No. 09-215

In the

SUPREME COURT OF THE

UNITED STATES OF AMERICA

TULANIA SIRENS FOOTBALL TEAM,

Petitioner,

v.

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

Respondent.

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

BRIEF FOR THE PETITIONER

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STATEMENT OF THE ISSUES PRESENTED

I. Whether professional sports teams are protected by their First Amendment rights to display a mascot that some members of the community deem to be obscene?

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

STATEMENT OF THE CASE

The Tulania Sirens Football Team ("the Sirens") respectfully asks that the Court reverse the decision of the Fourteenth Circuit. The Sirens presents two issues before the Court: first, whether professional sports teams are protected by their First Amendment rights to display a mascot that some members of the community deem to be obscene; and second, whether an opposing team can be found negligent for a player's injuries during a game that resulted from an imperfection in the stadium?

I. Factual History

The Tulania Sirens are a professional football team that recently recreated their mascot depicting a topless mermaid in an effort to rebrand the organization. R. at 12. The Sirens' new mascot was used on promotional pamphlets for their Thanksgiving Day game against its division rival, the New Orleans Green Wave. *Id.* The promotional pamphlets provided fans with the location and time of the event, as well as encouraged them to show support for the Sirens and "PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY!" *Id.* The Thanksgiving Day game is an event that many members of the Tulania and New Orleans community look forward to and enjoy and watch in person or at home. *Id.* Nonetheless, in an effort to garner as much community interest in the Thanksgiving Day game as possible, the Sirens mailed the promotional pamphlets to all of the citizens of Tulania. *Id.*

The Sirens' recreated mascot was met by some backlash as some members of the Tulania community voiced that they were offended by the topless state of the mermaid. *Id.* Specifically, one group, the Center for People Against Sexualization of Women's Bodies ("PASWB"), alleged that the Sirens' mascot "appeals to the prurient interest and is not how the city of Tulania would like to be portrayed." *Id.* Resultantly, the city of Tulania passed a law stating that "[e]very person

who knowingly: sends or causes to be sent, . . . or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, . . . any obscene matter is guilty of a misdemeanor." *Id.* (quoting Sec. 12 Tulania Penal Code (2019)).

The Sirens hosted the New Orleans Green Wave at Yulman Stadium on the day of the big Thanksgiving Day division rivalry game. *Id.* The Sirens' stadium was filled with promotional depictions of the its new mascot, including one in the middle of the field. *Id.* Depictions of the new mascot and Sirens team pride were also being spread outside of the stadium via promotional fliers provided to communities members passing by the stadium. *Id.*

During pregame warmups for the Thanksgiving Day game, a Sirens player dove for a catch, causing him to hit the ground and his face mask to be shoved into the turf. R. at 17. When he got up there was a large portion of the turf that was jammed into his face mask, leaving behind a partially exposed patch of cement in its place. *Id.* This missing patch of turf was located about ten feet behind the left side of the endzone. *Id.* Due to the timing of the incident being so close to kickoff, to address the situation a member of the Tulania staff placed an orange cone over the missing patch of turf. *Id.*

During the fourth quarter of the Thanksgiving Day division rivalry game, Ben Wyatt, a wide receiver for the New Orleans Green Wave, ran into the endzone catching a well-placed pass to the back-left corner. *Id.* Catching the ball, Mr. Wyatt's momentum carried him through the endzone towards the orange cone. *Id.* Seeing the orange cone and trying to avoid it, Mr. Wyatt attempted to make a sharp right, but slipped and fell thus injuring his left knee after his foot landed in a part of the cement patch that was not covered by the cone. *Id.* Mr. Wyatt's resultant injury to his left knee ended his football season with the Green Wave. *Id.*

II. Procedural History

Mr. Wyatt and the PASWB filed suit alleging that the Sirens' promotion of a topless mascot is obscene and sought to enjoin the Sirens from further displaying and promoting their new mascot. R. at 13. Additionally, Mr. Wyatt filed suit alleging negligence and seeking to recover damages contending that the Sirens had a duty to protect him from injury, the Sirens failed to perform that duty, and the Sirens failure proximately caused injury to Mr. Wyatt. R. at 17. In the interest of judicial efficiency, the district court consolidated Mr. Wyatt's two actions. R. at 5, 12.

