No. 09215

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,

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

BRIEF FOR RESPONDENT

Team Number 16

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 FACTS

Issue 1

Ben Wyatt, a wide receiver for the New Orleans Green Wave, participated in a Thanksgiving Day football game against the Tulania Sirens. (R. at 12.) Many members of the Tulania and New Orleans community watch the Thanksgiving Day game, making it a family event that many children enjoy. (R. at 12.)

Recently, the Tulania Sirens redesigned their mascot to depict a topless mermaid. (R. at 12.) In an effort to maximize profits, the Sirens mailed unsolicited pamphlets promoting the nude mascot to the citizens of Tulania, including Wyatt. (R. at 12.) In bold letters, the pamphlet read: "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" (R. at 12.)

The Tulania community was extremely offended by the disturbing mascot because, as the Center for People Against Sexualization of Women's Bodies ("PASWB") stated, it "appeals to the prurient interest and is not how the city of Tulania would like to be portrayed." (R. at 12.) In response, 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 or offer to distribute, any obscene matter is guilty of a misdemeanor." (R. at 12.)

On Thanksgiving day, depictions of the topless mascot covered the stadium, much to Wyatt's horror, and were included on fliers provided to every person who passed the stadium. (R. at 12.) Wyatt was devastated as his wife, Leslie Knope, was a member of PASWB. (R. at

12.) Knope and the couple's young children were present at the game where they were exposed to the horrifyingly nude mascot on display. (R. at 12.)

Wyatt and the PASWB brought suit in the United States District Court for the Southern District of Tulania, claiming that their promotion of a topless mascot is obscene and seeking to enjoin the Tulania Sirens from further displaying and promoting it. (R. at 13.) The District Court held that Wyatt and the People Against Sexualization of Women's Bodies could not enjoin the Tulania Sirens Football Team from the use of their mermaid mascot because it fails to satisfy the *Miller* prongs of obscenity and is thus protected by the First Amendment. (R. at 16.) After an appeal to the United States Court of Appeals for the Fourteenth Circuit, the District Court's decision was reversed due to the conclusion that the image is in fact obscene in nature. (R. at 10.) The petition for a writ of certiorari was granted to address the question of whether professional sports teams are protected by their First Amendment rights to display an obscene mascot. (R. at 2.)

Issue 2

At the Thanksgiving Day game, Wyatt played as a wide receiver for the Green Wave against the Tulania Sirens at Yulman Stadium in Tulania, Tulania. (R. at 17.) During pregame warmups, a player on the Tulania Sirens dove for a catch. (R. at 17.) When he got up, a large portion of the turf was jammed into his face mask, leaving behind a dangerous, exposed patch of cement. (R. at 17.) This cement patch was located merely ten feet behind the left side of the endzone. (R. at 17.)

In order to address this situation, a member of the Tulania staff haphazardly placed an orange cone over only part of the affected area, leaving an extremely dangerous patch of hard cement exposed. (R. at 17.) During the fourth quarter of the game, Wyatt ran into the endzone

catching a well-placed pass to the back-left corner. (R. at 17.) After catching the ball, Wyatt's force carried him through the endzone towards the cement patch. (R. at 17.) In an attempt to avoid the cone, Wyatt tried to make a sharp right. (R. at 17.) Wyatt's left foot landed on the cement patch that was not covered by the cone. (R. at 17.) He slipped and fell, severely injuring his left knee. (R. at 17.)

Wyatt maintains the resultant injury to his left knee ended his football career. (R. at 5.) Wyatt brought suit against the Tulania Sirens in the United States District Court for the Southern District of Tulania, claiming that the Sirens had a duty to protect him from injury, the Sirens failed to perform that duty, and the Sirens' failure proximately caused injury to Wyatt. (R. at 17.) The District Court held that Wyatt sustained a knee injury as a result of the Tulania Sirens' negligence and that he could recover damages in the amount expended on hospital bills, attorney's fees, and lost wages. (R. at 20.) After an appeal to the United States Court of Appeals for the Fourteenth Circuit, the District Court's decision was affirmed. (R. at 10.) The petition for a writ of certiorari was granted to address the question of whether an opposing team can be found negligent for a player's injuries during a game that resulted from an imperfection in the stadium. (R. at 2.)

STANDARD OF REVIEW

This court reviews all matters *de novo*. (R. at 2.)

SUMMARY OF THE ARGUMENT

Issue 1

The Tulania Sirens' bare-breasted mascot is obscene material unprotected by the First Amendment. Respondents and the Tulania community have condemned the image as falling below contemporary community standards. Further, the image's gratuitous nudity appeals to the prurient interest, and its unavoidable exhibition is patently offensive. The commercially exploitative nature of the mascot renders it devoid of any redeeming "serious" artistic or political value. Because the image meets the constitutional definition of "obscene," this Court should enjoin the Tulania Sirens from further use of the topless mascot.

