No. 09-215

IN THE
SUPREME COURT OF THE UNITED STATES

TULANIA SIRENS FOOTBALL TEAM,
Petitioner,

v.

BEN WYATT; THE CENTER FOR PEOPLE AGAINST SEXUALIZATION OF WOMEN'S BODIES,
Respondent.

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

BRIEF OF THE RESPONDENT

TEAM 14
Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the Tulania Sirens Football team produced and distributed the kind of obscene material explicitly excluded from sacred First Amendment protection when it created a sexually oriented, team mascot that depicts a fetishized fictional character traditionally associated with children's stories as having exposed breasts, and did so purely for financial gain?

2. Whether the Tulania Sirens Football team was negligent in its failure to replace or repair a missing patch of turf near the endzone when it had a duty to ensure that the playing surface does not unreasonably increase the risks inherent to football, breached that duty, and was the proximate cause for a player to sustain a career ending injury?

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The Opinion of the U.S. Court of Appeals for the Fourteenth Circuit is available at J.A. 3. The Decision and Order of the U.S. District Court for the Southern District of Tulania is available at J.A. 11.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

STATEMENT OF THE CASE

Ben Wyatt was an excellent wide receiver for the New Orleans Green Wave in the midst of a breakout season, the highlight of which was a Thanksgiving Day football game against the division rival Tulania Sirens. J.A. at 12. The Thanksgiving Day game is a tremendously popular and exciting event for the Tulania and New Orleans communities. *Id.* Pursuant to this popularity, many people watch the game either in person or at home. *Id.* These games are family events with many children either in attendance or watching from home. *Id.*

Shortly before the kickoff of the latest Thanksgiving Day game, the Tulania Sirens Football Team decided to change its mascot to a depiction of a topless mermaid. *Id.* They promoted this change by mailing unsolicited pamphlets to the citizens of Tulania that read: "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" *Id.*

The new topless mascot, used to promote a family and children friendly event, was unpopular among many members of the Tulania community. *Id.* The Center for People Against Sexualization of Women's Bodies ("PASWB") stated that the new mascot "appeals to the prurient interest and is not how the city of Tulania would like to be portrayed." *Id.* Other groups and community members supported this sentiment, which inspired the city of Tulania to pass a law prohibiting the distribution of "obscene matter." *Id.*; *See* Sec. 12 Tulania Penal Code (2019).

At the Thanksgiving Day game, the Tulania Sirens conspicuously displayed their new mascot everywhere; from a large logo in the middle of the field to fliers that were provided to every community member who passed by the stadium. J.A. at 12. Wyatt's wife Leslie Knope, a member of PASWB, and their small children were at the game to cheer him on. *Id.* To their horror, Wyatt and his family were exposed to the topless mascot through all the decorations and pamphlets that were displayed or distributed. *Id.*

During pregame warmups, a player for the Tulania Sirens fell in the back of an end zone and create a ten-foot-long gash in the turf with his facemask, leaving behind an equally large patch of bare concrete. J.A. at 17. Although a Sirens employee saw the dangerous gash, all the staff did was place an orange cone of the hazard, and prepare for kickoff. *Id.*

Late in the game, the score was still close. *Id.* To cap a fourth quarter drive, Wyatt caught a back-corner pass in the damaged endzone. *Id.* As he approached the gash, where only concrete remained, he attempted to plant his left foot and cut back to the right. *Id.* However, his cleats slipped on the bare patch of concrete, causing his left knee to collapse. *Id.* Wyatt later learned the injury would end his season. *Id.*

Procedural History

Wyatt and PASWB brought suit against the Tulania Sirens claiming that their promotion

of a topless mascot is obscene, and sought to enjoin the Sirens from further displaying and promoting their new mascot. Wyatt also brought suit against the Sirens for negligence, seeking damages in the amount expended on hospital bills, attorney's fees, and lost wages.

The District Court found that the Tulania Sirens mascot is protected by the First Amendment, but that the Sirens were liable to Wyatt for Negligence. The Fourteenth Circuit reversed the District Court with respect to the First Amendment issue and affirmed the court with respect to the Negligence issue. Respondent respectfully requests that this Court affirm the Fourteenth Circuit on both issues.

STANDARD OF REVIEW

The United States Supreme Court will review all matters in this case *de novo*.

SUMMARY OF THE ARGUMENT

The First Amendment issue in this case is about maintaining sacred First Amendment protection of important speech while declining to protect the kind of obscene material which seeks to disguise itself as one such vital expression of ideas. The negligence issue in this case is about ensuring the law is properly applied to support and encourage athlete safety in sports.

To warrant First Amendment protection, Petitioner must show that its depiction of a topless mermaid fails to satisfy the three-pronged test for obscenity articulated in this Court's *Miller v. California* decision. Because Petitioner cannot show that its mascot fails to satisfy the standards set out by this Court's jurisprudence regarding each prong of *Miller*, its mascot is obscene material which lacks First Amendment protection and is unlawful under local statute.