The district court held in favor of the Sirens, finding its new mascot was not constitutionally obscene and thus was protected by the First Amendment; therefore, Mr. Wyatt and the PASWB were unable to enjoin the Sirens from the use of their mermaid mascot. R. at 16. Further, the district court held that Mr. Wyatt sustained a knee injury as a result of the Sirens' negligence; therefore, Mr. Wyatt was unable to recover damages in the amount expended on hospital bills, attorney's fees, and lost wages. R. at 20. Subsequently, Mr. Wyatt and the PASWB, and the Sirens each appealed the unfavorable judgments they received. R. at 5. The Fourteenth Circuit reversed in part and affirmed in part, holding that the Sirens' mascot was obscene in nature and that Mr. Wyatt's injury was the result of negligence on the part of the Sirens. R. at 10.

SUMMARY OF THE ARGUMENT

As to the first issue, the appellate court's judgment should be reversed because in applying the contemporary community standards of Tulania, the average person would not find that the Sirens' mascot appeals to the prurient interest in sex; the Sirens' mascot does not depict or describe, in a patently offensive way, sexual conduct and the Tulania Law is invalid; and the Sirens' mascot does not lack serious literary, artistic, and political value. Therefore, the Court should hold the Sirens' mascot is not obscene and, therefore, is protected by the First Amendment.

As to the second issue, the appellate court's judgment should be reversed because the Respondent cannot prove one of the essential elements of a negligence claim. First, the doctrine of primary assumption of risk applies to negate the Sirens' duty to protect against inherent risks. The doctrine applies to this case because slipping on an imperfection in a playing field is an inherent risk of professional football. Additionally, the Respondent's experience with the sport of football means he was aware of and appreciated this inherent risk. Further, the Respondent voluntarily participated in the game. Finally, public policy supports applying the doctrine of primary assumption of risk to the Respondent's negligence claim.

Second, even if the Respondent did not assume the risk of slipping on an imperfection in the field, the Sirens fulfilled their duty of care with regard to that imperfection. Affirming the appellate court's ruling and allowing the Respondent to recover would open the floodgates to litigation and adversely affect sports at all levels.

Therefore, the Court should find the Sirens did not have a duty to protect the Respondent, and even if they are found to have owed the Respondent a duty, they did not breach said duty.

Accordingly, the Court should hold that the Sirens were not negligent and dismiss the Respondent's claim.

ARGUMENT

I. THE TULANIA SIRENS FOOTBALL TEAM'S MASCOT DEPICTING A TOPLESS MERMAID IS NOT LEGALLY OBSCENE UNDER THE *MILLER V. CALIFORNIA* STANDARDS.

The First Amendment protects freedom of speech and of the press, however, this protection is not absolute and does not extend to materials that are found to be legally obscene. *Roth v. United States*, 354 U.S. 476, 485 (1957). States have the power to prevent the distribution of material that is deemed to be legally obscene but given "the inherent dangers of undertaking to regulate any form of expression" otherwise protected by the First Amendment, state statutes designed to regulate obscene materials must be carefully limited. *Miller v. California*, 413 U.S. 15, 23-24 (1973). Thus, most forms of material that individuals may argue are obscene are actually protected by the First Amendment, because there is a high threshold that must be met in order for obscenity not to be protected. *See id.* at 24. This high threshold limits obscene materials "to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.*

When making the determination as to whether the depiction of the Tulania Sirens Football Team's ("the Sirens") mascot should be deemed legally obscene and thus not protected by the First Amendment, the Court should look to the following guidelines it set out in *Miller v. California*, 413 U.S. 15, 16 (1973):

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(internal citations omitted). When examining the depiction of the Sirens' mascot to determine whether it is obscene, the Court must evaluate each guideline independently and all three must be met before the material may be held to be obscene. *Penthouse Int'l, Ltd. v. McAuliffe*, 610 F.2d 1353, 1363 (5th Cir. 1980).

A. The average person, applying contemporary community standards, would not find the depiction of the Sirens' mascot, taken as a whole, appeals to the prurient interest.

The Court instructs that contemporary community standards, rather than a national standard, must be applied to determine what appeals to the prurient interest. *Miller*, 413 U.S. at 30-31. The Court further contends that a uniform national standard would prove unworkable due to the diverse attitudes of the fifty United States. *Id.* at 33. Thus, the application of contemporary community standards allows the trier of fact to apply one's own understanding of the tolerance of the average person in their community. *Smith v. United States*, 431 U.S. 291, 305 (1977).

