale, distribution, and exhibition, *inter alia*, of obscene matter a misdemeanor. Sec. 12 Tulania Penal Code (2019). While this alone is not dispositive of the contemporary community sentiment, the change in law is relevant evidence of a local community standard. *Smith*, 431 U.S. at 310.

Additionally, the inherent function of a mascot in a professional athletic event is to excite, arouse, and entertain the audience. It is the duty of the Sirens' mermaid mascot to excite and entertain. While exposed breasts alone are not obscene, the combination of the exposed mascot and how it is being used in this context, is obscene. "*Purient,*" as defined in *Roth*, is "material having a tendency to excite lustful thoughts." *See Roth*, 352 U.S. at 487, n. 20. It is also defined as "itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longs; of desire, curiosity, or propensity, lewd." *Id.* In the context of professional football, which is a male dominated, hard-hitting and arguably violent sport, the presence of an exposed female mermaid mascot, whose very presence is meant to excite, entertain, and interact with the crowd, appeals to the prurient interest. Furthermore, as the Sirens are a professional football team, their games are broadcasted across television. Of all forms of communication, broadcasting has the most limited First Amendment protection. *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 728 (1978).

B. The Sirens depicted or described, in a patently offensive way, sexual conduct specifically defined by Section 12 of the Tulania Penal Code (2019) by knowingly sending for sale and distribution, preparing, publishing, printing, and exhibiting, pictures, pamphlets, and live performances of a mermaid mascot with exposed breasts.

The Sirens’ commercial use of a mermaid mascot with exposed breasts in both advertising materials and during live games both depicted and displayed in a patently offensive way, sexual conduct specifically defined by Section 12 of the Tulania Penal Code (2019). The second prong of the *Miller* Test requires a determination of “whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.” *Miller*, 413 U.S. at 24. Under Tulania state law, sexual conduct is defined as: “[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, publishes, prints, exhibits, distributes, or offers to distribute, or has in his/her possession with intent to distribute or exhibit or offer to distribute any obscene matter is guilty of misdemeanor.” Section 12 of the Tulania Penal Code (2019).

Section 12 of the Tulania Penal Code (2019) denotes “sexual conduct” as a series of actions including the exhibiting and distributing obscene matter. While “sexual conduct” itself, outside of Tulania, could mean a myriad of things under state regulation, Tulania defines “sexual conduct” for the manner in which they intend to regulate it. The scope of the activities the law seeks to regulate are those actions which involve the sale, distribution, and exhibition of obscene matter. These regulations do not extend to regulating that which is one has in one’s possession for private use and enjoyment nor does it seek to edit or regulate the content itself.

The regulation, however, does not speak to what constitutes “obscene matter.” The Fifth Circuit addressed this issue in *U.S. v. Salcedo* stating that “where the relevant statute does not further define obscenity, we look under the second prong to whether the allegedly obscene material falls within “patently offensive representations or descriptions of that specific ‘hard-core’ sexual conduct given as examples in *Miller*.” 924 F.3d 172, 177 (5th Cir. 2019). The Fifth

Circuit goes on to state that the Court in *Miller* "singled out" in its examples: "[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "[p]atently offensive representations or depictions of masturbation, excretory functions, and lewd exhibitions of the genitals." *Id*. at 178.

Here, it is crucial to highlight that while the court in *Miller* offered examples of obscene, patently offensive representations, this second prong is ultimately guided by what the average person, applying contemporary community standards, finds to be patently offensive sexual conduct or "hard-core." *See U.S. v. Loy*, 237 F.3d 251, 262 (2001); *Smith v. United States*, 431 U.S. 291, 301 (1977). As described in the analysis of the first prong, there is great evidence that the community of Tulania found the work, taken as a whole, to appeal to the prurient interest. The evidence described in the first prong of the analysis in addition to the description of sexual conduct in Section 12 of the Tulania Penal Code, the Sirens' use of a bare-chested mascot constitutes the distribution of obscene matter in a patently offensive way.