Issue 2

The Tulania Sirens' negligent failure to ensure the safety of their playing field caused Wyatt to sustain a career-ending injury. The Sirens owed a duty to the general public and specifically those invited on the field to remove or warn of dangerous conditions and to maintain the field in a reasonably safe condition. In violation of this duty, the Sirens negligently permitted an exposed patch of cement to exist on the field about ten feet behind the endzone. The Sirens knew of the dangerous condition, as a member of the Tulania staff placed an orange cone over part of the affected area.

While Wyatt assumed the risks inherent in football, he did not assume the risk that he would suffer a career-ending injury because of an exposed patch of cement on the field. Furthermore, Petitioner's claim that the Collective Bargaining Agreement ("CBA") eliminates the Sirens' duty of care lacks merit because Wyatt's negligence claims are based solely on Tulania common law and can be maintained without reference to the agreement at all. Since

Wyatt's injury was a direct result of the Sirens' negligent actions, Wyatt is entitled to damages in the amount expended on hospital bills, attorney's fees, and lost wages.

ARGUMENT

I. THE RECREATED MASCOT IS OBSCENE UNDER THE *MILLER* STANDARD

The First Amendment, as applied to the states through the Fourteenth Amendment, protects the freedom of speech and expression. U.S. CONST. AMEND. I. However, this protection has never been treated as absolute. *Breard v. Alexandria*, 341 U.S. 622, 642 (1951). It is well settled that "obscenity is not within the area of constitutionally protected speech." *Roth v. United States*, 354 U.S. 476, 485 (1957). Although "all ideas having even the slightest redeeming social importance have the full protection" of the Constitution, obscene material is "no essential part of any exposition of ideas." *Id.* at 484-485 (internal quotations omitted). Unfettered exhibition of obscene material threatens important public interests, such as "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973). These community concerns lie at the heart of all obscenity cases, including civil actions like the instant case.

Despite its clear "rejection of obscenity as utterly without redeeming social importance," *Roth*, 354 U.S. at 484, this Court has long struggled to define obscenity, finally settling on the three-pronged approach articulated in *Miller v. California*, 413 U.S. 15 (1973). In determining whether a work falls outside the scope of the First Amendment,

> "[t]he basic guidelines for the trier of fact must be: (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 24.

All three guidelines must be met for a work to be found "obscene." *See Brockett v. Spokane Arcades*, 472 U.S. 491, 501 (1985) (explaining that material that meets only two of the three guidelines "is not without constitutional protection"). This Court reviews obscenity claims *de novo,* given the "ultimate power of appellate courts to conduct an independent review" of First Amendment cases. *Miller*, 413 U.S. at 25.

Although a "dim and uncertain line" often separates obscenity from constitutionally protected speech, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963), this Court has repeatedly warned against allowing "fatigue" to spur an "abnegation" of judicial duty in the form of an "absolutist, 'anything goes' view of the First Amendment." *Miller*, 413 U.S. at 29. Because Tulania and Respondents are well within their constitutional rights to regulate material they deem "obscene" in their community, the Tulania Sirens should be enjoined from using the image of a bare-breasted mermaid as their mascot.

A. THE MASCOT'S EXPOSED BREASTS APPEAL TO THE "PRURIENT INTEREST" UNDER THE RELEVANT COMMUNITY STANDARDS

The first guideline of the *Miller* test examines whether the average person applying "contemporary community standards" would find that the work, "taken as a whole, appeals to the "prurient interest." 413 U.S. at 25. In seeking the "community standard," the Court must consider

"all those whom [the work] is likely to reach," *Roth*, 354 U.S. at 490, rather than "the most prudish or the most tolerant." *Smith v. United States*, 431 U.S. 291, 304 (1977).

The obscenity test fixes "substantive constitutional limitations" on what a community can prohibit as obscene through the "prurient interest" requirement. *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974). This Court has defined prurient interest to mean a "shameful or morbid interest in nudity, sex or excretion." *Roth*, 354 U.S. at 487 n.20. Because the citizens of Tulania have indicated that the nude creature falls short of community standards and because the mascot appeals directly to the prurient interest, this threshold inquiry is satisfied.

1. Tulania's Obscenity Statute Passed in Response to The Sirens' Mascot Reflects The "Contemporary Community Standard."

The Fourteenth Circuit correctly dismissed the notion of seeking a "national" standard under this prong, (R. at 7), as this Court has explicitly rejected the establishment of a nationwide standard as "hypothetical and unascertainable." *Hamling v. United States*, 418 U.S. 87, 103 (1974). The District Court need not have "searched hard" for the applicable community standard; the citizens of Tulania already denounced the mascot as obscene through their elected officials. (R. at 15.)

