No. 09-215

In the

SUPREME COURT OF THE UNITED STATES OF AMERICA

TULANIA SIRENS FOOTBALL TEAM,

Petitioner,

v.

BEN WYATT; THE CENTER FOR PEOPLE AGAINST SEXUALIZATION OF WOMEN'S BODIES**;**

Respondent.

BRIEF FOR RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

Team No. 12

Attorneys for Respondent

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QUESTIONS PRESENTED

I. Whether professional sports teams are protected by their First Amendment rights to display an obscene mascot?

II. Whether an opposing team can be found negligent for a player's injuries during a game that resulted from an imperfection in the stadium?

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STATEMENT OF THE FACTS

On Thanksgiving Day, Defendant-Petitioner, the Tulania Sirens Football Team ("Petitioner"), played a game before members of the Tulania and New Orleans communities, which included children and their families. R. at 12. Prior to the game, Petitioner underwent a process of rebranding and created a new mascot depicting a mermaid with exposed breasts. R. at 12. In an effort to promote the rebranding of the team as well as the Thanksgiving Day game itself, Petitioner mailed unsolicited pamphlets portraying the nude mascot to every citizen of Tulania, including Plaintiff-Respondent, Ben Wyatt ("Mr. Wyatt"), and his family. R. at 12. Mr. Wyatt and his children were just a few members of the Tulania community who were greeted by a giant, topless mermaid when they arrived at Petitioner's stadium for the Thanksgiving Day game. R. at 12. Images of the mascot were displayed throughout the stadium, and every community member who passed by the stadium, irrespective of whether they were attending the game, received fliers of the new mascot. R. at 12.

Various organizations and community members who had either attended or watched the game on television voiced their concerns with Petitioner's new mascot. R. at 12. Mr. Wyatt and his wife's organization, the Center for People Against Sexualization of Women's Bodies ("PASWB"), were among those who spoke out against the mascot. R. at 12. Due to the volume of complaints received, the city of Tulania responded to Petitioner's new mascot by passing a law prohibiting the distribution of "obscene" imagery. R. at 12. Mr. Wyatt and PASWB brought suit against Petitioner, seeking to enjoin Petitioner from further use of the mascot. R. at 12. The United States District Court for the Southern District of Tulania found in favor of Petitioner on this issue. R. at 16. Mr. Wyatt appealed, and the Fourteenth Circuit reversed on the district court's ruling, holding that Petitioner could be enjoined from using the mascot because the

mascot met the definition of obscenity and, therefore, was not protected by the First Amendment. R. at 10. Petitioner subsequently appealed. R. at 1-2.

Petitioner also appealed the Fourteenth Circuit's decision to hold Petitioner responsible for Mr. Wyatt's career-ending knee injury. R. at 1-2, 5. As the wide receiver for the New Orleans Green Wave ("the Green Wave"), Mr. Wyatt played in the Green Wave's Thanksgiving game against Petitioner at Yulman Stadium, which was located in Petitioner's hometown of Tulania. R. at 17. During pregame warmups at the stadium, the mask of a Sirens player shoved into the turf of the stadium's football field. R. at 17. As the player dove for a catch, his mask exhumed a large portion of the turf, exposing a patch of cement in the process. R. at 17. "This missing patch of turf was located about 10 feet behind the left side of the end zone." R. at 17. Tulania staff later placed an orange cone over the cement patch. R. at 17. During the fourth quarter of the Thanksgiving Day game, Mr. Wyatt "ran into the end zone catching a well-placed pass to the back-left corner." R. at 17. Upon catching the ball, Mr. Wyatt's momentum propelled him through the end zone towards the orange cone. R. at 17. Despite Mr. Wyatt's best efforts to avoid the cone, his left foot landed on the cement patch. R. at 17. Mr. Wyatt then slipped, fell, and injured his left knee. R. at 17. Mr. Wyatt's injury ended his football season as well as his career as a professional football player. R. at 5, 17. Mr. Wyatt later sued Petitioner for negligently maintaining the premises of Yulman Stadium. R. at 5. At trial, substantial evidence established "that the missing patch of turf was inadequately patched in preparation for the game and was not reasonably safe." R. at 19. The evidence also demonstrated that Mr. Wyatt's injury "resulted not from a bad side-step, an inherent risk of the sport of football, but rather from the condition of the patch of missing turf." R. at 19. Accordingly, the district court found Petitioner negligent and liable for Mr. Wyatt's injury. R. at 9. The Fourteenth Circuit affirmed this ruling, noting that

"[t]he only 'reasonable' way to perform [its] duty of care would have been to fill [the] hole" created by the missing patch of turf. R. at 9. The Fourteenth Circuit emphasized that the use of an orange cone served as an insufficient warning of risk "because a professional football player, running at full speed, [could not] be expected to make a full and reasoned risk-assessment of a small orange cone as [he] barrel[s] through the end zone after a touchdown." R. at 9.

