NO. 09-215

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IN THE

SUPREME COURT OF THE

UNITED STATES OF AMERICA

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TULANIA SIRENS FOOTBALL TEAM

*Petitioner*,

v.

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

*Respondents,*

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ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

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# BRIEF FOR THE RESPONDENTS

Team18
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## QUESTIONS PRESENTED

I. WHETHER PROFESSIONAL SPORTS TEAMS ARE PROTECTED BY THE FIRST AMENDMENT TO DISPLAY AN OBSCENE AND OFFENSIVE MASCOT THAT SERVES TO DEGRADE AND EXPLOIT THE FEMALE PHYSIQUE.

II. WHETHER AN OPPOSING FOOTBALL TEAM CAN BE FOUND NEGLIGENT FOR A PLAYER'S INJURIES DURING A GAME THAT RESULTED FROM AN IMPERFECTION IN THE FIELD WHICH THE TEAM WAS AWARE OF BUT FAILED TO REPAIR.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit entered final judgment for Respondents. The petition for a Writ of Certiorari was granted. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

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## OPINIONS BELOW

The District Court for the Southern District of Tulania found for Petitioner with respect to the first issue, holding that the mascot image was protected by the First Amendment. As to the second issue, the District Court held for Respondent, finding that Respondent had sustained injuries as a result of Petitioner's negligence. The Fourteenth Circuit affirmed in part and reversed in part the District Court's holdings by finding for Respondent on both issues. The Fourteenth Circuit held that the First Amendment does not protect the display of an image that is obscene in nature and that Respondent's injuries were a result of Petitioner's negligence. Petitioners sought a writ of certiorari, and this Court has granted review.

## STATEMENT OF THE CASE

The Thanksgiving Day football game, this year between the Tulania Sirens ("the Sirens") and the New Orleans Green Wave ("Green Wave"), is an all-important event for community members and families in both the Tulania and New Orleans communities. R. 12. Adults and children alike enjoy watching the football game either at the stadium or at home on live television. R.12. Ben Wyatt ("Wyatt"), a wide receiver for the New Orleans Green Wave, dedicated long hours and hard work to prepare for this highly anticipated event. R. 12.

Prior to the Thanksgiving Day game, the Sirens reinvented their mascot to depict a topless female mermaid with exposed breasts. R. 5, 12. The Sirens printed an image of their new mascot on pamphlets promoting the Thanksgiving Day football game announcing, "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" R. 12. These promotional pamphlets were mailed out broadly to members of the community, including Wyatt and his family. R. 12. No request was made by Wyatt or any of his family members to receive the team's promotional materials. R. 12.

In response to the mascot depicting a topless mermaid, many members of the community were offended by the explicit image and expressed their concerns. R. 12. The Center for the People Against Sexualization of Women's Bodies ("PASWB"), opposed the new mascot as it "appeals to the prurient interest and is not how the city of Tulania would like to be portrayed." R. 12. Other community members and groups asserted similar concerns. R. 12. Subsequently, 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. 12.

On the day of the Thanksgiving Day football game, the family event the community had been looking forward to, Wyatt entered the stadium to see a giant topless mermaid with exposed breasts printed in the middle of the field. R. 12. Leslie Knope ("Knope"), Wyatt's wife, a member of PASWB, was present along with her young children. R. 12. Knope was troubled by the display of the topless mascot as she, and her young children, were involuntarily exposed to the explicit image. R. 12. Additionally, fliers displaying the topless mermaid were distributed to every community member passing the stadium, whether or not they entered the game. R. 12.

While fliers were being passed out, the Sirens began warming up. R. 17. During the warmup, one of the Sirens' players face planted ten feet outside of the endzone and tore a piece of turf with his facemask, leaving a portion of the concrete beneath the turf exposed on the outskirts of the field. R. 17. Rather than fixing the turf, the Sirens placed a cone that only partially covered the cement. R. 17.

During the game, Wyatt caught a touchdown pass towards the back-left corner of the endzone. R. 17. His momentum carried him out of the endzone and, in an attempt to avoid the cone, stepped on the exposed cement patch, fell, and suffered a devastating, career-ending knee injury. R.17.

Petitioners, Wyatt and the PASWB, brought suit against the Sirens seeking to enjoin the team from displaying or using the mascot further. Petitioners assert that the promotion of the mascot with exposed breasts is obscene. R. 5, 13. Additionally, Wyatt is bringing a negligence suit for the injury he sustained as a result of the Sirens' failure to adequately warn of or address the hazard of exposed concrete on the playing field. R. 17.