It's undisputed that the Tulania legislature passed its obscenity law in direct response to the deluge of concerns it received about the mascot's exposed breasts. (R. at 12.) Although the District Court correctly noted that a singular group cannot speak for an entire community, (R. at 14) (citing *Hoover v. Byrd* 801 F.2d 740, 741-42 (5th Cir. 1986)), numerous groups and individuals unaffiliated with the Respondents voiced negative feedback to the mascot. This Court has long recognized that a "local statute on obscenity provides relevant evidence of the mores of the community whose legislative body enacted the law." *Smith*, 431 U.S. at 307-08. The timely

passage of the statute indicates that the community of Tulania, not merely the group party to this action, finds the mascot to be prurient and intolerable.

2. The Siren's Nudity Constitutes the "Whole" of the Work and was Designed to Appeal Directly to the "Prurient Interest"

A court may overturn a community determination that is clearly contrary to the First Amendment, such as "a conviction based upon a defendant's depiction of a woman with a bare midriff." *Jenkins*, 418 U.S. at 161. However, both common sense and case law instruct that the mascot's exposed breasts appeal to the prurient interest. As such, the community's determination that the nude mermaid is obscene fell within the confines of the Constitution and should be respected.

This Court has acknowledged that nudity and sex are "vital problem[s] of human interest" and have "indisputably been a subject of absorbing interest to mankind through the ages." *Roth*, 354 U.S. at 487. Subsequently, "nudity alone is not enough to make material legally obscene." *Jenkins*, 418 U.S. at 161. However, not all nudity is per se protected by the First Amendment. *See Miller*, 413 U.S. at 25 ("Nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation…"); *see also New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (rejecting that contention that a statute prohibiting the display of a "female breast area below a point immediately above the top of the areola" in bars infringed on First Amendment rights). "Lewd exhibition" of sensitive body parts, in this case breasts, can constitute obscenity appealing to the prurient interest. *Jenkins*, 418 U.S. at 160.

Taking the work as a "whole" in this case means examining the depiction of the topless mermaid alone. In contrast, "scenes of nudity in a movie" or "pictures of nude persons in a book" are placed in the context of the entire work and are "in this respect…distinguishable from the kind

of public nudity traditionally subject to indecent exposure laws." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 211 n.7 (1975). It is this contextualization that has dissuaded courts from condemning artistic exhibitions of nudity as appealing to the prurient interest. For example, a film tracing the lives of two men and their sexual relationships was not deemed obscene because "the camera [did] not focus on the bodies of the actors" and the scenes only displayed "occasional" flashes of nudity in the context of the entire film. *Jenkins*, 418 U.S. at 161; *see also United States v. Various Articles of Merch., Schedule No. 287*, 230 F.3d 649, 657 (2000) (finding magazines portraying the "nudist lifestyle" were not obscene because the photos "primarily focused on [the subjects'] activities" rather than making the nude bodies the "focal point" of the photographs).

Rather than a "flash" of nudity in a work designed to appeal to other interests, the topless mascot is exhibition of nudity "for its own sake." *Miller*, 413 U.S. at 35. The Sirens argue that the purpose behind the work was to claim the "first ever depiction of a strong female mascot in the sport of football." (R. at 16.) Our "robust common sense" should cause us to cry foul. *Paris Adult Theatre I*, 413 U.S. at 63. Other popular brands, such as Starbucks, use sirens to represent their company, but do so without exposing the breasts of the creature. Exposed nipples are wholly unnecessary to depict a "strong female" and are completely irrelevant to the game of football. The toplessness of the mermaid was clearly intended to appeal to a "morbid interest in nudity." *Roth*, 354 U.S. at 487 n.20.

Even if this Court ultimately does not agree with Tulanians' judgment concerning the mascot, it would be an overstep of its power to overrule a regulation within a community's constitutional police power. *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch . . . social conditions.") Obscenity law recognizes that "[i]t is neither realistic nor constitutionally sound to

read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller*, 412 U.S. at 32. The Court should thus respect Tulanians' voice and allow "the residents of [the] community to decide for themselves what will or will not be considered obscene in their local community." *United States v. Langford*, 688 F.2d 1088, 1096 (7th Cir. 1982).

