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;

Respondents.

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

BRIEF FOR THE RESPONDENTS

R17

QUESTIONS PRESENTED

I. Whether a professional football team's topless siren mascot baring exposed breasts is protected by the First Amendment?

II. Whether a football team can be found negligent for its failure to fix a known imperfection in the turf resulting in an opposing player's injuries?

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STATEMENT OF THE CASE

This case contains a unique consolidation of two actions. The first action involves Respondents-Appellants below, Ben Wyatt ("Wyatt") and the People Against Sexualization of Women's Bodies ("PASWB"), (together "Respondents") seeking to enjoin the Petitioner-Appellee below, Tulania Sirens Football Team ("Tulania Sirens" or "Sirens") from using a topless siren with exposed breasts as its mascot. R. at 12. The second action involves Wyatt, individually, seeking to hold the Tulania Sirens negligent for his career ending injury incurred as a result of an imperfection in the turf at the Sirens' Yulman Stadium. *Id.* In the interest of judicial efficiency, the cases were consolidated. *Id.*

I. Topless Siren Mascot Baring Exposed Breasts

The Tulania Sirens is a football team located in the Tulania community. *Id.* Watching the Sirens play is a family event that the community looks forward to. *Id.* Many families enjoy the game by either attending in person or watching on television at home. *Id.* One game many members of the Tulania community enjoy is the division rivalry game against the New Orleans Green Wave on Thanksgiving Day. *Id.*

Prior to the rivalry game on Thanksgiving Day, the Sirens decided to rebrand their mascot. *Id.* The new mascot depicts a topless siren with exposed breasts. *Id.* The Sirens mailed unsolicited pamphlets to the citizens of Tulania in an effort to promote not only the Thanksgiving Day game, but also their new topless mascot. *Id.* The pamphlet encouraged purchasing Sirens' gear displaying the topless siren with her breast exposed as a way to show your support. Specifically, the pamphlet stated: "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" *Id.* at 7.

Many members of the community, including Wyatt and PASWB, were offended by the Sirens' topless mascot and did not want the City of Tulania to be portrayed in this manner. *Id.* at 12. Although the Respondents did not request the promotional material, they received the pamphlets in their mailboxes. *Id.* PASWB, as well as many members in the community were offended, and did not want the City of Tulania to be portrayed in this manner. *Id.* In response to similar concerns from other groups and members of the community, the City of Tulania passed a new law. *Id.* The law provides 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 offer to distribute, any obscene matter is guilty of a misdemeanor." *Id.*

Despite the new law, when Wyatt entered the Sirens' stadium on Thanksgiving Day, much to his horror, he encountered a giant topless siren with exposed breasts in the middle of the field. *Id.* In addition, depictions of the topless Siren with her breasts exposed were everywhere, including on fliers that were given to everyone who passed by the stadium. *Id.* Wyatt was extremely upset as his wife and young children were present at the game and thus were forced to be exposed to the breasts of the topless mascot. *Id.* Not only were guests in attendance exposed to the sirens' breasts, but also the viewers watching at home. *Id.* Both Wyatt and his wife are members of PASWB. *Id.* Thus, Wyatt and PASWB brought suit to enjoin the Sirens from using the topless mascot.

II. Career Ending Knee Injury

Wyatt is a former star wide receiver for the New Orleans Green Wave football team. R. at 17. As a critical pawn in the offensive scheme of his team, Wyatt was always on the field. *Id.*

Wyatt's offense depended on him to score touchdowns, especially during division rivalry games against the Tulania Sirens. *Id.*

On Thanksgiving Day, Wyatt and his team faced division rivals, the Tulania Sirens, at Yumlan Stadium. *Id.* During pregame warmups, a Tulania Sirens player dove for a catch in the endzone. *Id.* As he hit the ground behind the endzone, his face mask was shoved into the turf causing a large portion of turf to jam into his face mask. *Id.* As a result, the field was missing a patch of turf, which left behind a partially exposed patch of cement. *Id.*

Instead of repairing or replacing the missing patch of turf, which could have occurred prior to the game, a member of the Tulania staff placed a small orange cone over the large portion of missing turf. *Id.* at 8-9, 17, 19. The cone failed to completely cover the exposed patch of cement. *Id.*

The division game was close, and during the fourth quarter Wyatt ran into the endzone for a touchdown. *Id.* As Wyatt caught the ball, his momentum carried him though the endzone towards the small orange cone placed by the Tulania staff. *Id.* In an attempt to avoid the cone, Wyatt made a sharp right, and his left foot landed on the cement patch that was not covered by the cone. *Id.* Wyatt's foot landing on the cement patch caused him to slip, fall, and injure his left knee. *Id.* This left knee injury ended Wyatt's career as a star wide receiver. *Id.* Thus, Wyatt, individually, brought suit against the Tulania Sirens for negligence.