When deciding whether "the average person, applying contemporary community standards" would consider the work as "prurient," the work must be measured by its impact on the community as a whole, not based on the reaction of a particularly susceptible or sensitive group**.** *See Mishkin v. State of New York*, 383 U.S. 502, 508-09 (1966). Prurient is defined as morbid, degrading and unhealthy interest in sex, as distinguished from a mere candid interest in sex. *The Lecture Law Library*, https://www.lectlaw.com/def2/p106.htm (last visited Jan. 21, 2020). Here, one outspoken group known in the Tulania community as the Center for People Against the Sexualization of Women's Bodies ("PASWB") expressed disdain for the new mermaid mascot and argued that it "appeals to the prurient interest and is not how the city of Tulania would like to be portrayed." R. at 12. Some additional members of the community have expressed similar thoughts. *Id.* Although select, sensitive members of the community have

expressed disapproval of the mascot, their opinions do not speak for the community as a whole and therefore, do not solely define the contemporary community standards. *See Smith*, 431 U.S. at 304.

In looking at the impact of the community as a whole, it is important to note that members of the Tulania community still attended the Thanksgiving day game even after the depiction of the new mascot was displayed. Additionally, as the district court stated, the football team does not define the community, therefore the mascot is not intended to portray the city of Tulania, but the Sirens' football team.

Therefore, it is unlikely that the average person, applying contemporary community standards" would consider the depiction of a topless mythical creature that is the mascot of a professional football team as prurient.

B. The Sirens' mascot does not depict or describe in a patently offensive way, sexual conduct specifically defined by the applicable state law.

The depiction of the Sirens' new mascot is not one that is patently offensive. The Court has offered examples of what could meet the patent offensive requirement including representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. *Miller*, 413 U.S. at 24. The examples were not intended to be an exhaustive list, but rather provide guidance on what type of material is subject to the determination. *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974). The Court further explained that it would be in conflict with Miller to uphold an obscenity conviction based upon a mere depiction of a woman with a bare midriff. *Id.*

The depiction of a topless mythical creature created for the sole purpose of being the mascot of a football team does not fall within either of the patently offensive example standards

provided in Miller. There is no exhibit of any sexual acts of any kind nor descriptions or representations of genitals. The mascot is topless, however, in addition to it being a mythical creature, nudity alone is not enough to make material legally obscene. *Id.* at 161.

The Tulania State Law is unconstitutional. Statutes designed to regulate obscene materials must be carefully limited. *Miller*, 413 U.S. at 24. Under Tulania Law, "sexual conduct" is defined 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.

Sec. 12 Tulania Penal Code (2019). In *Pinkus v. United States*, 436 U.S. 293, 297 (1978), the Court held "that children could not be considered part of the 'community' in determining whether material is obscene under *Miller*." The Tulania Law does not explicitly limit children under "every person." *See* Sec. 12 Tulania Penal Code (2019).

> [I]t may well be that a jury conscientiously striving to define the relevant community of persons, the "average person," . . . by whose standards obscenity is to be judged, would reach a much lower "average" when children are part of the equation than it would if it restricted its consideration to the effect of allegedly obscene materials on adults.

Pinkus, 436 U.S. at 298. The law is therefore overbroad and invalid.

C. The Sirens' mascot depicting a topless mermaid does not lack serious literary, artistic, and political value and, therefore, is protected by the First Amendment.

Under the third guideline for judging whether the depiction of the Sirens' mascot is obscene, the Court must determine "whether the work, taken as a whole, lacks serious, literary, artistic, political, or scientific value." *Miller*, 413 U.S. at 24. Unlike the other two guidelines which require the Court make its determination by reference to contemporary community standards, the third guideline requires that the Court make its determination based on a reasonable person standard. *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). The focus of the reasonable person inquiry for the third guideline is "not upon the most sensitive members of the [people], and not upon the majority of the [people]." *Commonwealth v. Am. Booksellers Assn.*, 372 S.E.2d 618, 623 (Va. 1988). Rather, the depiction of the Sirens' mascot will pass statutory muster, if it has serious value for a legitimate minority of the people. *Id.* Accordingly,

> [T]he Court's opinion stands for the clear proposition that the First Amendment does not permit a majority to dictate to discrete segments of the population . . . the value that may be found in various pieces of work. That only a minority may find value in a work does not mean that a jury would not conclude that "a reasonable person would find such value in the material taken as a whole." Reasonable people certainly may differ as to what constitutes literary or artistic merit. . . . [T]he Court's opinion today envisions that even a minority view among reasonable people that a work has value may protect that work from being judged "obscene."