B. THE DISTRIBUTION AND PUBLIC EXHIBITION OF A TOPLESS MERMAID CONSTITUTES SEXUAL CONDUCT UNDER TULANIA LAW

The second guideline of the *Miller* test requires that the work in question depict "in patently offensive way, sexual conduct specifically defined by the applicable state law." 413 U.S. at 24. Although the case at bar is a civil action, it's definition of "sexual conduct" derives from Tulania's criminal obscenity law. (R. at 12.) This Court has lauded the use of such civil procedures as providing "the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." *Paris Adult Theatre I*, 413 U.S. at 55.

As with the question of "pruriency," determining whether a work is "patently offensive" is also essentially a question of fact subject to constitutional limits. *Jenkins,* 418 U.S. at 160-61. While this Court has not defined "patently offensive," it has provided examples of the "hard core sexual conduct" it intended to restrict, including "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller,* 413 U.S. at 25-27. This list, however, was not intended to be an "exhaustive catalog" of what constitutes "patently offensive" or "hard core" content. *Jenkins*, 418 U.S. at 160. The nude mascot satisfies the second prong of the *Miller* test, as it depicts "patently offensive sexual conduct" as contemplated by Tulania law and the First Amendment.

1. <u>The Tulania Law Defines Sexual Conduct with the Requisite Constitutional Specificity</u>.

The Tulania law at issue states that: "[e]very person who knowingly . . . publishes, prints, exhibits, distributes, or offers to distribute . . . any obscene matter is guilty of a misdemeanor." (R. at 7.) The Sirens' promotion of the nude mermaid through unsolicited mailings, flyers, and exhibitions on television, thus easily qualifies as conduct prohibited by the applicable statute.

Further, the Tulania obscenity law defines sexual conduct with the specificity required by the First Amendment. It's well established that "commerce in obscene material is unprotected by any constitutional doctrine." *Paris Adult Theatre I*, 413 U.S. at 69. This Court has stressed states' legitimate interest in regulating the public exhibition and sale of obscene material, even if that same material could be viewed in private without consequence. *See Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (clarifying that its holding giving an individual the right to mere possession of obscene material does not "impair" or affect the states' "broad power" to regulate the distribution of such material).

The only possible contention with the statute could thus be the legislature's decision to use the term "obscene" within the text of the law. However, this Court has repeatedly upheld statues that leave the term "obscene" undefined or defined only by case law, so long as such laws are construed to incorporate the definition of obscenity from *Miller*. *See, e.g., Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 581 (2002) (upholding federal obscenity statutes prohibiting the mailing or transportation of "obscene" materials); *see also Ward v. Illinois*, 431 U.S. 767, 775 (1977) (rejecting the contention that state obscenity statute was overbroad for failing to enumerate the kinds of sexual conduct it intended to cover because the state court had construed the law to incorporate the *Miller* definition of obscenity). The Tulania law is thus constitutionally adequate, as it falls squarely within Tulania's police power and utilizes a construction accepted by this Court.

2. The Nude Mermaid is "Patently Offensive" Under First Amendment Jurisprudence

Pervasive exhibition of sensitive areas of the body is precisely the type of conduct this Court has attempted to restrict through obscenity law. Nudity exploited for "its own sake," as the instant case, was clearly of concern to the Court when it passed *Miller*, as evidenced by inclusion of "the lewd exhibition of the genitals" as an enumerated example of obscenity. 413 U.S. at 25. "Lewd" has been used interchangeably with "obscene" or "prurient." *See Brockett*, 472 U.S. at 493 (incorporating "lewd" in the Court's definition of "prurient" and upholding statue defining "'lewd matter' [as] synonymous with 'obscene matter'"). As described above, the gratuitous use of bare breasts by the Sirens' is both "prurient" and "lewd," thus rising to the level of "patently offensive" and "hard core" material contemplated by *Miller*.

Further, this Court has posited that "it may not be the content of the speech, as much as the deliberate 'verbal [or visual] assault' that justifies proscription." *Erznoznik*, 422 U.S. at 210 n.6 (citing *Rosenfeld v. New Jersey*, 408 U.S. 901, 906 (1972)). In this case, the Sirens are deliberately attempting to "reach" and "shock unwilling viewers" by plastering the bare-breasted mermaid all over the community. *Id*. The instant case represents the most extreme example of the oft-repeated concern for unsolicited exposure of obscene material to unwilling audiences. *See Paris Adult Theatre I*, 413 U.S. at 57 ("[The Supreme Court has] often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults.") "[S]exually explicit materials [were] thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials" not only through the mail, as in *Miller,* but also through the prominent display of the mascot on television and at the stadium during the Thanksgiving Day game, a family event and fixture of local cultural life. *Miller*, 413 U.S. at 18.