## SUMMARY OF THE ARGUMENT

First, this Court should protect the moral fabric of a community trying to preserve the sensibilities of the youth by affirming the Fourteenth Circuit's finding that the display of a topless female mascot is obscene and thus unprotected by the First Amendment. The Sirens' display and dissemination of an image depicting a female's nude breasts for the purpose of garnering viewers appeals to the prurient interest as defined by the family-oriented community standards, illustrates sexual conduct in a patently offensive manner under Tulania Law, and lacks any redeeming social value. As a result, the Sirens' display of the mascot is obscene. Furthermore, the inability or failure to limit exposure to consenting adults and the dissemination of this image into the private lives of local citizens poses potential threat to children's ethical and psychological development. For these reasons, this Court should uphold the state's right to protect the health, welfare and morals of its communities.

Second, this Court must hold the Sirens accountable for their blatant failure to protect both Wyatt and the other athletes on the field. As frequent hosts of football games, the Sirens should

have immediately recognized the dangers of exposed concrete on the field. The Sirens, as the hosting team, had a duty to protect Wyatt and all the other football players from such dangers. However, due to the Sirens' neglect and failure to prevent or adequately warn of the potential danger, Wyatt can no longer compete as a professional football player. As a consequence of the Sirens' breach of their duty owed, this Court should affirm the lower court's decision and hold the Sirens liable for Wyatt's unfortunate and traumatic injury.

## ARGUMENT

### I. THE FIRST AMENDMENT DOES NOT PROTECT THE SIRENS' PUBLIC DISPLAY OF AN OBSCENE MASCOT DEPICTING A TOPLESS MERMAID WITH EXPOSED BREASTS.

The First Amendment provides that "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. However, this Court has firmly opposed the view that freedom of speech and association are absolute. *See Roth v. United States*, 354 U.S. 476, 479 (1957); *See also Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 37 (1961). While the First Amendment assures the "unfettered interchange of ideas for bringing about political and social changes," some degree of abuse is inseparable from the proper use of this right. *Roth*, 354 U.S. at 484; *see also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964). Implicit within the protection of the First Amendment is the rejection of obscenity as "utterly without redeeming social importance." *Roth,* 354 U.S. at 484. *See also, Miller v. California*, 413 U.S. 15, 23 (1973). When the Sirens mailed an unsolicited image of their mascot, a topless mermaid with exposed breasts, to members of the community, publicized the sexualized icon on television and at the stadium, and distributed it on pamphlets to all community members passing by the event, the Sirens acted under several instances of unprotected speech. R. 12. This vile exploitation of the female body thrust into the public eye for families and children to inevitably view, is not the type of expression protected by the First

Amendment. Rather, it is an attempt by the Sirens to gather an audience by appealing to sexual curiosity.

### A. The Graphic Display Of A Mermaid Mascot With Exposed Breasts is Obscene Material Under the *Miller* Test and Thus Constitutes Speech Not Protected By The First Amendment.

This Court has continuously held that obscene material is unprotected by the First Amendment. *See Miller v. California*, 413 U.S. 15, 23 (1973); *Kois v. Wisconsin*, 408 U.S. 229 (1972); *United States v. Reidel*, 402 U.S. 351, 354 (1971); *Roth v. United States*, 354 U.S. 476, 484 (1957). In *Miller*, this Court set forth the modern test for determining whether material is considered obscene and subsequently not protected by the First Amendment. The test provides three guidelines. First, whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interests." *Miller v. California*, 413 U.S. 15, 24 (1973); *Roth v. United States*, 354 U.S. 476, 489. Second, whether the work depicts, in a patently offensive way, sexual conduct specifically defined by the applicable state law. *Miller*, 413 U.S. at 24. Third, whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Id*.

Here, the flagrant display and dissemination of a mermaid with bare breasts rises to the level of obscenity as defined by *Miller*. The Sirens sought monetary gain by mailing and televising a patently offensive image, which appeals to the prurient interest and possesses no social value.

#### 1. The depiction of the topless mermaid appeals to the prurient interests of the average person applying contemporary community standards.

The Sirens utilized the rebranding of a female mascot with exposed breasts to attract an audience by inciting prurient interests. An idea is obscene if, considered as a whole, its predominant appeal is to prurient interest. *Roth*, 354 U.S. at 479. Prurient, meaning material having a tendency to excite lustful thoughts, is determined based upon contemporary community

standards. *See Id* at 476, n. 2; *see also Smith v. United States,* 431 U.S. 291, 300-01 (1977). These contemporary community standards take on meaning only with reference to underlying questions of fact and must be applied in accordance with the tolerance of the average person in the community, not the callous minority. *Smith*, 431 U.S. at 305. The test, therefore, is not whether it would arouse sexual desire or impure thoughts in a particular segment of the community, but upon all those whom the material is likely to reach. *See Roth*, 354 U.S. at 479. Here, the record clearly shows that the members of the community whom the image is likely to reach include families, children, and nonconsenting adults throughout the community. R. 5, 12. Unsolicited exposure to this vulgar image affects families attending the game in person, as well as community members who watched from the privacy of their homes through television broadcasting and those who received the pamphlets via mail. R. 12.