SUMMARY OF THE ARGUMENT

This Court should affirm the findings of the Fourteenth Circuit and enjoin Petitioner from displaying the topless mermaid mascot for two reasons. First, the mascot satisfies all three prongs of the *Miller v. California* obscenity test, because (1) applying contemporary community standards, the average person would find that the dominant theme of the mascot appeals to the prurient interest, (2) the partially nude mascot depicts sexual conduct as defined by Tulania law in a patently offensive way, and (3) the mascot entirely lacks any serious literary, artistic, political or scientific value. Second, even if the mascot is not deemed obscene under the *Miller* test, the state should still prohibit its display because the potentially offensive image was disseminated in a way that intruded upon the homes of every Tulania citizen, making it impractical for the unwilling viewer to avoid exposure. Thus, the mascot was appropriately deemed to be unprotected by the First Amendment and this Court should affirm.

With respect to the second issue in this case, this Court should also affirm the Fourteenth Circuit's decision and find Petitioner liable for Mr. Wyatt's career-ending knee injury. First, Petitioner negligently maintained Yulman Stadium, breaching its duty to Mr. Wyatt, an invitee, to ensure that he would be playing football on reasonably safe premises. Second, even if Petitioner's placement of a cone on top of the missing patch of turf warned Mr. Wyatt of the dangerous condition, the danger of having a cement patch on a football field was still reasonably

foreseeable. Therefore, Petitioner is liable for Mr. Wyatt's injury. Finally, Mr. Wyatt neither knew about the cement patch nor had the opportunity to appreciate its dangerousness; thus, he did not assume a risk that would absolve Petitioner of liability. Accordingly, because Petitioner was negligent in maintaining its stadium and Mr. Wyatt assumed the risks associated with playing football on a reasonably safe field, this Court should affirm the Fourteenth Circuit's judgment.

ARGUMENT

I. THE LOWER COURT PROPERLY FOUND THAT PETITIONER'S MASCOT IS NOT PROTECTED UNDER THE FIRST AMENDMENT, BECAUSE IT IS "OBSCENE" AND PETITIONER CREATED A SIGNIFICANT DANGER OF OFFENDING UNWILLING VIEWERS.

Petitioner should be enjoined from displaying their mascot because it is obscene and, therefore, not protected under the First Amendment. Although it is important in our society for ideas that "hav[e] even the slightest redeeming social importance [to] have the full protection of the [First Amendment] guaranties," the First Amendment was not intended to protect every utterance. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 568 (1942); *Roth v. United States*, 354 U.S. 484 (1957). It is "implicit in the history of the First Amendment" that obscene material is not protected, because it lacks "any redeeming social importance." *Roth*, 354 U.S. at 484. *See Kois v. Wisconsin*, 408 U.S. 229 (1972); *United States v. Reidel*, 402 U.S. 351 (1971).

Whether material is considered "obscene" depends upon three factors set forth in *Miller v. California*: (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. 15, 23 (1973). Further, states have a "legitimate interest in

prohibiting…exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *See, e.g.*, *Reidel*, 402 U.S. at 351; (1969); *Ginsberg v. New York*, 390 U.S. 629, 637-63 (1968).

A. Petitioner's mascot is obscene and unprotected by the First Amendment, because it portrays nudity in a patently offensive way that appeals to the prurient interest and lacks serious redeeming value.

Petitioner's mascot is obscene, and thus unprotected by the First Amendment, because the mascot, taken as a whole, appeals to the prurient interest and is patently offensive under the contemporary community standards in Tulania and lacks serious artistic value. The test for obscenity under *Miller v. California* requires the trier of fact to determine: (1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. 15, 23 (1973). If a trier of fact finds that all three prongs of the *Miller* test are satisfied, the material is deemed obscene *Id*. When the question of whether material is "obscene" presents a close case, the "mode of dissemination" may be a relevant consideration, especially when there is a "significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller*, 413 U.S. at 18-19.

1. The average person, applying Tulania's contemporary community standards, would find that Petitioner's mascot appeals to prurient interest.