Lastly, it is important to acknowledge that the use of the exposed mascot is for commercial gain. Section 12 of the Tulania Penal Code seeks to regulate the manner in which persons who wish to profit and distribute obscene material, do so. While the commercial nature of the mascot will be explored in greater detail in the analysis of *Miller's* third obscenity prong, it is necessary to underscore that Tulania's choice to expose the chest of their mermaid mascot is tantamount to what the Supreme Court has recognized in precedent as "pandering." *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 676 (2004). "Pandering" is defined as the engagement of commercial entities in the "sordid business" of "deliberately emphasizing the sexually provocative aspects of [their non-obscene products], in order to catch the salaciously disposed." *Id.* The Supreme Court has held "pandering" by commercial entities to be

"constitutionally, unprotected behavior." *U.S. v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 831 (2000). It is within a State's broad power to regulate commerce and protect the public environment by regulating commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public. *Paris Adult Theatre v. Slaton,* 413 U.S. 49, 69 (1973).

Here, while a mermaid or even a mermaid with exposed breasts is not in itself obscene, the decision by a commercial entity to use the exposed female body for commercial gain as a team mascot, both in advertisements and during live games, is obscene. It is expected behavior for a mascot to engage in physical comedy and slapstick and other performance means to entertain the audience. To put an exposed female in such a role is not respectful or inspiring. It is exploitative and demeaning. Tulania has an extremely compelling interest in the regulation of exploitative commercial regimes that cause both juveniles and nonconsenting adults to be exposed to obscene matter.

C. **The Sirens' mermaid mascot, taken as a whole, lacks serious literary, artistic, political, or scientific value as its primary purpose is for entertainment and commercial exploitation.**

The Sirens' bare-chested mermaid mascot, taken as a whole, lacks serious literary, artistic, political, or scientific value as evidenced by the Sirens' promotional materials, the unveiling of their mascot, and in their questionable decision to leave her exposed despite potential community harm. While community standards are used to determine whether a work is patently offensive, a "reasonable person" standard must be used to determine whether a work lacks serious merit. *U.S. v. Loy*, 237 F.3d 251, 262 (2001).

Pro-football is a large-scale, interstate, commercial enterprise. The primary function of mascots within professional sports, and in commercial enterprises in general, is to function as a

symbol for the team, a branding tool, to excite and entertain audiences both live and broadcast. While many works that excite and entertain that have serious literary, artistic, political, or scientific value (i.e. the Venus de Milo), the Sirens' bare-breasted, female mermaid mascot is an offense to serious literary, artistic, political, or scientific depictions of exposed woman, all of which afford the female figure a modicum of dignity. Here, the female figure and exposed breasts are being used to obscenely emphasize a non-obscene mythological character to a widespread audience of both adults and children for commercial gain.

The lack of seriousness with which the Sirens' referred to their mascot can be seen in the focus of their promotional materials. The promotional pamphlet, which the Sirens' sent out to unsolicited to members of the Tulania community, contained only the location, the time of the event, the picture of the exposed mermaid, and the phrase in bold letters "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" There were no sentiments of thoughtfulness expressed or speech of literary, artistic, political, or scientific merit shared. Only the sales gimmick. This pandering on behalf of the Sirens continued during the game. There wasn't a single image of the bare-chested mascot in a revered position on the field, the image of the mascot was everywhere throughout the stadium, including on the flyers that were provided to every community member who passed by the stadium. Such inundation with an exposed mascot is not tasteful or respectful, it is exploitative. The exposed mascot was not meant to make a serious impact. If it were, the manner in which the female mascot was presented, and would continue to be presented, would be serious, not a deluge.

Non-obscene mascots themselves as expressive speech, fall under commercial speech, as they promote some type of commerce. Lawful commercial speech that is not misleading is

subject to an intermediate level of scrutiny, and suppression is permitted whenever it "directly advances" a "substantial" governmental interest and is "not more extensive than necessary to serve that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 573 (1980). Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or is misleading. *Id*. at 563-564; *Florida Bar v. Went For It, Inc*. 515 U.S. 618, 624 (1995). Here, the Siren's mascot falls under commercial speech that concerns obscene, unlawful activity. Therefore, this Court should enjoin the Sirens' from further use of this obscene mascot.

II. The Sirens were negligent by failing to use reasonable care to eliminate the risk created by the presence of an exposed patch of concrete existing on the field throughout the entire game.

The court should affirm the District Court and Fourteenth Circuit's decisions and find that the Sirens were negligent in their decision to merely place a cone over an exposed patch of concrete on their field rather than replacing the turf before the game. Under Tulania law, a plaintiff must show four elements in order to establish a prima facie case of negligence. A plaintiff must show that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of duty was the proximate cause of the plaintiff's injury; and (4) the plaintiff suffered damages. *Green v Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014). A defendant in a negligence case can assert that the hazard was an "open and obvious," and as such that he had no duty to the plaintiff. *Helms v. Chicago Park Dist.*, 630 N.E.2d 1016, 1020 (Ill. App. Ct. 1994). Additionally, the defendant can argue that the plaintiff assumed the risk inherent in the activity, relieving the defendant of liability. *Shin v. Ahn*, 165 P.3d 482, 489 (Cal. 2007).