The United States District Court for the Southern District Court of Tulania incorrectly held the topless Tulania Sirens mascot was protected by the First Amendment, but correctly held Wyatt's career ending knee injury was a result of the Tulania Sirens' negligence. *Id.* at 16, 20. A notice of appeal was filed, and the United States Court of Appeals for the Fourteenth Circuit properly reversed the lower court with respect to the topless mascot, finding the image is obscene

in nature and not protected by the First Amendment, and properly affirmed the lower court with respect to Tulania Sirens' negligence. *Id.* at 10. Petitioners filed a writ of certiorari, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) for the first issue and jurisdiction is proper under the Court's supplemental jurisdiction for the second issue under 28 U.S.C. § 1367.

SUMMARY OF THE ARGUMENT

I. The Tulania Sirens' mascot is not protected by the First Amendment because it is obscene.

The District Court's failure to enjoin the Tulania Sirens professional football team from using the Siren mascot with exposed breasts was properly reversed by the Circuit Court's finding that the image is obscene in nature. Respondents respectfully request this Honorable Court affirm the Circuit Court's holding because the topless Tulania Sirens' mascot is obscene. Obscenity is defined in *Miller v. California*. The mascot appeals to the prurient interest of an average citizen of Tulania; depicts in a patently offensive way, sexual conduct specifically by Tulania law, and lacks serious literary, artistic, political, or scientific value. Thus, the Tulania Sirens mascot satisfies the obscenity test in Miller and is not afforded First Amendment protection.

II. The Tulania Sirens were negligent for failing to provide a reasonably safe working environment resulting in Wyatt's career ending injury.

The District Court's correct conclusion that Wyatt's career ending injury was the result of negligence on the part of the Tulania Sirens professional football team was properly affirmed by the Circuit Court. Wyatt respectfully requests this Honorable Court affirm the Circuit Court's finding because the Sirens had a duty to provide a reasonably safe stadium and to warn Wyatt of the patch of missing turf with exposed cement. The Sirens breached this duty by not repairing the turf before the Thanksgiving Day game and not warning Wyatt of the hazardous condition. The Sirens breach of duty is the proximate cause of Wyatt's career ending knee injury when he slipped on the exposed cement while barreling through the endzone after catching a pass. The Tulania Sirens failed to carry its burden under an assumption of risk defense because it cannot be said that a missing patch of turf with exposed cement is an inherent risk in professional football.

In sum, Respondents respectfully request this Honorable Court affirm the Circuit Court's conclusions that the topless siren mascot with exposed breasts is not protected by the First Amendment, and Wyatt's career ending knee injury was a result of the Tulania Sirens' negligence.

STANDARD OF REVIEW

This Court reviews *de novo* the United States Court of Appeals for the Fourteenth Circuit's ruling to enjoin the Tulania Sirens professional football team's use of a topless siren with exposed breasts as a mascot, and conclusion that Wyatt's career ending knee injury is the result of the Tulania Sirens professional football team's negligence. R. at 5.

ARGUMENT

I. The Tulania Sirens' Mascot is not protected by the First Amendment because it is obscene.

The Circuit Court correctly concluded that the Tulania football team's Siren mascot constituted obscene material and therefore is not protected by the First Amendment. In determining whether the Sirens' mascot was obscene, the Circuit Court analyzed the mascot using the three-prong obscenity test established in *Miller v. California*. As set forth in *Miller*, if the material, (1) taken as a whole, appeals to the prurient interest of an average person in the community, (2) depicts or describes, in a patently offensive way, sexual conduct that is specifically defined under state law, and (3) lacks any serious "literary, artistic, political, or scientific value," then the material is obscene and is not afforded First Amendment protection. *Miller v. California*, 413 U.S. 15, 15-16 (1973). All of the *Miller* prongs must be satisfied in order to conclude the questioned material is obscene.

In this case, a topless siren mascot with exposed breasts does not fall under the realm of protected expression because it appeals to the prurient interest, depicts sexual conduct specifically defined by Tulania state law, and lacks any literary, artistic, political, or scientific value. As the mascot satisfies each prong of the *Miller* test, it is deemed obscene and therefore does not receive First Amendment protection.

A. The Tulania Sirens mascot appeals to the prurient interest of the average citizen of Tulania and therefore is not protected under the First Amendment.

The Tulania Sirens mascot, baring exposed breasts, appeals to the prurient interest of the average person in Tulania and is not protected by the First Amendment. Determining whether material appeals to the prurient interest of the average person necessitates an analysis of the contemporary community standards in which the material is distributed. *Id.* In addition, it

requires an analysis of prurient interests in order to determine whether the material depicts a morbid interest in sex, nudity, and obscene or pornographic matters. *Id.* at 16 n.1.