Wyatt must successfully show four elements to be successful in his negligence claim: (1) the existence of a duty, (2) the breach of that duty, (3) proximate cause between the breach of duty and the injury, and (4) damages. The Tulane Sirens had a duty to maintain a safe field that

did not expose players to risks beyond those inherent in the sport. They breached that duty by not providing ordinary care to repair a known hazard on the field. Slipping on the damaged turf when trying to plant his left foot proximately caused Wyatt's left knee injury. Although athletes assume the level of risk inherent to the sport, athletes do not assume risks associated with negligent conduct. Application of the facts to the law in this case show that the four elements of negligence are met and the Tulania Sirens do not have a valid affirmative defense. Therefore, the Tulania sirens are liable for negligence.

ARGUMENT

I. Petitioner has no First Amendment right to display a fetishized depiction of a fictional being — a mermaid with exposed breasts — as a commercial mascot because it is precisely the kind of "obscene material" that lacks First Amendment protection under this Court's First Amendment jurisprudence.

While the fundamental importance of the First Amendment's protection against infringement on "genuinely serious literary, artistic, political or scientific expression" is indisputable, it is not absolute and does not encompass the kind of "obscene material" this Court has consistently refused to protect. *Miller v. California*, 413 U.S. 15, 23 (1973) (recognizing this as "categorically settled by the Court."); *see also Kois v. Wisconsin*, 408 U.S. 229 (1972); *United States v. Reidel*, 402 U.S. 351 (1971); *Roth v. United States*, 354 U.S. 476 (1957). In *Miller*, perhaps the most notable such decision, this Court articulated the modern three-pronged inquiry for identifying "obscene material:"

> (a) [W]hether '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.

Miller, 413 U.S. at 24 (citing *Kois*, 408 U.S. at 230; *Roth*, 354 U.S. at 489).

The First Amendment protects speech and press "to assure unfettered interchange of ideas for … political and social changes" and "reject[s] obscenity as utterly without redeeming social importance." *Roth*, 354 U.S. at 484. "[A] mermaid with exposed breasts" is exactly the kind of obscene material to which the Court consistently denies First Amendment protection, demonstrated by its satisfaction of each prong of the "*Miller* test" within the standards defined by this Court's jurisprudence. J.A. at 5. The Court should therefore uphold the Fourteenth Circuit and again decline to extend the First Amendment's sacred protection to Petitioner's indefensibly obscene, fetishized depiction of a fictional being designed solely as a sexual commercial advertisement that is deeply offensive to individuals throughout the local community.

A. *Applying Tulania's contemporary community standards, the average person would find that the depicted mermaid with exposed breasts, taken as a whole, appeals to the prurient interest and therefore satisfies Miller's first prong.*

Petitioner's depiction of a mermaid with exposed breasts satisfies the first prong of *Miller*'s obscenity test because it tends to incite lustful thoughts, desires, and lewdness under Tulania's community standards. A visual depiction satisfies *Miller*'s first prong when, based on the specific standards of jurors and the community in which the obscenity challenge arose, it tends to incite lustful thoughts, desires, and lewdness. *See Pope v. Illinois*, 481 U.S. 497 (1987); *Smith v. United States,* 431 U.S. 291 (1977); *Hamling v. United States*, 418 U.S. 87 (1974); *Miller*, 413 U.S. 15; *Reidel,* 402 U.S. 351; *Roth,* 354 U.S. 476.

It is well established that the "community standards" inquiry of *Miller*'s first prong considers the specific standards of jurors and the community in which an obscenity challenge arises. As this Court reiterated in *Pope*, "appeal to prurient interest" is an issue "of fact for the jury to determine …." 481 U.S. at 500 (citing *Smith,* 431 U.S. 291) (contrasting this with the "reasonable person" standard of *Miller*'s value inquiry, which does not "vary … based on the degree of local acceptance …."). In fact, even *Miller* itself underscored that "we must continue to

rely on the *jury* system" to resolve the "inevitably sensitive questions" of obscenity challenges, exhibiting the Court's focus on a localized approach. 413 U.S. at 26; *see also Hamling*, 418 U.S. at 103-04 (quoting *Miller*, 413 U.S. at 31-32) ("'Nothing … requires that a jury must consider hypothetical and unascertainable 'national standards' … to determine … materials are obscene[,]'" which is a theory that "*Miller* rejected ….").