While "the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes," *Erznoznik*, 422 U.S. at 210-211 (internal quotations omitted), the exhibition of the topless mermaid was "so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup v. New York*, 386 U.S. 767, 769 (1967). For many families, football is more than a sport; it's a central aspect of community engagement. Even if a Tulanian were able to avoid the countless mailings and flyers, the burden to "avert his [or her] eyes" from his or her home football team all together is a much higher burden than merely avoiding certain publications in the corner store or certain movie theaters. *See Id.* (discussing the sale of magazines); *Erznoznik*, 422 U.S. at 212 (declining to enjoin theater from showing movies containing nudity). Such an inescapable "assault" on the unwilling Respondents is in itself "patently offensive" and "justifies proscription." *Id.* at 210.

C. THE MASCOT IS COMMERCIAL IN NATURE AND LACKS SERIOUS LITERARY, ARTISTIC, POLITICAL, OR SCIENTIFIC VALUE.

The third prong of the obscenity test, which requires determining whether the work "lacks serious literary, artistic, political, or scientific value," *Miller*, 413 U.S. at 24, is satisfied, as the mascot is utilized solely for commercial purposes. A plaintiff need not bear the "virtually impossible" burden of demonstrating that a work is "utterly without redeeming social value." *Miller*, 413 U.S. at 22. Rather, Respondents must only show that a "reasonable person" would find that the work in question lacks merit. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). While it's notably difficult to determine whether some artistic works possess "serious" social value, a pandering mascot of a sports team is unambiguously devoid of such cultural value.

While nudity may be permissible in some contexts, it's not protected when it's "commercially exploited for the sake of prurient appeal" alone. *Memoirs v. Massachusetts*, 383

U.S. 413, 418 (1966). This Court has determined that works possess redeeming artistic value when they use nudity to enhance their central, non-commercial message. *See Kois v. Wisconsin*, 408 U.S. 229, 230-31 (1972) (holding that a photo of a nude man and woman embracing was not obscene because its placement in a story accounting the arrest of a person in possession of a similar photo rendered it relevant and valuable to the article), *Jenkins*, 418 U.S. at 158-59 (declining to find the film "Carnal Knowledge" obscene because the sexual scenes merely contributed to the coming of age story at the center of the work). Similarly, courts have found that portrayals of the nude body are "political" when the context of such photos promotes a particular social or political message. *See Various Articles of Merch.*, 230 F.3d at 658-59 (holding that a magazine containing nude photos was not obscene because the work as a whole promoted the nudist lifestyle and the photos displayed such a lifestyle with "utopian flavor").

By contrast, the work in question has appeared only in a commercial context. *See Ashcroft v. Free Speech Coalition*, 535 U.S. at 258 ("Where a [party] engages in the 'commercial exploitation of erotica solely for the sake of prurient appeal', the context he or she creates may itself be relevant to the evaluation of [whether] the materials [are obscene].") The nude mascot has been displayed on pamphlets urging community members to purchase merchandise and in a stadium that fans pay to access. Further, the mascot's nudity bares no relevance to the sport of the football. The context of the bare-breasted mermaid's exhibition thus clearly indicates that its purpose is to draw attention and to exploit lewd nudity for profit. This is not artistic or political; it's branding. "To equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Miller*, 413 U.S at 34. In

light of such a high Constitutional mandate, the Court should recognize the Sirens' assaultive and purely profit-seeking topless mascot for what it is—unprotected obscenity.

II. THE SIRENS ARE NEGLIGENT FOR FAILING TO ENSURE THE SAFETY OF THE PLAYING FIELD

The relevant facts in this case are undisputed. For the purposes of this review, the United States Supreme Court will review all matters *de novo*. "[I]n any action for negligence, the plaintiff must establish that the defendant had a duty to protect the plaintiff from injury, the defendant failed to perform that duty, and the defendant's failure proximately caused injury to the plaintiff." *Lopez v. Three Rivers Elec. Coop.*, 26 S.W.3d 151, 155 (Mo. banc 2000).

Wyatt's claim to relief is based on theories of both premises liability—that the Sirens had control over the premises and did not make them safe—and general negligence—that the Sirens negligently allowed for the dangerous condition that injured Wyatt. "The touchstone for the creation of a duty is foreseeability." *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 62 (Mo. banc 1988). The scope of the duty is measured by "whether a reasonably prudent person would have anticipated danger and provided against it." *Smith v. Dewitt & Assocs.*, 279 S.W.3d 220, 224 (Mo. Ct. App. 2009). Courts have consistently held that sporting participants can only assume risks which are inherent in the sport and do not assume the risks created by a team's negligence. *See Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 506 (8th Cir. 1988); *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. App. 1993).