1. A topless Siren mascot violates the contemporary community standards of the citizens of Tulania.

Applying contemporary community standards in order to identify obscene material ensures the material is judged by its impact on the average person, and not a highly susceptible or sensitive person. *Id.* at 33. The courts, in line with this view, consider the contemporary community standards of the local municipalities, and not on a national scale. *Ashcroft v. A.C.L.U.*, 535 U.S. 564, 576 (2002). This allows the trier of fact to consider what is acceptable in his or her community, while precluding him or her from being held to a community standard acceptable in another geographical region. *Id.* at 577. For example, what is acceptable in Portland, Maine may not be acceptable in Los Angeles, California. Thus, because community standards can differ, the analysis hinges on what the local citizenship deems obscene.

Technology, however, has made discerning community standards difficult. For example, in *Ashcroft*, the Child Online Protection Act ("COPA"), a statute relating to the regulation of child pornography, identified community standards as "material that is harmful to minors." *Id*. at 601. In defining material that is harmful to minors, COPA modeled its definition on the test established in *Miller*. *Id.* at 570. This Court in *Aschroft* held that "[a]bsent geographic specification, a juror applying community standards will inevitably draw upon personal 'knowledge of the community or vicinage from which he comes.'" *Id.* at 577. Further, jurors were presented with instructions under COPA to apply community standards of the entire adult population, even though the variance in community standards across the country "could still cause juries in different locations to reach inconsistent conclusions as to whether a particular work is 'harmful to minors.'" *Id*. at 577. The standard established in *Ashcroft* did not violate the

First Amendment nor did it render the statute unconstitutional because the COPA test included additional restrictions under the first *Miller* prong. *Id.*

Additionally, this Court made clear in *Mishkin v. New York*, that the primary concern of using contemporary community standards is to ensure that material, not aimed at any deviant group, will be "judged by its impact on an average person, rather than a particularly susceptible or sensitive person -- or indeed a totally insensitive one." 383 U.S. 502, 508-09 (1966). In *In re Club "D" Lane, Inc.*, the defendant violated state regulations when the club allowed female dancers with transparent pasties covering only the nipples on their breasts to perform for their customers. *In re Club "D" Lane, Inc.*, 272 A.2d 302, 302-03 (N.J. Super. Ct. App. Div. 1971). In their rationale, the court emphasized that "the community has a right to protect itself against this kind of an immoral atmosphere which exists elsewhere in the United States." *Id*. at 30 (citing *Paterson Tavern & Grill Owners Ass'n Inc., v. Hawthorne*, 261 A.2d 677, 680 (N.J. Super. Ct. App. Div. 1970), *rev'd on other grounds*.

Although local municipalities may have difficulty discerning what constitutes obscene material, some material is so obscene that it is universally unacceptable, regardless of geographic lines. For example, the infamous 2004 Super Bowl halftime performance by Janet Jackson and Justin Timberlake included Timberlake tearing away part of Jackson's costume exposing her bare right breast. *CBS Corp. v. FCC*, 535 F.3d 167, 172 (3d Cir. 2008). This exposure of Jackson's breast on live national television sparked major controversy and caused a sensation to the point where the Federal Communications Commission received complaints from a large number of viewers. *Id.* at 172.

Just as broadcasting Jackson's exposed breast offended viewers, many people of the Tulania community were offended after being exposed to the Sirens' new mascot. R. at 12. In

response to the Siren's mascot, the City passed a law stating that anyone who distributes obscene material is guilty of a misdemeanor. *Id*. *See also* Tulania Penal Code § 12 (2019). Prior to the big Thanksgiving Day game, families and children opened their mailbox and were presented with an unsolicited advertisement of a bare breasted siren sent to promote the re-branding of the mascot. *Id*. Many citizens look forward to the big game every year and they were offended by the change to their team's mascot. *Id*.

The Sirens' mascot promotes their football team and displaying a bare breasted siren before and during a game may attract the wrong crowds. The City of Tulania determined that they did not want to have any obscene matter prepared, published, printed, exhibited, distributed, or intended to distribute for sale. *Id.* Tulania has the right to protect their citizens who were clearly upset about the bare breasted mascot. *Id*. Tulania's mascot has the potential to cause a universal issue that blurs geographical areas in the football community. Clearly the football community does not approve of even one breast being exposed for a moment during a halftime show, let alone extended exposure of children and families to the topless Sirens' breasts. Therefore, the Tulania Sirens mascot does not conform to the community standards of the City of Tulania which moves the analysis to establish whether the mascot appeals to the prurient interest.