Further, while the Court has cautiously avoided a narrow, precise legal definition of "prurient interest," instead explicitly leaving this inquiry to the fact-finder, First Amendment jurisprudence demonstrates that the term encompasses depictions that tend to excite lustful thoughts, desires, and lewdness. Fundamentally, in *Roth*, this Court defined such prurient material as "having a tendency to excite lustful thoughts" as well as "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd." 354 U.S. at 487, n.20 (internal citation omitted). Relatedly, in *Reidel*, the Court held that a statute defining "prurient" as "'[e]very obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance" was constitutional as applied to the distribution of obscene materials. 402 U.S. at 352, n.1; *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 505, n.13 (1985) (noting state statutory definitions of "prurient" as including, *inter alia*, "an interest in lewdness or lascivious thoughts[,]" and "a lustful, erotic, shameful, or morbid interest in nudity, sex or excretion.") (internal quotations omitted). *Contra Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 579, n.9 (2002) ("[W]e have great difficulty understanding how pictures of a war victim's wounded nude body could reasonably be described … as erotic, especially … from the perspective of minors.").

Petitioner's fetishized depiction of a bare-chested mermaid is exactly the type of obscene material to which this Court has consistently denied First Amendment protection. The half-naked

mermaid is nothing short of a blatant attempt to attract commercial attention to Petitioner's business by evoking a precisely prurient interest in potential new customers while shamelessly marginalizing long-standing fans in the community — many being underage minors far more familiar with Disney's depiction of "The Little Mermaid" than with Petitioner's crude depiction, resembling something from dark and shameful corners of anonymous internet message boards. Rather than resembling anything close to the "war victim's wounded nude body" which this court noted as exemplifying a non-prurient depiction of nudity. *Ashcroft*, 535 U.S. at 579, n.9.

Petitioner's depiction is a pretextual attempt to "excite [the] lustful thoughts," lewdness, lust, and eroticism that the Miller decision has long sought to exclude from the First Amendment's sacred protection. *Brockett*, 472 U.S. at 505, n.13; *Roth*, 354 U.S. at 487, n.20. This depiction therefore falls squarely within the definition of such obscene material that the average person, applying Tulania's contemporary community standards, would find as appealing purely to the prurient interest in satisfaction of the *Miller* test's first prong and wholly undeserving of constitutional protection.

B. By depicting a mermaid — or a fictional character largely designed for children — with exposed breasts, Petitioner depicts precisely the kind of patently offensive material defined as "sexual conduct" by applicable Tulania law.

Petitioner's topless mermaid depiction falls squarely within the definition of "sexual conduct" under constitutionally valid and applicable state law, is "patently offensive" under contemporary community standards, and thus satisfies *Miller*'s second prong. Visual depictions are "patently offensive" when, based on contemporary community standards of the fact-finder, they concern the type of "hardcore conduct" targeted by this Court's *Miller* decision. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 235 (2002); *Pope*, 481 U.S. 497; *Smith*, 431 U.S. 291. Relatedly, material is specifically defined as containing "sexual conduct" under applicable state

law when it depicts imagery that the law defines as "obscene" under this Court's *Miller* decision. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Hamling*, 418 U.S. 87; *United States v. 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123 (1973); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971); *United States v. Buie*, No. 18-2942, 2019 WL 7206063, at *1 (8th Cir. Dec. 27, 2019).

Moreover, an obscenity statute is constitutional and must survive an overbreadth challenge when it requires that covered materials be "obscene," thereby encompasses only unprotected speech. *Brockett*, 472 U.S. 491; *Vill. of Hoffman Estates*, 455 U.S. at 494; *Ward v. Illinois*, 431 U.S. 767 (1977); *United States v. Orito*, 413 U.S. 139 (1973). And even where an obscenity statute is invalidated for overbreadth, parties do not escape liability so long as the statute provided proper notice that the prescribed conduct would be prosecuted. *Pope*, 481 U.S. 497; *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. Harriss*, 347 U.S. 612 (1954); *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947); *United States v. Ragen*, 314 U.S. 513 (1942).

First, a visual depiction is "patently offensive" when, based on contemporary community standards of the fact-finder, it is the kind of "hardcore conduct" described in *Miller*, rather than a broader idea often found in modern society, art, or literature. As in *Miller*'s first prong, *Pope* established that "patent offensiveness" is an issue of fact for the jury, determined under "contemporary community standards." 481 U.S. at 500. However, this Court's earlier decision in *Smith* provided more tangible guidance in holding that "a jury would be permitted to label as 'patently offensive' … the 'hard core' types of conduct suggested by the examples given in *Miller*." 431 U.S. at 301 (citing *Hamling*, 418 U.S. at 114). Contrarily, in a relatively recent decision, this Court cited the proscription of "visual depictions of an idea — that of teenagers engaging in sexual activity … a fact of modern society and … theme in art and literature" as not

meeting the "patently offensive" definition. *Ashcroft*, 535 U.S. at 235.