Applying Tulania's "contemporary community standard," the average person would find that Petitioner's mascot appeals to the prurient interest. Prurient, in this context, is defined as a

shameful or degrading interest in sex or nudity. *Roth*, 354 U.S. at 487 n. 20; *Kois*, 408 U.S. at 229. Whether material appeals to the prurient interest in light of "contemporary community standard" is determined by looking at the community where the material is disseminated because there "neither should, nor can be fixed, uniform national standards of what appeals to the 'prurient interest' or is 'patently offensive.'" *Hoover v. Byrd*, 801 F.2d 740, 741 (5th Cir. 1986) (*citing Miller*, 413 U.S. at 30). A juror is entitled to draw on his own knowledge of the views and tolerance of the average person in the juror's community, but not upon their own subjective reactions. *See Hamling v. United States*, 418 U.S. 87, 104-05 (1974); *Smith v. United States*, 431 U.S. 291, 305 (1977).

Whether Petitioner's mascot appeals to the "prurient interest" is essentially a question of fact that must be decided by considering the community in which imagery of the mascot disseminated. *Miller*, 413 U.S. at 30. In *Miller*, the court refused to extend First Amendment protections in a case involving the unsolicited mailing of sexual materials to "unwilling recipients who had in no way indicated any desire to receive such materials." *Id*. at 18. The court pointed out that the concept of "prurient interest" will vary by state, as it is not realistic to expect "the people of Maine or Mississippi [to] accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id*. at 32. Finally, the court noted that the "sexual revolution of recent years" may mean an increased tolerance for what is considered "prurient," but that does not mean that "no regulation of patently offensive…materials is needed or permissible." *Id*. at 36.

The prurient appeal of Petitioner's mascot must be judged by considering the average person in the community "rather than the most prudish or most tolerant." *Smith v. U.S.*, 431 U.S. at 304. In *Smith*, the court upheld the petitioner's conviction for violating a law that prohibited

the mailing of obscene materials. *Id*. at 300. The court found that the jury was entitled to draw upon their personal knowledge of the views and tolerance of the average person in that community, so long as they did not rely upon their own subjective reactions. *Id*. The court further pointed out that "contemporary community standards" take on meaning "only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case." *Id*.

Like in *Miller*, this case also involves the unsolicited mailing of sexual materials to unwilling recipients. In this case, every citizen of Tulania received a pamphlet depicting nude breasts, regardless of whether they had requested such material. While that might be tolerable in Las Vegas or New York City, as the court pointed out in *Miller*, it is the people of Tulania who must be considered. As the record demonstrates, it is clear from Tulania's responsive law-making prohibiting that exact form of speech that they are not as tolerant. Regardless of how progressive the nation as a whole or the people of Tulania themselves have become, this Court should find that the unsolicited mailing of nude images cross the threshold of obscenity and is not protected speech under the First Amendment.

As the *Smith* court made clear, Tulania's community standards must be considered in reference to the underlying questions of fact that must be resolved in this obscenity case. The facts here show that the Petitioner disseminated imagery of nude breasts to every resident in Tulania via the mail, to those watching or attending the football game, and in a variety of other ways. The facts of record further show that the community of Tulania responded to this dissemination by enacting a statute that specifically prohibits that very conduct. Although not dispositive, the negative reactions of several large social organizations in the community as well as the legislature's critical move of creating a law in response to Petitioner's mascot provide

evidence that the community of Tulania, on average, was offended by the illustrations and would find that they appeal to the prurient interest. Just as the court in *Smith* did, this Court should find that the depictions of the topless mermaid disseminated by the Sirens are obscene and, thus, unprotected by the First Amendment.

2. Petitioner's mascot depicts sexual conduct, as specifically defined by Tulania state law, in a patently offensive way and is, therefore, obscene.

The Siren Mascot depicts sexual conduct within the sufficiently narrow definition provided by Tulania law in a patently offensive way. Section 12 of the Tulania Penal Code defines "sexual conduct" as "[e]very person who knowingly: sends or causes to be sent…or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute… any obscene matter is guilty of a misdemeanor." Material depicts such sexual conduct in a "patently offensive" way if the portrayal is "so offensive as to affront current community standards of decency." *Hoover*, 801 F.2d at 740. Although nudity alone is generally not enough to be deemed "patently offensive," nudity may not be "exploited without limit by…pictures exhibited or sold in places of public accommodation any more than live…nudity can be exhibited or sold without limit in such public places." *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Miller*, 413 U.S. at 25.

When interpreting state statutes, "generic terms such as 'obscene'…are to be construed as limited to the sort of specific 'hard-core' sexual conduct given as examples in *Miller*." *Hamling*, 418 U.S. at 114; *Miller*, 413 U.S. at 25. In *Miller*, the Court listed example statutory definitions of "hard-core" sexual conduct, including "patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated… representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller*, 413 U.S. at 25. The Court made clear this was not an exhaustive list when it further explained that

"illustrations…of human anatomy" would be patently offensive material, unless, for example, the illustrations were included in a medical textbook. *Id*. at 26.