2. A topless Siren mascot appeals to the prurient interest of an average person in Tulania.

After recognizing that the topless siren mascot would be considered unacceptable under the contemporary community standards, what is considered a prurient interest needs to be determined. A "prurient interest" is to be determined by the trier of fact and in general is defined as "a shameful or morbid interest in nudity… which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without

redeeming social importance." *Miller*, 413 U.S. at 30; (quoting California Penal Code § 311(a) (2019)).

Roth v. United States established the prurient subsection of the *Miller* obscenity test. 354 U.S. 476 (1957). Roth was charged with mailing obscene circulars, advertising, and book, in violation of the federal obscenity statute. *Id.* at 480-81. In *Roth*, this Court framed the First Amendment analysis as "whether [] the average person, applying contemporary community standards, [finds] the dominant theme of the material taken as a whole appeals to prurient interest." *Id.* at 489. It was determined that the advertising of the indecent books constituted obscene material that is not protected by the First Amendment. *Id.* at 480. If an idea has "even the slightest redeeming social importance" including ideas that are unorthodox, controversial, even hateful, the idea will have full protection of the First Amendment, unless it falls under the limited area of more important interests. *Id.* at 484. The First Amendment rejects obscenity as "utterly without redeeming social importance" because there is a universal conclusion that obscenity should be restrained which has been reflected in the specific obscenity laws of all of the states. *Id.* at 484-85. This *Roth* analysis later became the first prong of *Miller*. *See Miller*, 413 U.S. at 20-23.

Further, *Roth* cited *Chaplinsky* and highlighted that there are classes of speech that should be protected and that there are limited speech classes that can be punished which the Court presumed would not raise any Constitutional issues. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). Included in the classification of speech that would not be awarded First Amendment protection are the lewd and obscene. *Id.* This Court in *Chaplinsky*, and throughout First Amendment cases, highlight that obscene speech holds "no essential part of any exposition

of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Id.*

In *United States v. Playboy Entertainment Group*, Section 505 of the Telecommunications Act of 1996 was challenged because it required channels with content devoted primary to "sexual nature" to ensure their programming was protected from children potentially seeing the programs. 529 U.S. 803, 806 (2000). The network had to either scramble, block, or limit the transmission of the material to the hours of 10 p.m. to 6 a.m. *Id*. This Court began its analysis with the assumption that many adults themselves would find the material highly offensive and unwanted in homes where children might see or hear it against parental wishes or consent. *Id.* at 811-12. This Court concluded that there were legitimate reasons for regulating Playboy. *Id.* at 811. Playboy argued that its programming had First Amendment protection. *Id.* at 807. This Court concluded that adults have a constitutional right to view this material but there is a time, place and manner for this type of programming to be shown. *Id.* at 811-13.

Additionally, when the dominant theme of the material appeals to the prurient interest it will be considered obscene. *Kois v. Wisconsin*, 408 U.S. 229, 229-32 (1972). For example, in *Kois v. Wisconsin*, published pictures of naked bodies that were associated with articles pertaining to a photographer who was arrested for possessing and distributing obscene material were protected under the First and Fourteenth Amendment. *Id*. A siren is defined by Merriam-Webster as: "any of a group of female and partly human creatures in Greek mythology that lured mariners to destruction by their singing" with synonyms including "temptress" and "seductress." "Siren." *Merriam-Webster.com*. https://www.merriam-webster.com (5 Jan. 2020).

Similar to this case where the Sirens' sent unsolicited pamphlets, put the siren on gear and decorations in the stadium, and presented the mascot to the world by displaying a giant topless siren in the middle of the field before the game, *Miller* involved sexually explicit materials which the court described as having been thrust by "aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials." *Miller*, 413 U.S. at 18; R. at 12. The distinction between *Kois* and the case at bar is that the pictures in *Kois* were small and were considered to be associated with the article that was published. *Kois*, 408 U.S. at 231-32. Under the precedent of *Miller*, "nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Miller*, 413 U.S. at 18-19. Here, a mascot depicting a siren, whose sole purpose is to be a seductress and lure seamen to their death, showing her breasts, and putting this obscenity on television and merchandise to be worn by fans, including children, appeals to a prurient interest. R. at 12.

This Court recognized that states have "a legitimate interest in prohibiting dissemination or 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." *Miller*, 413 U.S. at 18-19 (internal citations omitted). Such so-called "entertainment" is nothing more or less than an appeal to the prurient interest. *In re Club "D" Lane*, 272 A.2d at 302-03. Citizens of Tulania should not be forced to see a topless siren in their homes on their television screens while they are trying to enjoy a football game and further should be able to shield their children from such conduct. R. at 5.