Second, material contains "sexual conduct" as specifically defined by applicable state law and in satisfaction of *Miller*'s second prong when it depicts imagery defined as "obscene" under this Court's *Miller* decision. The *Hamling* decision underscored that "when … 'serious doubt' is raised," the Court construes the term "obscene" as "limiting regulated material to patently offensive representations … of that specific 'hard core' sexual conduct … described in *Miller* …." 418 U.S. at 113 (quoting *Thirty-Seven (37) Photographs*, 402 U.S. at 369-74); *accord 12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123. Notably, the Eighth Circuit recently demonstrated this in denying a constitutional claim under *Hamling* and finding that the challenged statute "necessarily incorporated" the *Miller* factors as "essential elements of the offense" by requiring that a visual depiction be "obscene;" the statute, the court held, therefore permissibly encompassed only material already lacking constitutional protection. *Buie*, 2019 WL 7206063, at *2 (citing *Vill. of Hoffman Estates*, 455 U.S. at 494; *Hamling*, 418 U.S. at 115).

Relatedly, an obscenity statute is constitutional and must survive an overbreadth challenge so long as it encompasses only unprotected speech, which occurs when the statute requires that covered materials be "obscene." First, it is well established in this Court's jurisprudence that an "overbreadth challenge must fail" where the challenged statute covers only unprotected speech. *Vill. of Hoffman Estates*, 455 U.S. at 494; *accord Buie*, 2019 WL 7206063, at *2. Second, as discussed, this Court has repeatedly recognized that requiring material be "obscene" inherently incorporates the *Miller* test, thereby encompassing only unprotected speech. *See Orito*, 413 U.S. at 140; *12 200-Foot Reels of Super 8mm. Film*, 413 U.S. 123; *Hamling*, 418 U.S. at 113.

For example, this Court denied an overbreadth challenge to a state statute which failed to "expressly describe" the conduct *Miller* had intended to define, simply because a state court had

previously construed it as still incorporating such conduct. *Ward*, 431 U.S. at 775; *accord Brockett*, 472 U.S. at 505, n.13. Moreover, this Court has even upheld similar statutes under First Amendment challenge with merely a *presumption* that the state court would apply such a construction. *See Brockett*, 472 U.S. at 505, n.13 ("The evident likelihood that Washington courts would construe the instant statute to conform with *Miller* also counsels against facial invalidation …."); *accord Time, Inc. v. Hill*, 385 U.S. 374 (1967); *see also Roth*, 354 U.S. at 491 ("The California statute [covers] … material that is 'obscene' … This Court, however, has consistently held that … these statutes … do not offend constitutional safeguards ….") (internal citation omitted).

Lastly, and perhaps most notably, even where an obscenity statute is deemed overbroad, parties cannot escape liability under it so long as it provided proper notice that the prescribed conduct would be prosecuted. In *Pope*, this Court rejected that a state statute's facial invalidity required the reversal criminal convictions under it, instead holding that convictions could still be retried under the law "because petitioners could not plausibly claim . . . [it] failed to give them notice that the sale of obscene materials would be prosecuted." 481 U.S. at 501-02 (citing *Thirty-seven Photographs*, 402 U.S. at 375, n.3; *Dombrowski*, 380 U.S. at 491, n.7). More broadly, as this Court emphasized in *Roth*, "all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding ….' These words … give adequate warning of the conduct proscribed and mark 'boundaries sufficiently distinct … to administer the law.'" 354 U.S. at 491-92 (first quoting *Petrillo*, 332 U.S. at 7-8, then citing *Harriss*, 347 U.S. at 624, n.15; *Ragen*, 314 U.S. at 523-24.

By expressly depicting a fictional character most traditionally associated with children's stories as having exposed breasts, Petitioner seeks to have the Court extend sacred constitutional

protection — traditionally reserved for only the most important democratic ideals — to material that is "patently offensive" under this Court's jurisprudence, specifically defined as unlawful "sexual conduct" by applicable state law, and explicitly excepted from First Amendment protection. First, based on the contemporary community standards of the fact-finder — here, that is one local to the Tulania community, *See Pope,* 481 U.S. at 500 — Petitioner's new mascot is precisely the type of "hardcore" material suggested by this Court's Miller decision. *See Smith,* 431 U.S. at 301.

A clear demonstration of the patent offensiveness this depiction has already caused within the local Tulania community lies within the District Court's own enumeration of what the Fourteenth Circuit called "adequately summarized … facts of this case," none of which are in dispute. J.A. at 5. There, the court explained that "[m]any members of the Tulania community were offended by the new mascot," which also prompted immediate concern from local community organizations such as Respondent PASWB and stirred feelings of "horror" in generally strong-willed American football players such as Respondent Benn Wyatt. J.A. at 12. However, perhaps most demonstrative of common local sentiment regarding the mascot is the fact Tulania — a democratically administered city — passed a law specifically targeting obscene material such as Petitioner's mascot immediately after its publicization. *Id.* This is nothing short of clear evidence that, under Tulania's contemporary community standards, the bare-chested mermaid depiction is widely considered "patently offensive," tasteless obscenity the community seeks to prevent.