Id. (quoting *Pope*, 481 U.S. at 506 (Blackmun, J., concurring in part and dissenting in part)) (internal citations omitted). *See Pinkus*, 436 U.S. at 299. Therefore, if the Court finds that the depiction of the Sirens' mascot is found to have a serious literary, artistic, political or scientific value for a legitimate minority of the people, then it cannot be said to lack such value for the entire people taken as a whole. *See Am. Booksellers Assn.*, 372 S.E.2d at 624.

Here, the Sirens' mascot has serious literary and artistic value due to its roots in Greek mythology and fairy tales, and its artistic representations from the Old Babylonia Period onwards. The depiction of the Sirens' mascot as a topless mermaid has roots in Greek mythology, most well-known being the depiction of the sirens in Homer's ancient Greek epic poem *The Odyssey*. *See* Homer, *The Odyssey* (Emily Wilson trans., W.W. Norton & Co. 1st ed. 2017). The sirens in the *Odyssey* were not described as mermaid-like, instead they were depicted as some combination of human and bird, but popular culture has shifted to the image of a fish-tailed woman similar to that of the Sirens' mascot. *Id.* Additionally, the most famous literary mermaid tale of all, Hans Christian Andersen's fairy tale, *The Little Mermaid*, also depicts a creature similar to the Sirens' mascot. *See* Hans Christian Andersen, *The Little Mermaid* (H. B. Paull trans., Hythloday Press 2014). Depictions similar to the Sirens' mascot also appear in ancient artwork from the Old Babylonian Period onwards and are most commonly seen on the masts of ships. Jeremy Black & Anthony Green, *Gods, Demons and Symbols of Ancient Mesopotamia: An Illustrated Dictionary* 131-32 (1992).

In addition to having serious literary and artistic value, the Sirens' mascot also has great political value because it is the "first ever depiction of a strong female mascot in the sport of football." R. at 16. Courts have held that the term "'political' . . . is broad enough to encompass that which might tend to bring about 'political and social changes.'" *United States v. Various Articles of Merch.*, 230 F.3d 649, 658 (3d Cir. 2000) (quoting *Miller*, 413 U.S. at 34-35). Given the status of the political climate as it stands today, the Sirens having such a progressive and empowering female mascot is "*necessary* in that it is pivotal in 'bring[ing] about . . . social changes.'" R. at 16 (citing *Various Articles of Merch.*, 230 F.3d at 658 (quoting *Miller*, 413 U.S.

at 34-35)). Because the Sirens' mascot, taken as a whole, does not lack serious literary, artistic, and political value, it is protected by the First Amendment.

For the foregoing reasons, the depiction of the Sirens' mascot as a topless mermaid is not obscene and, therefore, is protected by the First Amendment.

II. THE TULANIA SIRENS FOOTBALL TEAM WAS NOT NEGLIGENT IN ITS REPAIR OR WARNING OF THE IMPERFECTION IN YULMAN STADIUM'S TURF.

Under Tulania law, a successful negligence claim requires a plaintiff to "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. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 257 (Mo. banc 2002). Regarding the first element, the duty of care owed to any particular plaintiff requires an analysis of the circumstances. *See Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986). In the context of professional sports, an analysis of the care owed to a participant by the proprietor of facility in which an event takes place must be evaluated by considering the risks that the injured participant assumed when he elected to participate in the event, and how those assumed risks qualified the defendant's duty. *Id.* Although participants are not deemed to have assumed risks that are concealed or unreasonably increased, the doctrine of primary assumption of risk allows a property owner to discharge their duty to a participant by "making [playing] conditions as safe as they appear to be." *Brown v. City of New York*, 895 N.Y.S.2d 442, 444 (N.Y. App. Div. 2010).

In the present case, the Respondent's action for negligence against the Sirens should be dismissed because: (1) the Respondent assumed the risk of receiving his injury, meaning that the Sirens did not breach their duty of care, and (2) even if the Respondent did not assume the risk of injuring himself on the turf, the Sirens fulfilled their duty to the Respondent by exercising

reasonable care. Ultimately, the Respondent cannot prove an essential element of his negligence action, meaning the Court should reverse the holding of the appellate court and dismiss the Respondent's negligence claim.