Although "nudity alone" is generally insufficient to find legal obscenity, it may not be exploited in places of public accommodation any more than live nudity may be. *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Miller*, 413 U.S. at 25. In *Jenkins*, the court declined to find that the film "Carnal Knowledge" depicted sexual conduct in a "patently offensive way" simply because it depicted nudity. The court refused to allow the state of Georgia to prevent the film from being shown in movie theatres. However, the court also made clear in *Miller* that limitations could be placed on displays of nudity in places of public accommodation.

Construed in light of the definitions provided by the court in *Miller*, the term "obscene" in Tulania's definition of sexual conduct is sufficiently narrow as to include Petitioner's mascot. Although the examples of "hard-core" sexual imagery provided by *Miller* did not explicitly mention mere nudity, the *Miller* court made clear with its further examples that such depictions fell within that scope. Thus, this Court should deem the exposed breasts on Petitioner's mascot as falling within the scope of "hard-core" imagery *Miller* sought to prohibit and enjoin Petitioner's further use of the mascot.

Unlike the nudity involved in *Jenkins*, the nudity in this case is pervasive, public, and readily viewed by juveniles and unwilling viewers. While the nude imagery in the *Jenkins* case could only be viewed by consenting adults who purchase movie tickets to the private showing, the nude imagery displayed by Petitioner in this case was viewed by every citizen of Tulania when they opened their mail and by those who watched or attended the Thanksgiving Day game, whether they desired to view it or not. Such displays would not be permissible if the nudity were

live and, as the *Miller* court did, this Court should find that this exploitation of nudity must be so limited.

3. Petitioner's mascot is obscene because the mascot, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Taken as a whole, Petitioner's mascot lacks serious literary, artistic, political, or scientific value and, therefore, is considered obscene. To warrant First Amendment protections, "at minimum, a prurient, patently offensive depiction of sexual conduct must have *serious* literary, artistic, political or scientific value." *See Ginzburg v. United States*, 383 U.S. 463 (1966); *Kois*, 408 U.S. at 230-32. This "inevitably sensitive question of fact of law" must be decided by a jury. *Miller*, 413 U.S. at 26.

Although depictions of nudity may have redeeming social value, that value must be "serious" to warrant First Amendment Protections. *Kois*, 408 U.S. at 229; *Ginzburg*, 383 U.S at 475 In *Kois*, the court found that two pictures published in a newspaper depicting nudity were not obscene. *Kois*, 408 U.S. at 229. The Court held that, because the nude pictures were relevant to the article they accompanied, they were not without serious literary or artistic value. *Id*. Conversely, in *Ginzburg*, the Court held that a sex education handbook, while not "obscene per se," was a "questionable publication" that was considered obscene in context of the existing circumstances. *Ginzburg*, 383 U.S at 475. The Court found that any redeeming educational or artistic value of the book was overshadowed by the fact that the sender "indiscriminately flooded the mail" with the material. *Id*. The Court further noted that "advertisements, plainly designed merely to catch the prurient" could not be disguised as having serious scientific or literary value in order to earn First Amendment protections. *Id*. at 473.

Petitioner's mascot is distinguishable from the photographs involved in *Kois.* Unlike the nude photographs in *Kois*, the imagery of Petitioner's mascot is not related in any way to any

literary or artistic work. In this case, the mascot stands alone as a sex symbol supporting a football team and, therefore, the "dominant theme" of the material can only be seen as appealing to the prurient interest. Petitioner's plain attempt to gain viewership by depicting a topless cartoon mermaid as a sex symbol cannot be said to have sufficient redeeming literary or artistic value, as the photographs in *Kois* did.

Further, unlike the handbook in *Ginzburg*, Petitioner's mascot does not have any redeeming literary, artistic, political or scientific value at all. Like the handbook, however, the depiction of nudity would overshadow any such redeeming value anyway. Petitioner's mascot does not accompany any literary or scientific works and there is no other evidence of such value. Further, any "artistic" or "political" value the mascot might be said to have would not rise to the level of seriousness required to warrant First Amendment protections. Thus, this Court should follow the *Ginzburg* court and find that whatever value, if any at all, the mascot might be said to have is not enough to overcome the obscenity of the illustration itself.

B. Even if Petitioner's mascot is not "obscene," Petitioner should still be enjoined from using the mascot because the mode of dissemination made it impractical for the unwilling viewer to avoid exposure.