Moreover, Petitioner's mascot depicts exactly the type of "sexual conduct" that the Tulania legislature defined in its law — supported in no small part by the fact that the applicable law was passed in direct response to the mascot. *Id.* By defining such unlawful conduct as that which is

"obscene," the Tulania legislature fell directly in line with this Court's long-standing jurisprudence recognizing that such language is sufficient to incorporate the *Miller* test as essential elements for the offense. *See Hamling*, 418 U.S. at 113. By doing so, it also immunized this law from overbreadth challenges, encompassing only such unprotected speech as defined by the *Miller* decision itself. *See id.*; *Buie*, 2019 WL 7206063, at *2. And lastly, though notably, even if Petitioner could successfully challenge the applicable law on constitutional grounds, its clear reference to precisely the kind of acts Petitioner engaged in — preparing, publishing, printing, and distributing, *inter alia*, obscene material — provided Petitioner with clear notice, thereby subjecting it to liability notwithstanding all other consideration.

The Court should therefore align with its long-standing jurisprudence and deem the mermaid with exposed breasts precisely the kind of patently offensive sexual conduct not protected by the First Amendment.

C. Taken as a whole, Petitioner's depiction of a mermaid with exposed breasts was designed solely to exploit nudity and sexualization for commercial gain, and therefore lacks even a modicum of serious literary, artistic, political, or scientific value.

Finally, Petitioner's bare-chested mermaid depiction wholly lacks even a modicum of serious literary, artistic, political, or scientific value and is instead designed to garner commercial attention for Petitioner through sexual depiction, brazenness and "shock value," thereby satisfying of *Miller*'s third prong. Visual depictions containing nudity are entirely devoid of First Amendment protection unless, taken as a whole, they are deemed to have serious literary, artistic, political, or scientific value from the perspective of a "reasonable person." *Pope*, 481 U.S. at 500-01; *Miller*, 413 U.S. at 25-26; *Smith*, 431 U.S. 300-01. Such value may exist only where the depiction is intended to specifically serve at least one such societal purpose and not where it is designed to elicit commercial attention through sexual brazenness or "shock value." *Ashcroft*, 535

U.S. at 587 (O'Connor, J., concurring); *Miller*, 413 U.S. at 25-26; *United States v. Schein*, 31 F.3d 135, 137 (3d Cir. 1994).

In *Miller* itself, this Court underscored that "nudity may not be exploited without limit" through exhibition or sale in public places "any more than live sex and nudity" and must have, "at a minimum, … serious literary, artistic, political, or scientific value to merit … protection." *Miller*, 413 U.S. at 25-26. Notably, rather than the perspective of "an ordinary member of any given community" considered by *Miller*'s first two prongs, this final prong considers "whether a reasonable person would find such value in the material, taken as a whole." *Pope*, 481 U.S. at 500-01 ("[V]alue … [is not] determined by reference to community standards. Indeed, our cases are to the contrary.") (internal citation omitted); *see also Smith*, 431 U.S. 300-01 (citing F. Schauer, *The Law of Obscenity* 123-124 (1976)) ("[V]alue, on the other hand, is not discussed in *Miller* in terms of contemporary community standards.").

A depiction of nudity lacks the minimum requisite societal value to merit First Amendment protection unless, taken as a whole, it is intended to specifically serve a societal purpose that is literary, artistic, political, or scientific in nature. For example, *Miller* itself exemplified the existence of such sufficient value with reference to medical books, inherently requiring "graphic illustrations … of human anatomy" to adequately serve their educational purpose of educating physicians. 413 U.S. at 25-26. Similarly, Justice O'Connor noted in *Ashcroft* that materials designed for the sexual education of minors — likely to contain depictions of nudity and sexual organs — "must, on any objective inquiry," have scientific value. 535 U.S. at 587 (O'Connor, J., concurring).

Contrarily, a depiction of nudity lacks even a modicum of the requisite value necessary to satisfy *Miller*'s third prong and warrant constitutional protection when, taken as a whole, it is not

intended to specifically serve a societal purpose in the fields of literature, art, politics, or science. Given the highly circumstantial inquiry involved, *Pope*, 481 U.S. at 500-01, this Court has declined to substantively guide the value inquiry. Notably, however, lower courts have grappled with this issue. For example, the Third Circuit rejected an argument that video tapes depicting sexual acts — what most refer to as "pornography" — possessed serious artistic value because art by Robert Mapplethorpe contained "urolagnic" pornography.[1] *Schein*, 31 F.3d at 137; *see also, id.* at 138 (rejecting that value exists "because participants … wear condoms and viewers are reminded … to have 'safe sex.'"). More recently, the Seventh Circuit affirmed a finding that naked images sent to undercover officers posing as minors had no societal value; it explained that, rather than "engage … in scientific discussion on human anatomy," the defendant intended "to emphasize his desire to have sex …." *United States v. Rogers*, 474 F. App'x 463, 470 (7th Cir. 2012).