The Respondents are not attacking the pornographic industry; however, these are the cases that produce the majority of precedent. The *Playboy* case supports this: "[n]o one suggests

the Government must be indifferent to unwanted, indecent speech that comes into the home without parental consent . . . even where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative." *Playboy*, 529 U.S. at 879-80. The less restrictive alternative here is managed through the Tulania statute. While this case does not involve pornographic movies, the topless siren with exposed breast is broadcasted through television, billboards, merchandise, and other mediums. R. at 12.

Therefore, the average person of Tulania, applying contemporary community standards and taking the Tulania Sirens mascot as a whole would find the use of such symbol for a football team mascot appeals to the prurient interest. It is clear the mascot satisfies the first prong of the *Miller* obscenity test.

B. The Tulania Sirens' mascot is not protected by the First Amendment because it depicts sexual conduct in a patently offensive way, which is specifically defined by Tulania Law.

The Tulania Sirens mascot, baring exposed breasts, depicts sexual conduct in a patently offensive way. This Court reasoned that states have a legitimate interest in banning distribution or showing of obscene material especially when the means of spreading this material carries with it "a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller*, 413 U.S. at 18-19. Courts will often focus on ensuring the state law is narrowly tailored in order to make First Amendment values applicable to the states through the Fourteenth Amendment. *Id.* at 15-16. The narrow tailoring allows appellate courts to conduct independent reviews when necessary in order to determine the constitutionality of a claim. *Id*. This Court in *Miller* proposed additional language that could be used in statutes, including

"ultimate sex acts" and "lewd exhibition of genitals," emphasizing that it is not the Court's function to propose legislation changes, but to interpret statutes. *Id.* at 25.

In order to survive the second *Miller* prong, the statute has to be specific in defining sexual conduct. When Courts are interpreting whether a statute is overly broad regarding sexual conduct, they review the wording of the statute to ensure the conduct is defined. *Id.* at 24. For example, in *Roth v. United States*, this Court analyzed the federal obscenity statute and the California Penal Code to determine whether the statutes were overly broad. 354 U.S. at 491-92. In analyzing the statutes, this Court recognized that terms of obscenity statutes are not precise. *Id.* However, this Court has consistently held that "lack of precision is not itself offensive to the requirements of due process." *Id.* at 491. Additionally, all that is required under the Constitution is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices . . . ." *Id.* at 491-92 (citing *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947)). The words used in the statute must "give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . . '" *Roth* at 492. (citing *Petrillo*, 332 U.S. at 7). This Court held that the federal obscenity and California Penal Code statutes included the proper standard for judging obscenity and therefore did not offend constitutional safeguards against convictions based upon protected material. *Id.* Additionally, the statutes gave adequate notice of what is prohibited. *Id.*

Similarly, the Tulania statute is not overly broad because it specifically defines sexual conduct and gives adequate notice of what is prohibited. Sexual conduct is specifically defined by Tulania Law as "[e]very person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his/her possession with intent to

distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." Tulania Penal Code § 12 (2019); *see also* R. at 7. The Tulania Sirens knowingly sent, distributed, published, and printed sexual conduct in a patently offensive way specifically defined by Tulania law. Additionally, the team intends to distribute the obscene material by advertising the merchandise on the pamphlets with "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" R. at 7. The specific way the Tulania statute identifies the production of the obscene matter is sufficient and includes sexual conduct which in this case is a siren with exposed breasts. Thus, while one may argue a statute is broad for not identifying sexual conduct with specificity, it is clear that the statute for Tulania provides a specific reference to the obscene which includes sexual displays, i.e. a topless siren. *Id.* at 12.

Moreover, the Tulania government has a right to protect its citizens from this type of obscenity. *See Lakeland Lounge v. Jackson*, 973 F.2d 1255 (5th. Cir. 1992) (restricting topless nightclubs through zoning ordinances to limit the harmful effects adult entertainment has on property values, crime rates, and the community as a whole). The citizens were pushing for action by the City when the unsolicited pamphlets were mailed to their home. R. at 12. The City of Tulania passed a statute that prohibits any obscene matter. *Id*. The City is not stating that the siren mascot is banned. There are other ways to display a siren mascot. *See* Ronald Holden, *Mermaid, Siren, Princess: How The Starbucks Logo Evolved*, FORBES (Mar. 4, 2017), https://www.forbes.com/sites/ronaldholden/2017/03/04/mermaid-siren-princess-how-the-starbucks-logo-evolved/#5602122758bd (discussing the process of altering the original siren Starbucks logo by covering the siren's exposed breasts with her hair). The Tulania

Sirens could still have the female siren as their mascot, and simply cover her breasts with her hair, or give her a bathing suit more similar to a mermaid instead of a seductress siren. Thus, the topless siren mascot depicts, in a patently offensive way, sexual conduct as defined by Tulania law and therefore satisfies the second prong of the *Miller* obscenity test.