Both lower courts correctly ruled that the Sirens negligently breached their duty under Tulania law and caused injury to Wyatt by failing to repair or create a boundary around the dangerous patch of cement on the field. Since this risk is not inherent in football and the CBA is

not applicable to Wyatt's claims, we respectfully request that this Court affirm the judgment of the lower courts allowing Wyatt to recover damages based on the Sirens' negligence.

A. THE TULANIA SIRENS BREACHED A DUTY TO PROTECT WYATT FROM INJURY BY NEGLIGENTLY FAILING TO REPLACE OR REPAIR THE PATCH OF CEMENT ON THE FIELD.

The evidence presented at trial proves that the Sirens had a duty to protect Wyatt from injury, the Sirens failed to perform that duty, and the Sirens' failure proximately caused injury to Wyatt. *See Bush v. St. Louis Reg'l Convention & Sports Complex Auth.*, No. 4:16CV250 JCH, 2016 U.S. Dist. LEXIS 72518, at *6 (E.D. Mo. June 3, 2016). As an invitee on the Sirens' premises, Wyatt was owed a duty to use "reasonable care to protect [him] against danger from a condition on the land that creates an unreasonable risk of harm of which the [Sirens] knew or by the exercise of reasonable care would discover." *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000). In determining the scope of the Sirens' duty, "[t]he risk reasonably to be perceived defines the duty to be obeyed." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 344 (1928). The Tulania Sirens knew or should have known of a risk of harm to players sufficiently probable to create a duty to repair or replace the exposed cement.

1. <u>The Sirens Had a Duty to Protect Wyatt Against the Foreseeable Possibility of Injury Caused by the Dangerous Patch of Cement.</u>

An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." *Wymer v. Holmes*, 412 N.W.2d 213, 215 n.1 (Mich. 1987). Since Wyatt was acting in his capacity as a professional football player in the stadium controlled by the Sirens at the time of the injury, he was owed a duty as an invitee to be protected from unreasonable risks of harm such as a patch of

a cement located merely feet outside the endzone. A claim brought under premises liability requires proof of four elements: (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. *Griffith v. Dominic*, 254 S.W.3d 195, 198 (Mo. App. S.D. 2008).

It is clear that an exposed patch of cement ten feet from the endzone of a football field could, and likely would, cause injury if a player was to run over it at the high speed that professional athletes move. *See Fowler v. Ill. Sports Facilities Auth.*, 338 F. Supp. 3d 822, 828 (N.D. Ill. 2018) (holding that a small, metal box on the wall of a baseball field poses a significant risk of injury to players running in the area). Just months before this incident, another NFL team was found liable to an NFL player for negligently leaving an exposed patch of concrete thirty-five feet behind a team's bench on the side of the field. *Bush v. Los Angeles Rams, LLC*, No. 1622-CC00013-01, 2018 WL 3139576, at *1 (Mo. Cir. June 12, 2018). This landmark negligence case undoubtedly put the Sirens on notice that a patch of cement located merely ten feet behind the endzone is a dangerous condition that needs to be addressed, regardless of whether the cement was within the field of play or not.

Furthermore, the Sirens certainly knew of the dangerous condition because a Tulania employee placed an orange cone near the affected area. An employer is liable for the torts of its employees when those torts are conducted in the scope of the employee's responsibilities. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 170-172 (2d Cir. 1968). As such, when the Tulania staff member haphazardly placed the cone over part of the affected area and failed to keep the playing field safe, that failure rests with the Tulania Sirens, not the employee. Any

claim by Petitioner that there should be no duty because the cement was only exposed immediately before the game began lacks merit because a grounds crew is expected to be present on game days in order to fix any issues. (R. at 19.)

Placing a cone haphazardly over only part of the dangerous cement was not sufficient to remove or warn of the danger, as Wyatt was unable to avoid slipping on the cement and injuring his knee as a direct result of this extremely dangerous condition. Since patching the hole or placing a protective barrier around it would not have placed an unduly high burden on the Sirens, they breached their duty of care to Wyatt in negligently failing to eliminate the risk.

2. Wyatt Did Not Assume the Risk That He Would Suffer a Career-Ending Injury Because of an Issue with the Field Not Inherent in the Game of Football.

The assumed risks in professional football are not those created by a football team's negligence but rather by the nature of the game of football itself. *See Duffy v. Midlothian Country Club*, 481 N.E.2d 1037, 1041 (Ill. App. Ct. 1985). The Sirens' duty in this situation was to make the football field "as safe as [it] appear[s] to be." *Turcotte v. Fell*, 502 N.E.2d 964, 968 (N.Y. 1986). If all the risks of the game were perfectly obvious or fully comprehended, then Wyatt could have consented to them. Here, however, the Sirens' failure to maintain their field created an additional risk that Wyatt could not have assumed since it is not inherent in football.