Numerous members of Tulania, a family-oriented community, were "offended by the new mascot." R. 12. Various individuals and groups voiced concern that the topless mascot "appeals to the prurient interest and is not how the city of Tulania would like to be portrayed," as the football games are a "family event that many children look forward to and enjoy." R. 12. The PASWB, a group dedicated to advocating for the respect of the woman's body, spoke specifically on how exposed breasts appeal to lustful thoughts. R. 12. This display of a topless mermaid mascot is not a symbol of respect for the female body, rather, it is the use of the woman's body as a sexual object to expand viewership by means of arousing sexual desire. The group further expressed fear of the reputation the image would give to the community. (R. 12). Mascots, characters adopted by a group to bring good luck, are found throughout communities at sporting events, related activities, on television commercials and social media. *Mascot*, OXFORD ENGLISH DICTIONARY, (7th ed. 2012). Mascots personify a brand by providing "something for the community to rally around,

something for everyone to have in common." Jeff Vrabel, *Lions and Tigers and Bears,* NCAA Champion Magazine, www.ncaa.org/static/champion/mascots/ (last visited Jan. 18, 2020) (quoting Emory marketing professor, Michael Lewis). The mascot, therefore, symbolizes not just the franchise; it symbolizes the community as a whole.

Rightly or wrongly, embedded within years of American culture is a focus on women's breasts as an object of sexual desire. *See, e.g. People v. Santorelli*, 600 N.E.2d 232, 237 (N.Y. 1992); *see generally United States v. Biocic*, 928 F.2d 112, 115-116 (4th Cir. 1991) ("Anatomies that traditionally in this society have been regarded as erogenous zones [include] the female, but not the male breasts."). In *Ginsberg*, this Court upheld a state statute forbidding the dissemination of magazines to minors containing pictures that depicted female nudity, where nudity was defined as "the showing of the female breasts with less than a fully opaque covering of any portion thereof below the top of the nipple." *Ginsberg v. New York*, 390 U.S. 629, 631-32 (1968). The same fears stressed by this Court in *Ginsberg* are present today. By subjecting minors to objects of sexual desire, such as the display of female breasts, the Court risks "impairing the ethical and moral development" of the youth. *Id*. at 641; *see also People v. Jackson,* 832 N.E.2d 418 (Ill. App. Ct. 2005). Furthermore, the court in *Upper Midwest Booksellers Association* recognized that "a child who walks into a store which openly displays sexually explicit covers may be harmed simply by viewing those covers." *Upper Midwest Booksellers Assoc. v. Minneapolis*, 602 F. Supp. 1361, 1363 (D. Minn. 1985) (holding the definition of obscenity must be assessed in terms of the sexual interests of minors). When evaluating whether the topless mermaid image appeals to prurient interests, the community standard requirement must give significant consideration to the abundance of families which the nudity is likely to reach.

By subjecting the families of Tulania, specifically children, to the exhibition of a female body part that American culture has long deemed an erogenous zone, the Sirens are not simply exercising their own right to expression, rather they are impinging on the privacy of others. *See, e.g., Paris Adult Theater I v. Slaton*, 413 U.S. 49, 59 (1973) (stating that the difference between a man reading an obscene book in his room and a man demanding the right to obtain pictures in public places is to "affect the world about the rest of us, and to impinge on other privacies."). As evidenced by the reaction of numerous community members, including parents and organizations, the display and dissemination of the image of exposed female breasts shocks the public and appeals to the prurient interests as determined by community standards.

**2. The image depicts patently offensive material as defined by the Section 12 Tulania Penal Code.**

Tulania lawfully seeks to protect the health, welfare, and morals of its communities by prohibiting the distribution and exhibition of patently offensive material through Section 12 of the Tulania Penal Code. R. 7. In order for a statute to be constitutionally permissible, exact precision in language is not required. *See Miller*, 413 U.S. at 19. "[A]ll that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding." *Id.* Tulania Law defines sexual conduct as "[e]very person who knowingly… in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his/her possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." Sec. 12 Tulania Penal Code (2019). By defining sexual conduct to include publishing, printing, exhibition, distribution and offers to distribute obscene material, the Tulania Penal Code provides well-defined notice of actions that constitute a misdemeanor. R. 7. Just as in *Miller*, where this Court held that the use of the word obscene has a definite legal meaning to give a defendant notice of the charge against him, similarly, the Tulania Penal Code uses the legal

definition of obscene to define what constitutes a misdemeanor. *Id.* Despite this notice, the Sirens willfully exhibited their depiction of a woman's naked torso on unsolicited pamphlets mailed to private homes, printed the offensive image on team gear for sale, displayed the topless mermaid on the center of the field at a game televised to the community, and disseminated pamphlets to all community members who passed by the stadium. R. 12. As a result, the Sirens' speech falls well within Section 12 of the Tulania Penal Code.