Lastly, this Court has repeatedly found that "pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining" obscenity. *Splawn v. State of California*, 431 U.S. 595, 598-99 (1977); *accord Hamling*, 418 U.S. at 130; *Ginzburg v. United States*, 383 U.S. 463, 470 (1966). Focusing on this final prong, the *Splawn* holding explained that such factors are particularly relevant to evaluating whether any claimed social importance is legitimate or simply a pretense for litigation. 431 U.S. at 598-99.

Petitioner's depiction of a mermaid — sexualized to arguably the highest extent possible for a creature with only half of a human body — is exactly the very same exploitation of nudity though exhibition and sale in public places which this Court denounced in *Miller*. 413 U.S. at 25-26. Even applying the broader standard of a reasonable person as required for Miller's third prong

[1] Merriam-Webster's Dictionary defines "urolagnia" as the medical term for "sexual excitement associated with urine or urination." MERRIAM-WEBSTER, *Definition: "urolagnia,"* https://www.merriam-webster.com/medical/urolagnia.

under *Pope*, 481 U.S. at 500-01, Petitioners do not and cannot identify a single factual assertion supporting that the depiction has any redeeming societal value whatsoever or simply explaining why a fully dressed mermaid would have been insufficient. Instead, it seeks to have the Court protect a blatant attempt at lewdness and tasteless marketing for commercial gain under the same umbrella as important societal contributions: medical textbooks, sex education materials, and a war victim's nude body.

Contrary to the redeeming aspects of these materials, Petitioner's mascot far more closely resembles the desperate attempts of pornography producers, *Schein*, 31 F.3d at 137, and online sexual predators, *See Rogers*, 474 F. App'x at 470, to avoid liability for the obscene material produced solely for selfish personal gain and at the detriment of the rest of society. Respondents urge the Court to flatly deny these attempts, find that Petitioner's mascot satisfies this final prong of the *Miller* test, and affirm the appellate court's decision to see this case for exactly what it is: an exploitation of sex, nudity, and obscenity for commercial financial gain.

II. The Tulania Sirens Football Team was negligent in its failure to replace or repair a damaged portion of its playing field because it had a duty to ensure that the playing surface does not unreasonably increase the risks of football to players beyond those risks inherent to the sport, it breached that duty by not exercising ordinary care, and the breach was the proximate cause for Ben Wyatt's season ending injury

The Tulania Sirens Football Team ("Tulania Sirens") is liable to Ben Wyatt for negligence. A negligence claim in all states consists of, in some form, the existence of a duty, the breach of that duty, causation, and damages. *See Duerson v. NFL, Inc.*, No. 12 C 2513, 2012 U.S. Dist. LEXIS 66378, at *8-9 (N.D. Ill. May 11, 2012). Here, the Tulania Sirens had a duty to ensure that their playing surface was reasonably safe. *See Sheppard v. Midway R-1 Sch. Dist.*, 904 S.W.2d at 264 (Mo. App. 1995). Although Wyatt assumed a level of risk, it did not extend to risks not inherent in the sport. *See Martin v. Buzan*, 857 S.W.2d 366 (Mo. App. 1993). The Tulania Sirens

breached their duty to exercise ordinary care by not repairing the damaged surface. *Benitez v. N.Y.C. Bd. of Educ.*, 541 N.E.2d 29, 33 (1989). The Petitioner's negligence led to the hazardous field conditions and thus was proximate cause for Wyatt's season ending injury.

A. The Tulania Sirens had a duty to ensure that the playing surface does not unreasonably increase the risks of football to players beyond those risks inherent to the sport

The Tulania Sirens had a duty to maintain a safe working environment. *See Carman v. Wieland*, 406 S.W. 3d 70, 72, 76-77 (Mo. Ct. App. 2013) (holding that it is the employer's non-delegable duty to (1) to provide a safe workplace, (2) to provide safe equipment in the workplace, (3) to warn employees of the existence of dangers of which the employees could not reasonably be expected to be aware, (4) to provide a sufficient number of competent fellow employees, and (5) to promulgate and enforce rules governing employee conduct for the purpose of enhancing safety."). Despite the risks inherent in football, the general roughness of the game is not an absolute defense to tortious conduct. *See Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520 (10th Cir. 1979).

The duty of care owed to an athlete varies by sport. *See, e.g., Sanchez v. Hillerich & Bradsby Co.*, 104 Cal. App. 4th 703 (2002) (holding that the NCAA may be found liable for permitting the use of metal baseball bats that increase the risk of harm beyond what is inherent to the sport). However, regardless of the sport, the defendant owes some duty to participants not to increase the risk of harm over and above those risks inherent in the sport. *Id.* at 706.

In *Turcotte v. Fell*, a court found that the owner of a racetrack owed the same general duty to those using its property as to owners of real property generally, which is "the duty to exercise 'reasonable care under the circumstances.'" 502 N.E.2d 964, 970 (1986). In that case the court found that the defendants had a duty to ensure track conditions in a horse race are "as safe as they appear to be." *Id.* In reaching its decision, the court considered both the

maintenance standards of other tracks and the ability of the owners to repair the surface. *Id.* at 970-71.