C. The Tulania Sirens mascot, taken as a whole, lacks serious literary, artistic, political, or scientific value and therefore is not protected by the First Amendment.

The Tulania Sirens mascot, baring exposed breasts, lacks serious literary, artistic, political or scientific value and therefore satisfies the final prong of *Miller*. In order for a matter to be of value the courts will analyze the matter as a whole in order to determine whether it should be awarded First Amendment protection.

Determining the seriousness of a material's literary, artistic, political or scientific value is difficult to discern. Courts are very reluctant to withhold protection for works that have even the slightest value for fear of treading on the First Amendment. In *United States v. Various Articles of Merchandise*, the Third Circuit held that nudist magazines depicting nudists' alternative lifestyles was political speech and therefore should be awarded First Amendment protection. 230 F.3d 649, 658-59 (3d Cir. 2000) In protecting the nudists, the term "political" was used because it was broad enough to encompass material that brings about "political and social changes." *Id.* The court reasoned that nudists are members of an alternative community, and "Naturally" the magazine, championed nudists' alternative lifestyle, which the nudist community feels is in danger of being curtailed by government regulation. *Id.* The court concluded that publications dedicated to presenting a visual depiction of an alternative lifestyle "have political value similar to the political value of articles criticizing government regulation of that and other lifestyles." *Id.*

Various Articles of Merchandise is distinguishable from the case at bar because citizens have the ability to subscribe to a magazine or pick them up at a local retailer with other magazines. Playboy and similar nude magazines typically have a cover and are not thrusted by "aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials." *Miller*, 413 U.S. at 18. Adults have the ability to subscribe to pornographic websites and publications at their choosing. The difference is that Tulania's exposed breasted mascot shoves onto unwilling children and families an obscene depiction. A football mascot is used for marketing and promotion of a team. It does not have any political, artistic, literary or scientific value – it is simply a way for a team to make a profit and keep their fans entertained before and during the games. Mascots also go to community events and travel with the teams to games. Moreover, the siren mascot could have been a dragon, firetruck, or police car siren. As football is a deeply rooted family sport, any other depiction of a "siren" would have been acceptable. However, there is no need to protect a topless siren which does not bring any literary, political, scientific, or artistic value and therefore the topless mascot satisfies the final prong of the obscenity test outlined in *Miller*.

The topless Tulania Sirens' mascot should not be awarded protection by the First Amendment. The average Tulania citizen applying contemporary community standards, would find the topless mascot appeals to the prurient interest; it depicts, in a patently offensive way, sexual conduct that is specifically prohibited under Tulania's law; and it lacks serious literary, political, artistic or scientific value. Courts often have difficulties determining whether or not material is considered obscene. Evolving technology has contributed to the mix, making it increasingly challenging for citizens to shield their families and young children from obscene materials. It is ultimately up to this Court to balance infringements between the First Amendment

and expressions of citizens containing artistic, political, literary or scientific value. In this case, the topless siren mascot is obscene, lacking any meaningful value, and therefore is not afforded protection under the First Amendment.

II. The Tulania Sirens were negligent for failing to provide a reasonably safe working environment resulting in Wyatt's career ending injury.

Wyatt respectfully requests this Court affirm the Circuit Court's finding that the Sirens were negligent in failing to provide a reasonably safe football field that resulted in Wyatt's career ending injury.

A federal court may take a state tort claim secondary to a federal subject-matter claim under supplement jurisdiction, in the interest of judicial efficiency, if there is a logical relationship between the two claims. 28 U.S.C. § 1367 (2019). When a federal court decides a state claim under supplemental jurisdiction it will apply state common law. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). Under Tulania common law, the standard of general negligence requires a plaintiff to establish the following: (1) the defendant had a duty to protect the plaintiff from injury; (2) the defendant failed to perform that duty; and (3) the defendant's failure was the proximate cause of injury to the plaintiff. *Bush v. St. Louis Reg'l Convention*, 2016 WL 3125869, at *2 (E.D. Mo. June 3, 2016); *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 257 (Mo. 2002). A defendant may claim a defense of assumption of risk in the context of sports participation, but this defense is not absolute. *Sheppard v. Midway R-1 School Dist.*, 904 S.W.2d 257, 261 (Mo. Ct. App. 1995).

In the present case, the courts below correctly determined Wyatt fulfilled his burden of proof by establishing the Sirens negligently maintained its football field, resulting in Wyatt's career ending injury. Additionally, the courts below rejected the Sirens' assumption of risk defense, finding the Sirens failed to meet its burden of proof.