Additionally, the Sirens' dissemination and display of an image depicting a woman's exposed breasts is patently offensive to the Tulania community. It is for the States to make a moral determination whether the public exhibition of patently offensive material will have a tendency to injure the community, endanger public safety, or jeopardize a States' maintenance of a decent society**.** *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 69. By allowing a community to determine its moral environment, the government is not "jeopardizing fundamental First Amendment values," rather it is protecting public safety and quality of life. See *Id.* at 58-69. Here, the state of Tulania maintains a legitimate interest in regulating the patently offensive display of a woman's nude body in public accommodations through Section 12 of the Tulania Penal Code. *See, e.g. Paris Adult Theater I*, 413 U.S. 49, 57. American culture has long regarded the display of bare female breasts to constitute nudity, especially in reference to the exposure of juveniles. *See, e.g. Craft v. Hodel*, 683 F. Supp. 289, 300 (D. Mass. 1988) (stating that "[n]udity in the case of women is commonly understood to include the uncovering of the breasts."); *see generally United States v. Biocic*, 928 F.2d 112, 115-116 (4th Cir. 1991) (regarding female breasts as an erogenous zone); *People v. Santorelli*, 600 N.E.2d 232, 237 (1992). When the Sirens exploited female nudity to attract an audience, the Sirens manipulated the feminine physique in a crude, sexual manner. Subsequently, the state of Tulania justifiably sought to regulate this patently offensive material in

order to protect the welfare and moral integrity of its community. See, e.g., *FCC v. Pacifica Found.*, 438 U.S. at 726 (stating that the court has long understood the need to protect children from exposure to patently offensive sex-related material).

**3. The topless mermaid mascot was adopted purely to garner an audience and lacks serious literary, artistic, political or scientific value.**

The use of a bare-breasted mermaid as a mascot is not the sort of serious literary, artistic, political, or scientific expression contemplated or valued by the First Amendment. The First Amendment protects the "unfettered interchange of ideas for bringing about political and social changes." *Roth v. United States*, 354 U.S. 476, 479. It does not, however, protect obscene material that is "utterly without redeeming social importance." *Id*. at 484. Here, the lewd display of exposed breasts is simply a tasteless attempt to attract an audience by making a spectacle of the parts of a woman's body that are considered private and normally concealed from unabashed public gaze.

This depiction of a topless female does not hold any deeper message, such that a motion picture, magazine, or adult theater containing nudity might. The Sirens cannot point to any message of value that the offensive image promotes. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure*", this Court held that the literary value of a book could not be canceled by its offensiveness because the book contained material dealing with sex in a manner that advocates educational ideas. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen. of Mass.,* 383 U.S. 413 (1966). Here, however, unlike Roary, the Detroit Lion's mascot who does work in elementary education programs, or Steely McBeam, the mascot for the Pittsburgh Steelers who was inspired by the city's history in steel production, the topless mermaid mascot has no social significance to the Tulania community. *See* Shaun Johnson*, These are the 16 Best Mascots in the NFL*, CBS Sports (Dec. 31, 2014) cbssports.com/nfl/photos/these-are-the-mascots-in-the-nfl/. The city's own community members express that this is "not how the city of

Tulania would like to be portrayed," as a community that parades a bare-breasted female figure with the goal of drawing an audience. R. 12. This widespread, public dissemination of a vulgar image does not advocate an idea or educate the viewers, but rather lures onlookers with the sexual appeal of the feminine physique.

In aiming to increase support by exciting erotic desire, the Sirens are utilizing the sexualization of a woman's body to further their business and monetary aspirations. This Court has recognized that when commercial entities engage in "the sordid business of pandering by deliberately emphasiz[ing] a sexually provocative aspect in order to catch the salaciously disposed," the business has engaged in constitutionally unprotected behavior. *Ashcroft v. ACLU*, 542 U.S. 656, 676 (2004) (Scalia, J., dissenting); *see also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 831 (2000) (Scalia, J., dissenting). By targeting sexual curiosity to enhance viewership, the Sirens are prematurely exposing children of the community to female erogenous zones for their own economic gain. The Sirens sought to harness the power of nudity and sex casually and callously; not as an expression of social value. The First Amendment does not shield exploitation of the human body or protect those using the female form as a means of inciting the prurient interest.

### B. Failure To Protect Against The Widespread And Unfettered Dissemination Of Explicit Material Which Only Serves To Shock And Offend Will Endanger Public Safety And Erode Moral Standards.