Even if the mascot is not considered "obscene," the state of Tulania should still prohibit its display because it is impractical for an unwilling viewer to avoid exposure to the potentially offensive imagery. States have a "legitimate interest in prohibiting…exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *See, e.g.*, *Reidel*, 402 U.S. at 351; (1969); *Ginsberg*, 390 U.S. at 637-63. In a narrow set of circumstances, a state may enact reasonable time, place, and manner regulations on any and all speech irrespective of content. *See Cox v. Louisiana*, 379 U.S. 536, 554 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966). The state

may permissibly act as a censor by selectively shielding from public view some kinds of speech it finds more offensive than others when: (1) the speech intrudes on the privacy of a citizen's home, or (2) the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975) (*citing Rowan v. Post Office Dep't*, 397 U.S. 728 (1970); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974)).

Depictions of mere nudity may be regulated by the state when the imagery intrudes upon the privacy of a citizen's home or it is impractical for the unwilling viewer to avoid exposure to the images. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). In *Erznoznik*, the Court held that the state could not prevent the showing of a film portraying nudity at a drive-in theater. *Id*. at 211. The Court found that because, in that context, the nudity alone was not sufficient to be considered obscene and because the unwilling viewer could easily avoid looking at the nude imagery being projected onto the screen, the film was protected under the First Amendment. *Id*. at 212. However, the court made a point to distinguish between displays of nudity that are entirely innocent, such as depictions of a culture in which nudity is indigenous, from those that are considered obscene. *Id*. at 214. The Court further pointed out that even if the nudity was not sufficiently obscene, the state could have regulated the imagery if it had intruded upon the homes of private citizens or if the circumstances made it impractical for the unwilling viewer to avert their eyes and avoid exposure. *Id*. at 209.

Unlike the nudity portrayed in the film in *Erznoznik*, the crude portrayal of exposed breasts on Petitioner's mascot could not be described as inherently innocent nudity that does not rise to the level of obscenity. However, even if this Court were to find, as the *Erznoznik* court did, that the mascot's nudity is not sufficiently "obscene," this Court should still find that images of Petitioner's mascot can be regulated by the state because of the manner in which it was

displayed. As the *Erznoznik* court pointed out, the film would have been regulated had it been displayed in a manner that made avoiding the nude imagery impractical for unwilling viewers. In this case, even though the unwilling viewer was free to leave Petitioner's stadium to avoid viewing the mascot, they would still have been affronted with the flyers being handed out on their way out of the stadium. Further, the unwilling Tulania citizen would have left the stadium only to arrive at their home to find the images on the unsolicited pamphlets in their mailbox. Not only did Petitioner's speech intrude upon the homes of Tulania citizens, the advertisements were "so obtrusive" as to make it nearly impossible for adults and children to avoid being bombarded with the images. Thus, this Court should follow the guidance of the *Erznoznik* court and find that the pervasiveness of the potentially offensive images of Petitioner's mascot is so obtrusive as to allow the state to enjoin further use of the mascot by Petitioner.

II. THE LOWER COURTS CORRECTLY FOUND PETITIONER NEGLIGENT FOR FAILING TO ENSURE THAT YULMAN STADIUM WAS REASONABLY SAFE.

Petitioner is liable for Ben Wyatt's injury because it failed to properly maintain the premises of Yulman Stadium or, alternatively, warn Mr. Wyatt of its defects. Under Tulania law, negligence is established when one party breaches a duty owed to another party, who sustains an injury caused by the first party's breach. *Green v. Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014). "[N]egligence claims are premised upon *common law duties*…." *Id.* (emphasis added) (citing *Carman v. Wieland*, 406 S.W.3d 70, 76-77 (Mo. Ct. App. 2013)). Accordingly, as stadium owners and operators, sports teams owe athletes a duty to maintain their stadiums "in a reasonably safe condition." *See Fowler v. Ill. Sports Facilities Auth.*, 338 F. Supp. 3d 822, 826 (N.D. Ill. 2018) (citing *Clifford v. Wharton Bus. Grp.*, 817 N.E.2d 1207, 1214 (Ill. App. Ct. 2004)); *Bush v. St. Louis Reg'l Convention & Sports Complex*

Auth., No. 4:16CV250JCH, 2016 WL 3125869, at *2 (E.D. Mo. June 3, 2016). Thus, a sports team breaches its duty when it fails to remove or warn an athlete about a dangerous condition. *Smith v. Dewitt & Assocs., Inc.*, 279 S.W.3d 220, 224 (Mo. Ct. App. 2009) (citing *Griffith v. Dominic,* 254 S.W.3d 195, 198 (Mo. Ct. App. 2008)). If the dangerous condition subsequently causes an athlete's injury, then the team will be found negligent. *Id.* Moreover, an assumption of the risk defense will not spare the team from liability. *See Bennett v. Hidden Valley Golf & Ski, Inc.*, 318 F.3d 868, 874 (8th Cir. 2003) (citing *Perkins v. Byrnes*, 364 Mo. 849, 853 (Mo. 1954) (noting that "a participant in sport 'accept[s] ... those [hazards] that reasonably inhere in the sport so far as they are obvious and usually incident to the game'")). Based on the foregoing, Petitioner should be held responsible for Mr. Wyatt's career-ending knee injury.