A. The Sirens breached its duty to provide a safe working environment by exposing Wyatt to unsafe turf conditions without adequate warning.

Under Tulania common law, the existence of a duty is unique among the elements of negligence because it is a question of law for the court to decide. *Carman v. Wieland*, 406 S.W.3d 70, 76 (Mo. Ct. App. 2013). The duty of care that an employer owes to an employee includes the duty to maintain a safe working environment, the duty to not to expose employees to unreasonable risk of harm, and the duty to warn employees of about the existence of dangers of which the employee is not reasonably aware of. *Id*. An employer's duty of care can apply to non-employees when its employee created the dangerous work condition in a common work area. *Killian v. Wheeloc Eng'g Co.*, 350 S.W.2d 759 (Mo. 1961) (holding general contractors owe a duty of care to subcontracted employees for the negligent actions of their general contracted employees). A duty of care can arise out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury. *Smith v. Dewitt & Assocs.*, 279 S.W.3d 220, 224 (Mo. Ct. App. 2009). A court determines if an employer fulfilled its duty of care by measuring "whether a reasonably prudent person would have anticipated danger and provided against it." *Id*.

In this case the Sirens owed a duty of care to Wyatt. A Sirens' employee caused the unsafe turf condition behind the left side of the endzone when a portion of the turf was jammed into the employee's facemask leaving behind a patch of exposed cement. R. at 17. Under *Killian*, because the Sirens' employee (football player) caused the dangerous work condition, the duty of care owed by the Sirens of its own employees applied to the Green Wave employees (football players) including Wyatt. Under the duty of care rule articulated by *Smith*, it was entirely foreseeable and likely that a football player would run at full speed in the endzone. It was therefore foreseeable that Wyatt would not be able to slow down his momentum enough to

avoid the missing patch of turf. The Sirens breached their duty of care by failing to repair the turf causing Wyatt's career ending injury. *Id.* The Sirens' unreasonable response to the missing patch of turf was to place a small orange cone over it, failing to entirely cover the exposed cement, instead of repairing it. *Id.* at 9,19. This small orange cone did not adequately or reasonably act as a warning to Wyatt because Wyatt never saw the cone until he was barreling through the endzone toward it in the fourth quarter. *Id.* at 17. Even if the Court is persuaded that Wyatt should have seen the cone, he was never given notice why the cone was placed there. The Sirens had a duty to warn Wyatt. Astonishingly, during trial it was admitted that it was possible for the ground crew to fix the turf prior to the Thanksgiving Day game. *Id.* at 19. It was entirely reasonable for the Sirens to repair the patch of missing turf before the game. A reasonably prudent hosting team would have fixed the missing patch of turf instead of risking injury to any employee. The Sirens had a duty of care and breached it by not protecting or warning Wyatt of the missing patch of turf behind the endzone.

B. The Sirens proximately caused Wyatt's career ending injury.

Under supplemental jurisdiction the federal court hearing a state cause of action will apply state common law. *United Mine Workers of Am.*, 383 U.S. at 726. The last element of general negligence plaintiff must prove is proximate cause. *Bush*, 2016 WL 3125869, at *6. Under the Tulania common law, proximate cause is defined as "whether the facts show that the injury would not have occurred in the absence of the negligent act." *Martin v. City of Washington*, 848 S.W.2d 487, 493 (Mo. 1993). Due to the complexity and variations in defining proximate cause, the Supreme Court of the United States in *CSX Transportation, Inc. v. McBride* interpreted proximate cause under federal law as follows: a defendant "cause[s] or contribute[s]"

to a plaintiff's injury "if [the defendant's] negligence play[s] a part, no matter how small, in bringing about the injury." 564 U.S. 685, 705 (2011).

In this case the Tulania District Court and the Circuit Court below used the definition provided in *McBride* in their legal analysis of this case. R. at 9-10,19. In candor to the Court, it was incorrect to use the *McBride* definition under supplement jurisdiction of Wyatt's state negligence claim. The correct definition that should have been used by the lower courts is presented in *Martin v. City of Washington.* However, regardless of which definition this Court finds more persuasive it is clear that Wyatt's career ending knee injury was proximately caused by the Sirens' failure to fix the missing patch of turf which left an exposed cement surface.

For instance, under Tulania's common law proximate causation standard, the Sirens' failure to repair the turf proximately caused Wyatt's injury because Wyatt's injury would not have occurred but for Sirens' failure to repair the turf. As explained above, instead of repairing the turf, the Sirens chose to place a small orange cone over the missing turf. *Id*. at 17. This small cone caused Wyatt to attempt to avoid the coned area. *Id*. As a result, Wyatt slipped on the cement surface that was left exposed from missing turf and sustained a career ending knee injury. *Id*. Had the Sirens fixed the turf, Wyatt would not have sustained his knee injury.