Even if this Court finds that the display of exposed breasts at a family event falls short of obscenity as defined by *Miller,* there is significant potential harm to children's ethical and psychological development, which is grounds for shielding the general public from this sort of sexual expression. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 573 (7th Cir. 2001). This Court has held that "[m]aterial which is protected for distribution to adults is not necessarily

constitutionally protected from restriction upon its dissemination to children." *Ginsberg v. New York*, 390 U.S. 629, 636 (1968) (quoting *Bookcase, Inc. v. Broderick*, 218 N.E.2d 668, 669 (N.Y. 1966)). In *Barnes v. Glen Theater, Inc*., this Court upheld the prohibition of nude dancing even though it fell short of obscenity by maintaining communicative value, because the state had an interest in preventing prostitution, sexual assault, and associated crimes. *Barnes v. Glen Theater, Inc.* 501 U.S. 560 (1991). This Court focused predominantly on the need to stop secondary effects. *Id.* Similarly, Tulania's efforts to safeguard the community from obscene displays of sexual conduct focus on "protecting societal order and morality." *Id*. at 560. By shielding the premature exposure of children to the callous use of the woman's body for monetary gain, Tulania seeks to prevent misconduct associated with the degradation of the female. Therefore, the mascot depicting a mermaid with exposed breasts, is not subject to the same protections as an explicit movie, pornographic magazine, or nude dancing club which can limit exposure to consenting adults "where there is no likelihood of further dissemination." *Ginsberg v. New York*, 390 U.S. at 636. Two key distinctions make the depiction of a mermaid with exposed breasts harmful to the welfare of the community. First, an inability or failure to limit exposure to willing adults and second, the dissemination of the image reaching directly into private homes, where "people ordinarily have the right not to be assaulted by uninvited and offensive sights and sounds." *FCC*, 438 U.S. at 758-59; see also *Erznoznik v. Jacksonville,* 422 U.S. 205, 209 (1975).

Football is a quintessential aspect of American culture and a popular event for Tulania families. R.12. The sport reaches audiences in attendance at the stadium, those watching on television, as well as members of the community in the privacy of their homes and as they innocuously walk down the street. R. 12. The topless mascot was featured on the center of the field and on unsolicited pamphlets that were indiscriminately mailed out. As a result, receipt of the

explicit image was not tailored to consenting adults. Unlike nude dancing which can be limited to adult-only theaters, or videos that can be rated for appropriate audiences, the topless mermaid is displayed through a variety of mediums including television, mail and public sporting events, making it virtually impossible to guarantee "no likelihood of further dissemination." *Ginsberg*, 390 U.S. at 636

Furthermore, the image of exposed breasts being forced into the homes of families with impressionable young children creates risk of harm to society. This Court has repeatedly recognized the right of parents to direct the moral upbringing of their children in a society that regards certain parts of the female body as erogenous zones. See *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* 518 U.S. 727, 832 (1996). In *FCC v. Pacifica Foundation*, this Court recognized that media, such as television and radio, is uniquely persuasive and intrusive into the home. *See FCC v. Pacifica Foundation*, 438 U.S. at 748 (upholding the prohibition of indecent language over television and radio). This Court stated that indecent material presented over the airwaves confronts the citizen both in public as well as in the privacy of the home and therefore, the individual's right to be left alone plainly outweighs the First Amendment. *See Id*. Here, where the unsolicited image of a topless female has been thrust into the private lives of community members through the mail and on the television, the right to be left alone in one's home outweighs the First Amendment rights of the Sirens seeking notoriety for monetary gain. Furthermore, just as in *FCC v. Pacifica Foundation,* warnings are insufficient to limit the exposure of youth and non-consenting adults, as the presence of the Siren's mascot is inherent in the culture of the community. *See Id*.

The mermaid mascot with exposed breasts at a family football game is "like a pig in the parlor instead of the barnyard." *see Id*. at 750-51 (opinion of Justice Sutherland). Even if this Court

finds that the image is not obscene, the regulation of the topless female mascot is within the power of the state. Here, a topless mermaid displayed at a family event is clearly out of place like that of a pig in the parlor. The Sirens utilized the medium of a mascot, a symbolic figure adopted to promote community spirit, to display an offensive exploitation of the woman's body at a family event and into the private homes of community members. Therefore, where the state finds that the "pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." *Id*. at 751.

## II. THE SIRENS WERE NEGLIGENT IN MAINTAINING THEIR FOOTBALL FIELD AND ARE THUS LIABLE FOR WYATT'S CAREER ENDING INJURY

As the lower courts highlighted, "in 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." *L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 257 (Mo. 2002) (en banc). Here, the Sirens had a duty to protect Wyatt from foreseeable injuries, the Sirens breached that duty when they neither repaired nor provided adequate warning of the exposed concrete, and that failure to warn or repair proximately caused Wyatt's devastating knee injury.