To prove that Wyatt assumed this risk, the Sirens must show that Wyatt had a full subjective understanding of the specific risk, both its nature and presence, and that he voluntarily chose to encounter the risk. *Brown v. Stevens Pass, Inc.*, 984 P.2d 448, 450 (Wash Ct. App. 1999). A professional athlete assumes only those risks that are *inherent* in the sport. *See Scott v. Pacific West Mountain Resort*, 834 P.2d 6, 13 (Wash. 1992) (footnote omitted). As a result, softball players assume the risk of collisions with others at home plate, *Martin*, 857 S.W.2d at 369-70, and those present at baseball games assume the obvious risk of foul balls flying awry in

the stadiums. *Friedman v. Hous. Sports Ass'n*, 731 S.W.2d 572, 575 (Tex. App. 1987). Such injuries are clear aspects of the sports and thus understood by players and invitees who participate. In the game of football, such obvious risks include the possibility of injury due to being tackled or turning quickly to avoid being tackled. They decidedly do not include dodging a dangerous, unexpected patch of cement on the field where players are running full speed. Wyatt could not have assumed such an unforeseeable risk when he pursued a career as a professional athlete or walked into the Sirens' stadium on Thanksgiving day.

Furthermore, teams are not relieved from liability for every failure to exercise due care simply because of inherent risks in the sport. *See Sheppard v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 264 (Mo. App. 1995) (holding that while a long jumper assumed the risk of a bad landing, he did not relieve the high school of duty to provide a reasonably safe jumping pit). "Primary assumption of risk in a sports setting does not include the failure of the operator to provide reasonably safe facilities." *Scott*, 834 P.2d at 16. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly has a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992). Similarly, although a football team has no duty to remove the risks inherent to the sport of football (tackling, high speed running, etc.), it clearly has a duty to use due care to maintain its playing field in a reasonably safe condition so as not to expose players to an increased and avoidable risk of injury.

3. The CBA Does Not Preempt the Negligence Claim Because These Duties Arise Solely From Tulania Common Law and Do Not Require CBA Interpretation.

Section 301 of the Labor Management Relations Act (LMRA) preempts state law claims that are "substantially dependent" upon analysis of a CBA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). However, the Supreme Court has established that section 301 does not

preempt state law claims merely because the parties involved are subject to a CBA and the events underlying the claim occurred on the job. *Id.* at 211. Thus, a state law claim is only preempted if the CBA is the source of the plaintiff's claims or if the claims are "substantially dependent" upon interpretation of the CBA. *Green v. Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014). To decide Wyatt's claims, a court will not have to interpret, apply, or compel compliance with any provision of the CBA. Wyatt's claims start and end with Tulania common law, without regard to the CBA.

The CBA does not preempt "what would otherwise be tort actions brought by [Wyatt] against the [Sirens] for the carelessness of [the Sirens]." *Brown v. Nat'l Football League*, 219 F. Supp. 2d 372, 389 (S.D.N.Y. 2002). The Sirens cannot hide behind a "mere reference" to part of the CBA without showing "how the interpretation of [these] sections is essential to plaintiff['s] case." *Green*, 21 F. Supp.3d at 1028. If there is a free-standing tort duty, the Supreme Court has repeatedly advised that it would be inconsistent with congressional intent to preempt state rules that proscribe tortious conduct independent of a labor contract. *Brown*, 219 F. Supp. 2d at 380 (citing *Allis-Chalmers*, 471 U.S. at 211-12; *Hawaiian Airlines. Inc. v. Norris*, 512 U.S. 246, 260 (1994); *Livadas v. Bradshaw*, 512 U.S. 107, 123-124 (1994)).

In analyzing an almost identical fact pattern, the Missouri Eastern District Court correctly determined that the sections in the CBA related to costs of medical services rendered by Club physicians, contractual obligations for physical examinations, and preventative care are irrelevant and inapplicable to a claim of common law negligence. *Bush*, 2016 U.S. Dist. LEXIS 72518, at *11. In *Brown*, a professional football player filed a negligence action after being hit in the eye by a penalty flag thrown by a referee. *Brown*, 219 F. Supp. 2d at 375. The court reasoned that the player's tort action would not require interpretation of the CBA and would

"implicate only ordinary concepts of negligence and assumption of risk, referring at most to the playing rules of NFL football and the proper conduct of referees - none of which are addressed in the CBA[.]" *Id.* at 389. Here, just as in *Green*, *Bush*, *Brown*, and many others, Wyatt alleges a state-law tort claim arising out of the duty of reasonable care that the Sirens owed to any other person in society who walked onto its dangerous field. Just because he is a football player does not mean Wyatt's claims of negligence against the opposing team must be preempted. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 397 n. 10 (1987) ("Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not pre-empted by § 301.").