Similarly, under the *McBride* proximate causation standard, the Sirens' failure to repair the turf proximately caused Wyatt's injury because the Sirens' negligence played a part in bringing about Wyatt's career ending injury. Instead of repairing the turf prior to the start of the game, the Sirens placed a small orange cone over the missing turf. This orange cone caused Wyatt to make a sharp turn in an attempt to avoid the cone. This caused Wyatt's foot to land on the cement patch, which ultimately resulted in his career ending knee injury. *Id*.

Thus, regardless of which definition this Court finds more persuasive, the Sirens' failure to fix the turf was the proximate cause of Wyatt's injury. As such, Wyatt carried his burden of proving the Sirens' negligence was the proximate cause of his career ending knee injury. it satisfies the last element under his negligence claim.

C. The slip risk of a missing patch of turf with exposed cement is not an inherent risk associated with professional football.

In attempting to avoid liability, the Sirens argue Wyatt assumed the risk of injury. Assumption of risk in an athletic competition context is an affirmative defense that, if proven, would mitigate or defeat a defendant's liability for its otherwise negligently maintained field. *Martin v. Buzan*, 857 S.W.2d 366, 368 (Mo. Ct. App. 1993). Plaintiffs in a sports context assume certain risk inherent in the sport or activity. *Sheppard*, 904 S.W.2d at 262. This assumption of risk is not an absolute defense but a measure of a defendant's duty of care. *Id.* at 261. The defendant is not relieved of the duty of care in a sports context if the plaintiff's injuries are the result of the negligence on the part of the defendant. *Id.* at 263-64.

There are three ways a plaintiff can assume the risk under Tulania law. *Id.* at 261. First, under an express assumption of risk, a plaintiff who expressly assumes the risk of the defendant's breach of duty, in advance of the competition, is barred from recovery for injury resulting from that breach of duty since there was no duty in the first place. *Id*. Second, under an implied primary assumption of risk, a plaintiff can be said to have consented to an assumption of risk when the parties have voluntarily entered a relationship where the plaintiff assumes well-known incidental risk. *Id.* at 262. The plaintiff's consent is implied from the act of electing to participate in the activity. *Martin*, 857 S.W.2d at 369. If the plaintiff is injured from these incidental risks the defendant is not negligent. *Sheppard*, 904 S.W.2d at 262. Third, under an implied secondary assumption of risk, the defendant owes a duty of care to the plaintiff, but the

plaintiff knowingly proceeds to encounter the known risk imposed by the defendant's breach. *Id.* In an implied secondary assumption of risk, the reasonableness of the plaintiff's actions are analyzed. *Id*. If the plaintiff's actions were reasonable, plaintiff's actions do not bar recovery for defendant's negligent action, whereas if the plaintiff's actions were unreasonable, the decision goes to the jury to determine the degree of contributory negligence by the plaintiff. *Id.*

For example, in *Sheppard*, the Tulania state court held that while a long jumper assumed the risk of a bad landing, he did not relieve the high school of the duty to provide a reasonably safe jumping pit. *Id.* There was substantial evidence at trial that showed the long jump pit was inadequately prepared and not reasonably safe. *Id*. at 264.

In this case it was clear by the record that Wyatt did not enter into an advance express agreement with the Sirens to relieve them of the duty of care. It also cannot be said that Wyatt consented to an implied primary assumption of risk. Although football poses inherent risks, a small orange cone over a missing patch of turf with exposed cement near the end zone is not an inherent risk known to professional football. It is also clear from the record that Wyatt was previously unaware of the turf condition until he was hurling through the endzone toward it. R. at 17.

Regarding whether Wyatt consented to an implied secondary assumption of risk depends on the reasonableness of his continuous to participate and encounter a known risk imposed by the Sirens breach of duty. Nowhere in the record does it suggest that Wyatt was aware that a small orange cone was placed on a missing piece of turf so close to the endzone. Even if this Court is inclined to view the cone as a known risk that was perceived by Wyatt during in the game, his continued participation in the game was reasonable in the belief that in professional sports, the turf would be in a safe condition as to prevent injury to highly paid athletes. Thus,

under the record presented to this Court Wyatt did not assume the risk posed by the negligent action of the Sirens.

CONCLUSION

The United States Court of Appeals for the Fourteenth Circuit properly ruled with regards to both conclusions: not affording the topless siren with exposed breasts First Amendment protection and finding Wyatt's career ending knee injury resulted from the Tulania Sirens' negligence. For the aforementioned reasons, Respondents respectfully request this Honorable Court find in Respondents favor and against Petitioner on all counts, as well as any additional relief this Honorable Court deems just and proper.

Respectfully submitted,
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