A. Petitioner is liable for Ben Wyatt's career-ending knee injury because Petitioner did not repair the missing patch of turf.

Even though Petitioner had prior knowledge of the danger posed by the missing patch of turf, Petitioner neglected to fix the turf of Yulman Stadium; therefore, Mr. Wyatt can recover for his injury under the theory of negligence and, more specifically, a premises liability claim. To prevail under the theory of negligence, a 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 injury to the plaintiff." *Green*, 21 F. Supp. 3d at 1027 (citing *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co.*, 75 S.W.3d 247, 257 (Mo. 2002)). Negligence claims are based on common law duties. *Green*, 21 F. Supp. 3d at 1027 (citing *Carman*, 406 S.W.3d at 76-77. Thus, the duty that sports teams owe athletes stems from the common law duty that landowners owe invitees. *Fowler*, 338 F. Supp. 3d at 826 (citing *Clifford*, 817 N.E.2d at

1214). In other words, sports teams have a duty to remove or warn athletes about unreasonable dangers, such as missing patches of turf. *Id.* The scope of this duty "is measured by whether a reasonably prudent person would have anticipated danger and provided against it." *Green*, 21 F. Supp. 3d at 1027 (citing *Smith*, 279 S.W.3d at 224). Furthermore, a breach of this duty will be said to have caused an injury if the breach "in natural or probable sequence, produce[d] the injury complained of." *CSX Transp. Inc. v. McBride*, 564 U.S. 685, 689 (2011). Ultimately, a sports team's negligence gives rise to a premises liability claim if an athlete shows that:

> (1) a dangerous condition existed on the [sports team's] premises which involved an unreasonable risk; (2) the [team] knew, or by using ordinary care should have known of the condition; (3) the [team] failed to use ordinary care in removing or warning of the danger; and (4) as a result, the [athlete] was injured.

Smith, 279 S.W.3d at 224 (citing *Griffith,* 254 S.W.3d at 198). Because Mr. Wyatt can establish every element of both claims, Petitioner should be found negligent and liable for Mr. Wyatt's injury.

First, Petitioner owed Mr. Wyatt a duty to ensure that Yulman Stadium did not present an unreasonable risk to him. In *Baker v. Mid Maine Medical Center*, there existed a genuine dispute as to whether the landowners of country club "negligently failed to take precautions to prevent [an experienced golfer] from being struck by a golf ball at a golfing exhibition." *Baker v. Mid Me. Med. Ctr.*, 499 A.2d 464, 465 (Me. 1985). The landowners conceded that, as an attendee of the country club's golfing exhibition, the golfer was legally on the premises and, thus, a business invitee. *Id.* at 467. Therefore, the landowners were required "to use ordinary care to ensure that the premises were reasonably safe for the plaintiff, guarding him against all reasonably foreseeable dangers…." *Id.* (citing *Libby v. Perry*, 311 A.2d 527, 536 (Me. 1973)).

Petitioners owed a similar duty of care to Mr. Wyatt. Like the golfer in *Baker*, who was legally on the premises of the country club, Mr. Wyatt was legally on the premises of Yulman Stadium. Accordingly, because the golfer was an invitee, Mr. Wyatt was also an invitee, and Petitioner owed Mr. Wyatt a duty to use ordinary care to ensure that Yulman Stadium was reasonably safe. Since Petitioner failed to exercise ordinary care, it breached its duty to Mr. Wyatt.

When it did not repair the missing patch of turf, Petitioner failed to exercise ordinary care and breached its duty to fix Mr. Wyatt, whose reasonably foreseeable injury was caused by the cement patch. In *Rosen v. LTV Recreational Development*, the owner of a ski area was found liable for injuries sustained by a skier who collided into a metal pole set in concrete. *Rosen v. LTV Recreational Dev.*, 569 F.2d 1117, 1117 (10th Cir. 1978). Prior to hitting the pole, the injured skier had bumped into another skier on the ski trail. *Id.* The injured skier alleged that the owner's negligence "consisted of maintaining this steel pole set in concrete at the place where it was" and that "this created a risk of injury of the very kind that occurred." *Id.* at 1119. A jury agreed with the skier, awarding damages in the sum of $200,000. *Id.* The Tenth Circuit affirmed the judgment of the trial court. *Id.* at 1124. The trial court properly adopted the foreseeability test to determine whether the owner breached its duty of care by failing to maintain the ski area "in a reasonably safe condition considering the…foreseeability of…injury to others…." *Id.* at 1120.