Here, as the owner of the Stadium, the Sirens owed Wyatt, a legal entrant of the stadium, a duty of reasonable care to discover and eliminate dangerous conditions on the field. Before the start of the game, the Sirens breached their duty when they failed to use reasonable care in their attempt to remedy a segment of exposed concrete on the field by partially covering the exposed concrete with a cone, instead of patching the turf. As a result of the Sirens' severely unreasonable decision, Wyatt suffered a season ending injury, which caused him emotional pain and suffering and cost him millions of dollars in medical bills. The exposed concrete was not an open and obvious danger, nor did Wyatt assume the risk of slipping on a concrete surface. Thus, the Sirens cannot successfully assert either of those defenses here.

Therefore, because Wyatt can clearly establish the four elements required for a negligence claim, this Court should affirm the decision of both the District Court and Fourteenth Circuit and hold that the Sirens were negligent.

A. The Sirens owed Wyatt a duty of reasonable care which required them to take reasonable measures to discover and eliminate the dangerous condition of exposed concrete on the field.

The Sirens owed Wyatt a duty of care to take reasonable steps to eliminate the grave dangers an exposed patch of concrete on the field presented to all players. As owners of the stadium, the Sirens have a duty to all entrants of the stadium to use reasonable care to discover and eliminate conditions that pose risks to those entrants. An exposed patch of concrete located only feet from the end zone throughout the game was a dangerous condition, and therefore, upon discovery of the exposed concrete, the Sirens had a duty to use reasonable care to eliminate that condition.

A landowner has a duty of reasonable care to entrants regarding conditions that pose risks to those entrants. Restatement (Third) of Torts §51 (Am. Law Inst. 2012). Encompassed in this

duty is using reasonable care to discover and eliminate dangerous conditions on the land. *Id.* §51 cmt. i. In some instances, transient precautions, such as a verbal warning, can satisfy this duty of care. *Id.* §51 cmt. h. However, when the risk of harm posed by the condition exceeds the burden of eliminating the condition through a durable precaution, eliminating the condition is required. *Id.*

A section of exposed concrete just feet behind the end zone is a condition that posed risks to entrants on the Sirens' field. Thus, the Sirens, as owner of the stadium, owed a duty of reasonable care to Wyatt, an entrant to the stadium, with regard to this dangerous condition. The Sirens knew of the exposed concrete, and admitted so at trial. Because the obvious risks posed by exposed concrete greatly outweighs the burden of eliminating that condition, the duty of reasonable care required the Sirens to eliminate the condition by repairing the turf. The exposed concrete poses risk of serious injury, as illustrated by that which Wyatt suffered. Further, as the Sirens admitted, they could have easily completely fixed the turf and removed the risk before the game. Therefore, it is evident that the Sirens had a duty to Wyatt to patch the hole in the turf.

B. Tulania breached its duty when it failed to repair the dangerous condition on the field.

This Court should find that the Sirens breached their duty of care to Wyatt because they did not use reasonable care to eliminate the risks posed by the exposed concrete on the field. Because whether a breach of duty occurred is a question of fact, unless no reasonable jury could differ, determining whether there has been a breach varies on a case by case basis. *Cox v. Paul,* 828 N.E.2d 907, 911 (Ind. 2005). *See also* Restatement (Third) of Torts §51 cmt. i. In determining whether a breach of duty occurred, the primary factors to consider are the foreseeability of the potential injury, the severity of the potential injury, and the burden of eliminating the risk. *Id. See also Basso v. Miller,* 352 N.E.2d 868, 872 (N.Y. 1976). A landowner

thus breaches his duty when he allows a dangerous condition that poses a foreseeable and severe risk to persist when fixing that condition imposes a low burden. *See generally Treps v. City of Racine*, 243 N.W.2d 520 (Wis. 1976) (imposing liability when a landowner allowed a dangerous condition to persist on its premises). But see *Praetorius v. Shell Oil Co*., 207 So.2d 872, 873 (La. Ct. App. 1968) (deciding the landowner did not breach its duty of care in part because the small depressions did not make the field unreasonably safe or pose a severe risk to players).