### A. Wyatt, As An Invitee, Was Owed A Duty Of Reasonable Care.

The courts below imputed a duty to the Sirens under the theory that the Sirens were Wyatt's employer. *See*, R. 9, 18. More specifically, the lower courts asserted that the Sirens owed Wyatt a duty to "maintain a safe working environment, not to expose employees to an unreasonable risk of harm, or to warn employees about the existence of dangers of which they could not reasonably be expected to be aware." R. 18 (citing *Carman v. Wieland*, 406 S.W. 3d 70, 76-77 (Mo. Ct. App. 2013)) Both courts explained that "the scope of the duty is measured by whether a reasonably prudent person would have anticipated danger and provided against it." *Id*. (citing *Smith v. Dewitt*

*& Assocs.*, 279 S.W.3d 220, 224 (Mo. Ct. App. 2009)). Furthermore, for a defendant to owe a plaintiff a duty as an employer, that special employer-employee relationship must exist. *See Phillips v. BJ's Wholesale Club, Inc*., 77 Va. Cir. 129, 130 (Va. Cir. Ct. 2008).

However, while the courts below were ultimately correct in the duty that they assigned, they were incorrect in the reasoning used to assign that duty. Wyatt is not an employee of the Sirens. Rather, Wyatt is a wide receiver and employee for the New Orleans Green Wave. Consequently, no employer-employee relationship exists between the Sirens and Wyatt. *See L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1389 (9th Cir. 1984) (posits that professional football teams are independent and competitive economic entities). Additionally, because the record contains no evidence of the contents of the collective bargaining agreement between the players and the football league, it also cannot be assumed that Wyatt is an employee of the Sirens within the structure of this specific sports league. As a result, the Sirens could not owe Wyatt a duty of reasonable care as an employer because there is no evidence to support the contention that an employer-employee relationship existed.

On the other hand, even in the absence of an employer-employee relationship between the Sirens and Wyatt, Wyatt was still owed a duty of reasonable and ordinary care as an invitee. An invitee is a person who enters another's property after the property owner extends an express or implied invitation. *See Nowell v. Harris*, 68 So. 2d 464, 467 (Miss. 1953). "'The owner of premises owes a duty to [invitees] to use reasonable care and diligence to keep the premises in a safe condition, or, if the premises are in a dangerous condition, to give sufficient warning so that, by the use of ordinary care, the danger can be avoided.'" *S. Ala. Brick Co. v. Carwie*, 214 So. 3d 1169, 1176 (Ala. 2016) [internal citations omitted]. When that invitation pertains to sports, the host of the event has a duty to not increase the risks inherent to the sport. *See Avila v. Citrus Cmty. Coll.*

*Dist.*, 38 Cal.4th 148, 161 (Cal. 2006). "The true basis of a landowner's liability is his superior knowledge of an unreasonable risk of harm of which the invitee, in the exercise of ordinary care, does not or should not know." *Kenward v. Hultz*, 371 S.W.2d 344, 350 (Mo. Ct. App. 1963).

Here, the Sirens hosted a football game in which Wyatt competed. Consequently, Wyatt was an invitee because he received an express invitation from the Sirens to compete. *See Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1311 (Fla. 1986) (held that a professional and participating race horse jockey was an invitee to defendant's race track). Additionally, the record provides two indications that the Sirens had knowledge of the exposed concrete. First, one of the Sirens' players removed the turf with their own facemask during the pre-game warmup on the field. Second, an orange cone was intentionally placed over the cement patch. As those responsible for maintaining the field, the Sirens placed the cone to convey that there was a hazard of which they were aware. The Sirens had a duty to either keep the football field safe for playing football by repairing the damage or adequately warning the participants of the cement patch. Although an orange cone may be understood as a warning of some sort, the Sirens easily could have provided a clearer, more effective warning without encountering any major hardship or inconvenience.

### B. The Sirens Breached the Duty of Care They Owed to Wyatt by Failing to Adequately Address the Risks that the Exposed Concrete Created.

Due to the fact that the Sirens owed Wyatt a duty of reasonable and ordinary care, a breach of that duty is determined by asking whether "a reasonable person could have foreseen that injuries of the type that occurred could or might occur and that steps should be taken to prevent the harm." *O. L. v. R. L.*, 62 S.W.3d 469, 476 (Mo. Ct. App. 2001). Analyzing a breach involves assessing the degree of the relevant risk, the severity of the possible harm and the likelihood of the injury. *See Id*.