A court must also decide whether it is in the public interest to impose damages on those who disregard important standards of conduct. *Pyeritz v. Commonwealth*, A.3d 687, 689 (2011). Courts consider five factors in making this policy judgment: (1) the relationship between the parties; (2) the utility of the defendant's conduct; (3) the nature and foreseeability of the risk in question; (4) the consequences of imposing the duty; and (5) the overall public interest in imposing the duty. *Id.*

Here, the Tulania Sirens had a duty to ensure the playing field was safe, and to warn the players of any dangers that they could not reasonably be expected to be aware of. A large divot is not a danger that players could reasonably be aware of. Additionally, the nature of the sport adds to this duty. Although football is inherently dangerous, the Tulania Sirens have a duty to ensure they do not increase the risk of harm beyond what is inherent to the sport. Permitting players to participate on an unsafe field, particularly in an area where players tend to attempt their most spectacular athletic feats, does increase the risk of harm beyond the high-speed contact risks inherent to football.

B. Ben Wyatt assumed only the level of risk inherent to the sport of football, and not risks caused by the Tulania Sirens' negligence

Athletes assume only those risks inherent in the game or activity in which they are participating. *See Martin v. Buzan*, 857 S.W.2d 366 (Mo. App. 1993) (holding that "the assumed risks in [athletic] activities are not those created by a defendant's negligence but rather by the nature of the activity itself"). A risk is inherent in a sport if its elimination would alter the fundamental nature of the activity and chill vigorous participation in the sport. *Ferrari v. Grand Canyon Dories*, 38 Cal. Rptr. 2d 65, 67 (1995).

Athletes do not assume risks that are "unreasonably increased or concealed." *Benitez v. N.Y.C. Bd. of Educ.*, 541 N.E.2d 29, 33 (1989) (holding that players who voluntarily join in extracurricular interscholastic sports assume only the risks to which their roles expose them). Athletes make only a primary assumption of risk, meaning that defendants in such negligence cases have a "duty to exercise care to make the conditions as safe as they appear to be." *Turcotte v. Fell*, 502 N.E.2d 964, 968 (1986). Assumption of risk in competitive athletics "is not an absolute defense but a measure of the defendant's duty of care." *Turcotte*, 68 NY2d at 439. An athlete does not assume risks caused by the negligence of others. *See Sheppard v. Midway R-1 Sch. Dist.*, 904 S.W.2d at 264 (Mo. App. 1995); *Kirk v. Wash. State Univ.*, 746 P.2d 285, 286 (Wash. 1987).

In *Sheppard v. Midway R-1 Sch. Dist.*, a long jumper suffered a knee during a high school track meet after landing in an inadequately prepared long jump pit that was maintained by the school district. 904 S.W.2d at 259. There, the court held that even though the risk of injury is inherent in the sport, the athlete did not assume the risk that the facilities would be in an unsafe condition. *Id.* At 264.

A court in *Kirk v. Wash. State Univ.* held that cheerleaders did not assume the added risk of switching to an AstroTurf surface from a traditional mat surface. 746 P.2d 285, 286 (Wash. 1987). The court reasoned that "a plaintiff's assumption of certain known risks in a sport or recreational activity does not preclude recovery for injuries resulting from risks not known or not voluntarily encountered." *Id.* at 286 (1987).

Similarly, in *Regan v. Seattle*, the court found that a driver of a "go-cart" does not assume unknown risk of spilled hazards on the course prior to and during competition. 458 P.2d at 16 (1969). The most salient fact pertaining to assumption of risk was that the track had

been cleaned after previous races, therefore the plaintiff had not reason to assume such an "extraordinary risk."

In another case involving a negligently maintained surface, the court held that an ice skater did not assume the risk of unusually hard and slippery ice at the defendant's rink. *See Meistrich v. Casino Arena Attractions, Inc*., 155 A.2d 90, 92 (1959). In *Meistrich*, the ice rink operator departed from usual ice preparation procedures, leading to conditions that skaters do not assume the risk for. *Id.*

In *Sunday v. Stratton Corp*., a court found that skiers do not assume the risk of becoming entangled in brush concealed by the snow, depending on their expectations of the surface. 390 A.2d 398, 403-04 (1978). In that case, a skier was injured after hitting hidden shrubbery on a slope reserved for less advanced skiers where the reasonable expectation is that hidden obstacles would not be encountered. *Id.*

In *Wood v. Postelthwaite*, the court held that a golfer does not assume unforeseen risks due to inadequate warning but does assume known risks "inherent in the game." 496 P.2d 988 (1972), *aff'd*, 510 P.2d 1109 (1973). In that case, a golfer was struck by a negligently struck ball, without proper warning, and in an area of play that would not have been reasonably expected. *Id.* The court's analysis concluded that although participants in sporting events generally are held to have assumed the risks of injury inherent in the sport, such an assumption of risk does not preclude a recovery for negligent acts which "unduly enhance such risks." *Id.* at 990.