For example, in *Treps,* the court held that the city, which owned the field, breached its duty of care to an athlete when it failed to adequately repair a hole on the city's property. *Treps,* 243 N.W.2d 520 at 523. There, the athlete stepped into a hole while warming up in the parking lot adjacent to the field before a game. *Id.* at 521. The court in *Treps* found that because the city was under a duty to foresee the hole as a severe hazard for people, it breached its duty when it permitted the hole to persist, rather than fixing it. *Id.* at 523.

Just as in *Treps*, where the city breached its duty of care by failing to repair a dangerous condition that created foreseeable and severe risk of injury, here, the Sirens breached their duty of care by allowing the exposed concrete to persist, rather than remedying it. The exposed concrete created a very foreseeable and severe risk, while the burden of eliminating that risk was minimal. Analyzing the factors set out in the Restatement and *Basso*, the actions taken by the Sirens are even more clearly a breach of duty than the actions in *Treps*. While the severity of injury in both cases may be similar, the foreseeability of the injury here is greater while the burden of eliminating the condition is lower. Given the proximity of the exposed concrete to the field, and the fact that it is impossible, even for the best athletes, to stop on a dime after running full speed, the likelihood that one would slip on the concrete during the course of the game is very high. Additionally, the burden of eliminating the condition is infinitesimal. The Sirens

admitted at trial that the turf could have been fully repaired easily before the game started. All three factors here suggest that using reasonable care would result in fixing the turf, so that the exposed concrete was no longer present, rather than simply placing a cone over part of the area. Therefore, this Court should affirm the Fourteenth Circuit's decision and find that the Sirens breached their duty of care.

C. The Sirens' failure to adequately remedy the defect in playing condition was the proximate cause of Wyatt's season-ending injury.

This Court should find that the Sirens' breach of duty was the proximate cause of Wyatt's season-ending injury. Proximate cause, as defined by the Supreme Court of the United States, is "any cause which, in natural or probable sequence, produced the injury" suffered by the plaintiff. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701-2 (2011). Here, it is clear that the Sirens' breach was the proximate cause of Wyatt's injury. The Sirens' breach of duty resulted in the presence of an exposed patch of concrete just feet from the end zone throughout the game. As both the District and Circuit Courts noted, had the concrete been completely covered by turf, Wyatt would not have had any concrete on which to slip. There was significant testimony at trial stating that Wyatt's injury was not due to his making a football move, but rather due to his slipping on the concrete surface. It is clear that had the concrete been covered, Wyatt would not have suffered a season-ending injury and been subjected to the physical and emotional pain and astronomical medical bills that accompany such a serious injury. Therefore, because the Sirens' failure to cover the concrete patch proximately caused Wyatt to slip and injure his knee, this Court affirm the Fourteenth Circuit's decision.

D. Tulania cannot assert the "open and obvious" or "assumption of risk" defense to negate liability.

This Court should find that that the hazardous condition, the exposed concrete on the field, was not an "open and obvious" one, and as such the Sirens remain liable for their negligence. A dangerous condition is "open and obvious" only when "even a child would generally be expected to appreciate and avoid [it]." *Helms,* 630 N.E.2d 1016 at 1020. When a dangerous condition is "open and obvious," a landowner owes no duty to visitors to remedy the condition. *Id*. However, in order for a dangerous condition to be deemed "open and obvious" the entrant must have actual knowledge of the danger. *See Zuzan v. Shutrump*, 802 N.E.2d 683, 685 (Ohio Ct. App. 2003) ("the open and obvious doctrine is based upon the [entrant]'s knowledge of the danger").

In *Helms*, the plaintiff fell from a piece of equipment on a playground onto the asphalt. *Helms,* 630 N.E.2d 1016 at 1017. The court held that the risk of falling onto a hard surface on a playground is an "open and obvious" one. Subsequently, the court held that the playground owner owed no duty of care to plaintiff and therefore, the playground owner was not negligent. *Id*. at 1020. *Compare with Treps*, 243 N.W.2d 520 (stating that a hole in a parking lot was not an open and obvious danger and the landowner did owe a duty of care).