Here, the foreseeability of Wyatt's injury is indisputable for three reasons. First, the exposed cement was a mere ten feet outside the field's end zone. Thus, the exposed cement was within the vicinity of the playing field and may even be considered part of the field. Second, it is difficult for an athlete who is running with extreme speed and momentum to come to a sudden stop once they become aware of a hazard that is not observable until they are within a few feet of it. Third, football players wear cleats which are meant to generate extra traction on turf and grass. A football player who is running at full speed while wearing cleats is prone to slip on smooth surfaces like cement. These three considerations firmly place Wyatt's knee injury within the realm of foreseeability. Due to the fact Wyatt's knee injury was foreseeable, the question of whether the Sirens breached their duty of care becomes a simple one: whether the Sirens took the same steps a reasonable person would have taken in order to prevent any of the athletes from being injured. According to the facts provided in the record, the Sirens breached their duty of reasonable and ordinary care on two occasions. Both instances independently impute liability to the Sirens and indicate breach of the duty they owed to Wyatt. First, the Sirens failed to repair the patch of missing turf. Second, the Sirens failed to adequately warn Wyatt of the exposed cement.

**1. The Sirens breached their duty of care by not repairing the patch of missing turf.**

For a professional football player, the playing surface's integrity is essential to both their performance and safety. Stadium turf provides a surface that lessens the risk of damage to a player's body when falling. When the Sirens noticed a patch of turf missing, they should have immediately tried to repair it. A reasonable person would have tried to repair the turf knowing that athletes, who are running at full speed, are at least be more vulnerable to injury, given the obstacle. Even further, the Sirens likely employed a maintenance crew that was more than capable of safely repairing the turf. Whether it was with turf adhesive, turf tape or a simple screw and concrete

anchor, so many alternative solutions would have been preferable to simply placing a cone that only partially covered the cement patch. However, by lazily placing a small orange cone on top of the concrete patch, the Sirens not only breached the duty of reasonable care owed to Wyatt, they also significantly increased the risk of potential harm to all of the football players participating that day, including their own.

The instant case is analogous to *Dawson v. Rhode Island Auditorium*, 242 A.2d 407 (R.I. 1968). In *Dawson*, plaintiff was a semi-pro basketball player scheduled to play at the defendant's venue. *Id.* at 410. The defendant knew that the venue's roof was leaking and took no steps to repair the roof or at least ensure it was not leaking over an area where the athletes would be playing. *Id*. The court held that the defendant's behavior was not in accordance with the duty owed to the plaintiff. *Id*. Similarly, the Sirens' failure to attempt repair of the field's turf constitutes a breach of their duty of care.

**2. The Sirens breached their duty by not adequately warning Wyatt of the exposed cement.**

The cone that the Sirens placed over the exposed cement was not an adequate warning because it did not provide Wyatt with reasonable notice of what danger the cone denoted; under that cone could have been a puddle, a soft patch, a hole or smooth concrete. The cone provided no information regarding the nature of the risk present.

Furthermore, the fact that this injury occurred during a football game makes the cone more unreasonable as a warning. Football players wear protective headgear: helmets and facemasks, which obstruct their vision. Additionally, Wyatt's position as a wide receiver necessarily meant that, at times, he would be looking away from his path of travel with an eye toward the football. Next, because Wyatt would be running with substantial momentum and speed, his reaction time was significantly reduced. All of these additional factors indicate that the cone could not properly

warn Wyatt of the risks it was meant to denote and in fact, made the existing hazard even greater. Notably, the record is devoid of evidence that a Sirens coach, player, manager or general staff member ever provided a simple verbal warning to the opposing team. Such a warning alone would have been a more reasonable and effective warning than merely placing a cone over the concrete. The Sirens' course of action was the equivalent of placing a wet floor sign in an area where there was actually ice.

Courts have consistently held that steps additional to warnings are necessary for a defendant to avoid liability. For example, in *Storie v. United States*, plaintiff visited the post office when there was approximately three inches of snow on the ground and fell inside the inner lobby of the post office, sustaining a fracture to his right hip. *Storie v. United States* 793 F. Supp. 221, 222 (E.D. Mo. 1992). The issue before the court was whether the presence of a wet substance on the floor of the post office was foreseeable, and if so, whether defendant breached its duty to make the premises safe for invitees. *Id*. The court held that, although the defendant placed a caution sign in the outer lobby, the defendant failed to fulfill its duty of reasonable care under the circumstances because he had failed to take additional steps like laying floor mats. *Id*. at 224. In the instant case, the Sirens could have simply given a verbal warning to the New Orleans coaching staff who could have provided proper notice of the concrete patch and advised players on how to avoid injury. In addition to that warning, the Sirens could have placed a padded barricade in front of the cement this way a player could not reach the cement patch.

### C. By Failing to Remedy or Provide Adequate Warning of the Exposed Concrete, the Sirens Proximately Caused Wyatt's Career Ending Knee Injury.