Similarly, players do not assume the risks of poor supervision and inadequate safety provisions. In *Leahy v. School Bd.*, a high school football player was injured during a drill due to having improper equipment and insufficient supervision over the activity. 450 So. 2d 883

(Fla. Dist. Ct. App. 1984). The court held the player did not assume these risks because he was uninformed, and therefore could not have exposed himself to the risks. *Id.* at 887.

Ben Wyatt did not assume the risk that the field would be unsafe. This case resembles closely previous cases concerning the field or surface conditions. As in the long jumper in *Sheppard*, a football player does not assume the risk that the playing surface is improperly prepared or maintained to the point that it poses a serious risk of injury. The safe playing surface logic extends though *Kirk, Reagan, Sunday*, and *Meistrich* as well. In each case, albeit different sports, the court held that athletes or participants do not assume the risk that the surface or facility itself would cause a serious injury.

Because the assumption of risk depends on the sport, Wyatt can reasonably expect the field to be properly maintained. In both *Wood* and *Leahy* the court found that the players did not reasonably assume the risk because they were not properly warned or informed. Here, Wyatt was not informed of the risk near the end zone, and did not reasonably expect a patch of concrete in the middle of the turf.

C. The Tulania Sirens breached their duty by failing to exercise ordinary care

Organized athletic teams must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks. *Benitez v. N.Y.C. Bd. of Educ.*, 541 N.E.2d at 33. There is a breach of duty when a reasonably prudent person would have anticipated danger and provided against it but fails to do so. *Smith v. Dewitt & Assocs.*, 279 S.W.3d 220, 224 (Mo. Ct. App. 2009) (holding that a landowner faces liability when "(1) a dangerous condition existed on the premises which involved an unreasonable risk; (2) the landowner knew, or by using ordinary care should have known of the condition; (3) the landowner failed to use ordinary care in

removing or warning of the danger; and (4) as a result, the invitee was injured."

A court found that the owner of a "go-cart" racecourse breached its duty to its drivers by not cleaning a liquid had spilled onto the track causing a dangerous slick spot. *Regan v. Seattle*, 458 P.2d 12, 13 (1969). This unsafe surface caused the plaintiff to crash and sustain injuries. *Id.* at 16. The material facts in the case turned on whether the track owner properly attempted to clean the substance off the track. *Id.*

By contrast, in *Turcotte v. Fell*, the court found that the racehorse track was maintained up to standards that the jockey had already seen and would reasonably expect given weather conditions and other tracks. 502 N.E.2d at 970. Therefore, the owners of the track did not breach their duty.

By allowing an unsafe field condition to persist it both failed to provide a safe workplace. J.A. at 17. The divot at the back of the end zone was an unsafe condition because it can cause high speed injuries to athletes that land in it. J.A. at 17. There is no dispute as to whether the Petitioners knew of the dangerous condition because an employee placed a cone near the area. J.A. at 17. However, this was not "reasonable" care in removing the danger. First, the hazard existed well before competition began. Second, replacing a section of turf, or filling it in, is not unduly burdensome. As the courts in *Turcotte* and *Regan* reasoned, it was the responsibility of the field owners to exercise ordinary care in ensuring that the dangerous condition is repaired.

D. The hazardous field condition in end zone was the proximate cause of Wyatt's season ending knee injury

Any chain of events "in natural or probable sequence" that caused an injury is "proximate." *See CSX Transp., Inc. v. McBride*, 564 U.S. 685 (2011). The nature of a case dictates the factors most relevant in assessing probable cause. *Derdiarian v. Felix Contractor Corp.*, 414 N.E.2d 666, 670 (1980). A plaintiff need only generally show that the defendant's negligence was a substantial

cause of the events which produced the injury in order to satisfy the burden of a prima facie case. *See Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451, 454 (1980); Restatement (Second) of Torts § 431. Plaintiff need not demonstrate, however, that the precise manner in which the accident happened, or the extent of injuries, was foreseeable. *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d at 545 Restatement (Second) of Torts § 435.

In this case, Wyatt was forced near the hazardous area of the end zone due to normal game play. J.A. at 17. However, there were hazardous conditions of the field and the conditions substantially caused his injury. In an effort to make a positive play he attempted to avoid the poorly placed orange cone, which caused his left foot to slip on a bare concrete patch. *Id.* This caused him to land in an unnatural fashion, which placed a stress on his knee significant enough to cause a season ending injury. *Id.*

CONCLUSION

For the foregoing reasons, the Tulane Sirens' mascot is obscene and therefore not protected by the First Amendment, and the team is liable to Ben Wyatt for negligence. Respondents respectfully request that the Court affirm the Fourteenth Circuit Court's decision.

Respectfully submitted,

Team 14

Counsel for Respondent

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