Similarly, in *Bush v. St. Louis Regional Convention and Sports Complex Authority*, a jury ordered a professional football team to pay an opposing team's running back $12,500,000 in damages after the athlete fell onto a "concrete ring of death." *See* Kristi Schoepfer-Bochicchio, *Premises Liability, Negligence Cost Rams $12.5M*, Athletic Business (Oct. 2018), https://www.

athleticbusiness.com/civil-actions/premises-liability-negligence-cost-rams-12-5m.html. The running back had been returning a punt out bounds when, upon trying to slow down after the play, "[his] momentum carried him off the turf surface and onto the concrete, where he incurred a season-ending tear of his left ACL." *Id.* The concrete was located eleven yards, or thirty-three feet, outside the sidelines. *See* Joel Currier, *The Rams Are Long Gone, but St. Louis Could Still be on the Hook for Player's 2015 Injury*, St. Louis Post-Dispatch (June 6, 2018), https://www.stltoday.com/news/local/crime-and-courts/the-rams-are-long-gone-but-st-louis-could-still/article_151f2e69-4e27-531f-bd19-df1a8f8c7641.html.

Ultimately, Petitioner should have repaired missing patch of turf because it was reasonably foreseeable that a cement patch could cause injury to a football player like Mr. Wyatt, who was running at a high speed on the field. While the skier in *Rosen* bumped into another skier prior to hitting the metal pole, the presence of a third party did not absolve the ski area's owner of liability. Indeed, irrespective of the third party, the Tenth Circuit was satisfied that the metal pole caused the plaintiff skier's injuries and that the danger presented by the pole was reasonably foreseeable. Accordingly, there should be no doubt that the cement patch caused Mr. Wyatt's injury in this case. Here, no third party or other intervening cause contributed to or played a role in Mr. Wyatt's knee injury. Therefore, the cement patch proximately caused Mr. Wyatt's injury.

Moreover, it was reasonably foreseeable that the cement patch could injure a football player like Mr. Wyatt. As *Bush* demonstrates, similar incidents have happened recently. Arguably, the danger presented by the missing patch of turf in this case was even more foreseeable than in other cases. Here, the cement patch was significantly closer to where players run and can be expected to run during a football game. In *Bush*, the concrete was located eleven

yards, or thirty-three feet, outside of the sidelines. By contrast, the cement patch in Yulman Stadium was located ten feet behind the left side of the end zone. If the athlete in *Bush* recovered damages after falling onto concrete located much further outside of the football field, then Mr. Wyatt should also recover damages for falling onto cement much closer to the football field. In sum, Petitioner was negligent in failing to fix the missing patch of turf; therefore, Petitioner should be held liable.

B. Even if Petitioner had warned Ben Wyatt about the missing patch of turf, Petitioner would still be responsible for Mr. Wyatt's injury.

Even if Mr. Wyatt knew about the missing patch of turf because Petitioner warned him of the dangerous condition, Petitioner is still liable for Mr. Wyatt's injury. A sports team breaches its duty when it neglects to warn an athlete about a dangerous condition. *Smith*, 279 S.W.3d at 224 (citing *Griffith,* 254 S.W.3d at 198). However, even where a plaintiff knows about a certain condition on a property, such knowledge may not absolve the landowner of liability. *See Eddy v. Syracuse Univ.*, 433 N.Y.S.2d 923, 925 (N.Y. 1980). For example, in *Eddy v. Syracuse University*, a university was held liable for a student athlete's injury after the student, who had been playing ultimate Frisbee in a gymnasium, crashed into the glass doors of the gym. *Id.* The student "acknowledged that he was aware of the presence of the walls and the doors when he participated in the game." *Id.* However, the court still held that the university was negligent because "[t]he close proximity of the doors to the basketball court sideline could be found to present a danger to a player in a hotly-contested basketball game. That danger [was] enhanced…with the playing of a running game employing the length of the gymnasium." *Id.* In other words, because the student's injury was reasonably foreseeable, the university was liable.

Even if Petitioner's placement of an orange cone over the cement patch had been sufficient to warn Mr. Wyatt of its hazardous nature, Petitioner is still liable for Mr. Wyatt's knee injury. If the danger of a closed, unbroken door was enhanced by playing a running game in a gym, then the danger of a cement patch on a football field must be enhanced by playing football, which involves even higher speeds than ultimate Frisbee. Indeed, just as the doors in *Eddy* presented a hazard to players, the missing patch of turf in this case also presented a hazard to Mr. Wyatt. It was reasonably foreseeable that a cement patch could cause injury. Therefore, Petitioners should have replaced the missing patch of turf and are liable for failing to do so.