Additionally, any attempt by Petitioner to invoke Article 43 of the CBA's arbitration requirement lacks merit because it is narrow in scope and does not encompass state law tort claims that, like Wyatt's, neither depend on nor require reference to the CBA. Article 43, entitled "Non-Injury Grievance," requires arbitration of certain disputes involving the interpretation or application of the CBA itself, the NFL Player Contract, or the NFL Rules, which contain Playing Field Specifications addressing field hardness, infill depth and evenness, and other issues relating to field safety. *Hous. NFL Holding L.P. v. Ryans*, 581 S.W.3d 900, 905 (Tex. App. 2019).

In *Ryans*, a Texas Court of Appeals diverged from extensive precedent, holding that an NFL player's premises liability claim fell within the CBA arbitration clause because it involved interpretation of the NFL Rules. *Id.* at 903. This unprecedented holding is inapplicable here, as Wyatt's claims do not fall within Article 43 for the same reason they are not preempted by the CBA: no interpretation of any CBA term is necessary to prove Wyatt's state law claims, and his claims are based solely on the premises liability and negligence laws of Tulania. Even if the mention of the NFL Rules in Article 43 established a standard of reasonableness less stringent than

what would be applied absent the contract, this part of the CBA would still not be part of Wyatt's claim, which solely derives from an interpretation of Tulania common law. Rather, they would merely be a defense to liability, since the operation of the NFL Rules would be a "reason why the plaintiff should not recover." *Green*, 21 F. Supp.3d at 1029. Therefore, the CBA does not eliminate the duty of care that Wyatt has established in his claim.

B. THE TULANIA SIRENS' FAILURE TO FIX THE DANGEROUS CONCRETE PATCH WAS THE PROXIMATE CAUSE OF WYATT'S KNEE INJURY.

Wyatt's injury was proximately caused by the Sirens' lack of effort to fix the missing patch of turf on the field. The Supreme Court has recognized that there are multiple common-law formulations of proximate cause including the "immediate" or "nearest" antecedent test; the "efficient, producing cause" test; the "substantial factor" test; and the "probable," or "natural and probable," or "foreseeable" consequence test. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 701 (2011). Under any of these formulations, the failure to fill the hole in the turf was the reason Wyatt's knee was turned in an unnatural fashion when his foot landed in this area. Had this problem been fixed, this injury would not have occurred. Having already determined that the Sirens failed in their duty by only placing a small orange cone near the affected area, it is evident that this injury is the result of the Sirens' negligence.

In the context of determining proximate causation, foreseeability refers to whether a defendant could have anticipated a particular chain of events that resulted in injury. *See Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 865-66 (Mo. 1993). This type of foreseeability relies upon hindsight to determine whether the particular injury was a natural and probable consequence of a negligent act. *See Lopez*, 26 S.W.2d 156. "It is of course unnecessary that the [Sirens] should have anticipated the very injury complained of or

anticipated that it would have happened in the exact manner that it did. All that is necessary is that [the Sirens] knew or ought to have known that there was an appreciable chance some injury would result." *Tharp v. Monsees*, 327 S.W.2d 889, 894 (Mo. banc 1959). Here, the Sirens could and should have foreseen that a patch of cement located merely feet away from the endzone of a football field created a serious risk that players running full speed would fall and hurt themselves on it. It makes no difference that Wyatt noticed the cone and attempted to make a sharp right because (1) his left foot still landed on the cement patch; and (2) Wyatt's actions do not disrupt the causal connection because the Sirens should have realized that a player may try to turn sharply to avoid a negligently placed patch of cement on the field. *See Palsgraf*, 248 N.Y. at 344. Therefore, the failure of the Sirens to properly address the missing turf was the proximate cause of Wyatt's knee injury.

CONCLUSION

The Sirens' nude mascot appeals to the prurient interest, is patently offensive under Tulania law, and is lacking any serious artistic or political value. As such, the image is "obscene" and unprotected by the First Amendment. Therefore, we respectfully request this Court affirm the judgement of the Fourteenth Circuit and enjoin the Sirens from further use of the mascot.

The Sirens had a duty to Wyatt. The breach of that duty was the proximate cause of Wyatt's injury. Wyatt sustained a career-ending injury due to the Sirens' negligence, causing him to lose the ability to do what he loves and to bargain for a contract that he worked his entire life for. Therefore, we respectfully request that this Court affirm the judgment of the lower courts in allowing Wyatt to recover damages in the amount expended on hospital bills, attorney's fees, and lost wages.