In order for the Sirens to be liable for Wyatt's injuries, their breach of duty must have caused Wyatt's injury. The Supreme Court has defined proximate cause as any cause which, in natural or probable sequence, produced the injury complained of. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 703 (2011). When determining proximate cause, the question to be answered revolves around whether "the negligence was the efficient cause that set-in motion the chain of circumstances that led to the plaintiff's injuries or damages." *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 588 (Mo. Ct. App. 2008). "Proximate cause requires something in addition to a but for causation test to exclude causes upon which it would be unreasonable to base liability upon because they are too far removed from the ultimate injury or damage." *Id*. In the case at hand, the Sirens' breach of their duty passes the but for causation test; but for leaving the cement patch exposed, there would not have been cement for Wyatt to step on and therefore, no injury would have occurred. Similarly, but for the Sirens failing to adequately warn Wyatt of the cement patch, Wyatt would not have been injured because he would have known that the cement patch was there and been able to take precautions to avoid it rather than confronted it when it was already too late.

In addition to but for causation, the Sirens' breach of their duty was the proximate cause of Wyatt's knee injury. As discussed previously, Wyatt's injury was foreseeable. The reasonable person, after seeing the exposed cement just ten feet outside of the end zone, could foresee an athlete sprinting toward the endzone for a touchdown, unable to come to a sudden stop and get carried by momentum out of the end zone, right up to the patch of cement and suffer an injury due to the harshness of the concrete surface. In fact, anyone watching a football game will observe the players running completely out of the end zone frequently during the game. Thus, the chain of events that caused Wyatt's injury was foreseeable and the opposing team's failure to repair the

cement patch or adequately warn athletes of the danger was the proximate cause of Wyatt's injuries.

### D. Primary Assumption of Risk is Not Applicable to the Instant Set of Facts Because Stepping On Exposed Cement is Not A Risk Inherent to the Sport of Football.

"Generally, assumption of risk in the professional sports context involves primary assumption of risk because the plaintiff has assumed certain risks inherent to the sport or activity." *Sheppard v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 262 (Mo. Ct. App. 1995). "However, 'the assumed risks in such activities [that fall within the primary assumption of risk category] are not those created by a defendant's negligence but rather by the nature of the activity itself.'" *Id*. [internal citations omitted].

Football is an extremely physical sport. With that physical nature comes a number of risks that a player accepts in order to participate. For example, fatigue, internal organ damage, and fractured bones are all risks that a player must accept as part of the game. *See Benitez v. N.Y.C. Bd. of Educ.*, 541 N.E.2d 29, 31 (N.Y. 1989); *Hammond v. Bd. of Educ.*, 639 A.2d 223, 225 (Md. Ct. Spec. App. 1994); *Fortier v. Los Rios Cmty. Coll. Dist.*, 52 Cal. Rptr. 2d 812, 814 (Cal. Ct. App. 1996). Wyatt's injury, however, was not the result of a risk inherent in the game of football; slipping on concrete while catching a pass is not a risk created by the nature of football mainly because football is meant to be played on a viable surface. Furthermore, the risk of stepping on cement only existed because the Sirens failed to repair their field. The risk of injury that the cement created cannot fall within the realm of primary assumption of risk because that risk was created by the Sirens' negligence. Finally, if this Court were to hold that a defective playing surface is a risk inherent in football, then the duty for a sporting event host to maintain a safe playing surface would be effectively abolished. Hosts would no longer need to worry about the quality of their fields

because liability could not stem from failing to maintain them. This would leave athletes at a heightened risk of injury without recourse.

Instances in which courts found that primary assumption of risk was applicable are completely distinct from the facts at hand. For example, in *Pascucci v. Oyster Bay*, plaintiff was injured during a softball game when he ran into a light pole located in the field. *See Pascucci v. Oyster Bay*, 588 N.Y.S.2d 663, 664 (N.Y. App. Div. 1992). The court held that, since the plaintiff played on that particular field twenty times in the past, observed the light pole on past occasions and was aware of the pole's location, plaintiff primarily assumed the risks by playing on the field. *Id*. In Wyatt's case, the defect in the field occurred immediately before the game started. Thus, even if Wyatt played at the Sirens' stadium in the past, there was no way Wyatt could be aware of the exposed cement because the exposed cement was a brand-new defect. Similarly, because the Sirens did not warn Wyatt of the dangerous patch of cement, Wyatt was completely unaware of the risks that existed just ten feet outside of the endzone. As a result, Wyatt could not have primarily assumed the risks associated with the patch of exposed concrete.

## CONCLUSION

For the foregoing reasons, this Court should uphold both of the Fourteenth Circuit's findings. First, that the display of a topless mermaid mascot is obscene and therefore unprotected by the First Amendment. Second, that the Sirens were blatantly negligent in failing to maintain a safe playing surface for participating athletes.