C. Petitioner cannot escape liability by asserting an assumption of the risk defense because Mr. Wyatt did not assume the risk of playing on a football field with a missing patch of turf.

Petitioner is further liable for Mr. Wyatt's injury because Mr. Wyatt did not assume the risk of playing on a football field with a missing patch of turf. Generally, "[o]ne who takes part in…a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball." *Anderson v. Hedstrom Corp.*, 76 F. Supp. 2d 422, 438 (S.D.N.Y. 1999) (citing *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 482 (N.Y. 1929)); *see also Perkins*, 364 Mo. at 853. However, "[a] different case [arises] if the dangers inherent in the sport were obscure or unobserved, or so serious as to justify the belief that precautions of some kind must have been taken to avert them." *Anderson*, 76 F. Supp. 2d at 438 (citing *Murphy*, 250 N.Y. at 483). Because Mr. Wyatt did not assume the risk of playing on a field where cement was present, Petitioner is liable for Mr. Wyatt's injury.

As a professional athlete, Mr. Wyatt assumed a risk inherent to playing football—namely, the possibility of injuring himself on the soft turf of a football field, not hard cement. In *Sheppard by Wilson v. Midway R-1 School District*, a long jump competitor meet sued a school district for failing to adequately prepare a long jump pit, which caused injury to the competitor's knee. *Sheppard by Wilson v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 257-59 (Mo. Ct. App. 1995). The competitor alleged that the school district failed to properly rake the pit between jumps and described the pit as wet, muddy, and lacking in sand. *Id.* at 259. In support of her contention, the competitor submitted substantial evidence that "tended to show that [her] injury resulted not from a bad landing, an inherent risk of the sport of long jumping, but rather from the [inadequately prepared] condition of the pit," which was not reasonably safe. *Id.* at 264. Ultimately, the court reversed the jury's decision to absolve the school district of liability, remanding the case for a new trial. *Id.* at 265. The court held that the jury improperly assessed the school district's percentage of fault because it did not consider whether the competitor "had knowledge of and appreciated the risk" of jumping into the pit despite its condition. *Id.* at 264-65.

Because Mr. Wyatt did not know about the missing patch of turf prior to the football game, he did not assume the risk of playing alongside such a hazard. Like the evidence in *Sheppard*, which tended to show the pit was inadequately maintained, the evidence in this case demonstrated that the missing patch of turf was inadequately patched. In *Sheppard*, the competitor's injury did not result from a bad landing; it resulted from a pit that was not reasonably safe. Likewise, in this case, Mr. Wyatt's injury did not result from a bad side-step; it resulted from the condition of the patch of missing turf. Therefore, just as sustaining an injury

from a wet, muddy, and improperly raked pit in *Sheppard* was not an inherent risk of long jumping, sustaining an injury from the cement patch in this case was not an inherent risk of football, where players expect to run on a soft, even field. Moreover, if in *Sheppard* a new trial was warranted because a jury had to consider whether the competitor knew about and appreciated the risk of jumping into the pit, then an affirmance is appropriate in this case. Here, Mr. Wyatt had no prior knowledge of the cement patch, and he could not appreciate the risk of potentially falling onto the cement due to the speed at which he was running when his injury occurred. Therefore, Mr. Wyatt did not assume a risk such that Petitioner should be absolved from liability, and Petitioner is responsible for Mr. Wyatt's career-ending knee injury.

CONCLUSION

In sum, Petitioner's mascot is not protected by the First Amendment, and Petitioner is liable for Mr. Wyatt's knee injury. Petitioner's mascot meets the *Miller* test for obscenity, and the pervasive display of the mascot makes it impracticable for unwilling viewers to avoid the mascot's offensive subject matter. Furthermore, Petitioner was negligent in failing to repair its football field's missing patch of turf to ensure the field was reasonably safe. Petitioner breached its duty to Mr. Wyatt, who assumed only those risks inherent to football. Accordingly, Petitioner should be enjoined from using its mascot and held responsible for Mr. Wyatt's injury, and this Court should affirm the Fourteenth Circuit's ruling.

Respectfully submitted,

/s/ Team 12
TEAM 12

Counsel for Respondent, Ben Wyatt

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the Respondent's Brief complies with the word limitation specified in Rule 6.3 of the Tulane Mardi Gras Invitational Competition Rules. Specifically, this Brief contains 6,875 words, not including the specifically excluded sections mentioned in the Rules. The type face is Times New Roman, 12-point font.

/s/ Team 12
Team 12

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