Here, the danger that was present due to the exposed concrete on the field is not an "open and obvious" one. When playing on a football field, a child would not recognize the risk of a patch of exposed concrete. The condition here, a defect in the premises, is much more similar to that in *Treps*, also a defect in the premises, than that in *Helms*, where the risk was inherent in the environment. Further, Wyatt did not know of the condition. As such, the open and obvious doctrine is inapplicable. There is no evidence in the record suggesting that the Sirens gave any warning to the players of the exposed concrete, other than placing the orange cone over part of the surface. Simply placing an orange cone over part of the area is not enough to cause Wyatt to

have knowledge of the dangerous condition. Wyatt only became aware of the orange cone and concrete on the play during which his injury occurred. Moreover, as the lower courts noted, even though he saw the cone while moving at full speed on the play, he cannot be expected to form a full risk analysis of what that cone means while attempting to complete an athletic feat. This is compounded when one considers that there are other orange pieces of equipment similar to cones (such as pylons) in that area.

Alternatively, even if the Court decides that the danger was an open and obvious one, the Sirens are still not relieved of liability. In the event a landowner should still recognize and anticipate the risk of harm, despite an entrant's knowledge of the danger, he still has a duty to take reasonable precautions. RESTATEMENT (THIRD) OF TORTS § 51 cmt. k. Additionally, when a risk remains despite an entrant's attempt to avoid it, the landowner has a duty to use reasonable care in regard to these residual risks. *Id.* In this sense, the open and obvious nature of the condition affects the determination of whether reasonable care was used. *Id*. Here, because the condition was located so close to the end zone, there was considerable residual risk despite the condition being open and obvious. As noted in the subsection on breach above, the burden on the Sirens to eliminate this risk was negligible. Thus, using reasonable care would still warrant patching the turf to completely eliminate the risk.

Further, this Court should find that Wyatt did not assume the risk of slipping on an exposed concrete surface when he participated in the football game. In a sports context, when a plaintiff chooses to participate, the doctrine of "assumption of risk" states that there is no liability when the particular risk that caused the plaintiff's injury is "inherent in [that] sport." *Shin v. Ahn*, 165 P.3d 482 at 489. However, the bar on negligence liability provided by this doctrine is not absolute. The risks assumed by a participant are only those that are "natural and ordinary"

risks in the game. *See Chase v. Shasta Lake Union Sch. Dist*., 359 Cal.App.2d 612, 616 (Cal. Ct. App. 1968) ("if a danger, such as a defect in the premises, occurs outside the range of those inherent in the game, he assumes the danger only if he knows it"); *see also Sheppard v. Midway R-1 Sch. Dist*., 904 S.W.2d 257, 264 (Mo. App. 1995) (noting that though the athlete assumed the risk of a bad landing in the long jump landing pit, she did not assume the risk of landing in a defective pit). Further, the doctrine is not applicable if the risk is "unassumed, concealed, or unreasonably increased." *Altagarcia v. Harrison Cent. Sch. Dist*., 24 N.Y.S.3d 764, 766 (N.Y. App. Div. 2016).

Here, the assumption of risk doctrine is inapplicable and does not relieve the Sirens of its liability. Just as in *Sheppard*, where the athlete assumed the risk of a bad landing but not landing in a defective landing zone, Wyatt did not assume the risk of playing on a defective field here. Stepping and slipping on exposed concrete is not a risk inherent in playing football on a professional field and Wyatt was unaware of the outside risk created by the Sirens' failure to act reasonably. Additionally, the Sirens' failure to properly remedy the concrete patch "unreasonably increased" the risk posed to players. Thus, Wyatt did not assume the risk of slipping on a concrete surface when he decided to participate in the game. Therefore, this Court should affirm the Fourteenth Circuit's decision and find that the Sirens are not shielded from their negligence under the "assumption of risk" doctrine.

This Court should find that the Sirens acted negligently throughout the Thanksgiving Day game. Upon discovery of a dangerous condition on the field, the Sirens, as owners of the stadium, had a duty to take reasonable steps to eliminate that condition. The Sirens breached their duty of care when they made a careless and incautious pregame decision to only place a cone over an exposed patch of concrete in the field instead of replacing the turf. Because the

exposed concrete remained present during the game and caused Wyatt to slip, the Sirens' breach was the proximate cause of Wyatt's season-ending injury. Finally, the Sirens are not shielded from liability as the dangerous condition was not "open and obvious" to Wyatt nor did Wyatt assume such an inconceivable risk when he participated in the game. Therefore, this Court should affirm the Fourteenth Circuit's decision and find that the Sirens were negligent and allow Wyatt recovery for damages associated with his hospital bills, lost wages, and pain and suffering.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that this Court affirm the decision of the Fourteenth Circuit.

This the 21st day of January, 2020.

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Team Number