A. The doctrine of primary assumption of risk is applicable in this case and bars the Respondent's negligence action.

To determine if the Sirens were negligent due to their failure to remove or warn of a dangerous condition in Yulman Stadium, the Court must determine what duty, if any, the Sirens owed to the Respondent. *See Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d at 257. In other words, the Court must analyze the existence of a duty and the corresponding scope of that duty as it was owed to the Respondent. *Turcotte*, 502 N.E.2d. at 967. The Court must also consider the Respondent's reasonable expectations regarding the duty owed to him. *Id*. This is particularly important in the realm of professional sports, which have an "elevated degree of danger" and participants frequently make "informed estimate[s] of the risks involved . . . and willingly undertake[] them." *Id*. Therefore, the Court must consider the risks assumed by the Respondent in order to appropriately measure the Sirens' duty of care.

While multiple categories of assumption of risk exist, the doctrine of primary assumption of risk is typically applied to claims by sport participants. *Martin v. Buzan*, 857 S.W.2d 366, 369 (Mo. Ct. App. 1993). This doctrine applies "where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury." *Rostai v. Neste Enters.*, 138 Cal. App. 4th 326, 331 (2006). The Court should hold that the doctrine of assumption of risk bars the Respondent's negligence claim because: (1) slipping on an imperfection in a stadium's turf is an inherent risk of professional football; (2) the Respondent was aware of and appreciated the nature of this risk;

(3) the Respondent voluntarily assumed this risk; and (4) public policy supports finding that primary assumption of risk bars the Respondent's negligence claim.

i. Slipping on an imperfection in the turf and colliding with an object out-of-bounds are inherent risks of professional football.

A voluntary participant in a sporting activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." *Philius v. City of New York*, 75 N.Y.S.3d 511, 513 (N.Y. App. Div. 2018). This means that, "if a plaintiff's injury is the result of a risk inherent in the sport in which he was participating, the defendant is relieved from liability on the grounds that by participating in the sport, the plaintiff assumed the risk and the defendant never owed the plaintiff a duty to protect him from that risk." *Sheppard v. Midway R-1 Sch. Dist.*, 904 S.W.2d 257, 263-64 (Mo. Ct. App. 1995). Inherent risks can be defined as "conditions or conduct that otherwise might be viewed as dangerous," but are an integral part of the sport itself. *Muchhala v. United States*, 532 F. Supp. 2d 1215, 1228 (E.D. Cal. 2007). Other courts have defined inherent risks as "risks which are simply a collateral part of the recreation activity." *Sapone v. Grand Targhee*, 308 F.3d 1096, 1103 (10th Cir. 2002). While there are other considerations in determining whether a plaintiff assumed liability for a particular risk, inherency is the *sine qua non*—the essential condition. *Morgan v. State*, 685 N.E.2d 202, 208 (N.Y. 1997).

It is well-established that, "[a]mong the risks inherent in participating in a sport are the risks involved in the construction of the field, and any open and obvious conditions of the place where the sport is played." *Philius*, 75 N.Y.S.3d at 513 (quoting *Bryant v. Town of Brookhaven*, 23 N.Y.S.3d 358, 360 (N.Y. App. Div. 2016)). For example, in *Sykes v. County of Erie*, 728 N.E.2d 973 (N.Y. 2000), while playing basketball on an outdoor court, the plaintiff "injured his knee when he stepped into a recessed drain near the free throw line." The court held that the

plaintiff assumed the risk of injury because "the risks of playing upon an irregular surface are inherent in outdoor basketball activities." *Id*. Similarly, the court in *Philius v. City of New York*, 75 N.Y.S.3d 511, 513 (N.Y. App. Div. 2018), found that a crack in the surface of a basketball court that was open and obvious constituted an inherent risk which the plaintiff consented to. A number of other courts have affirmed that facility imperfections—particularly those conditions that are open and obvious—are inherent risks of a sport. *Maddox v. City of New York*, 487 N.E.2d 553 (N.Y. 1985) (holding that slipping on mud where a field was wet as the result of an improperly functioning drainage system is an inherent risk of professional baseball); *Turcotte*, 502 N.E.2d at 971 (determining that "cupping" in a racetrack as the result of an overly-wet course is an inherent risk of professional horse racing). In each of these cases, the operators of the facilities made the conditions as safe as they appeared to be. *See Brown*, 895 N.Y.S.2d at 444.

Conversely, some courts have held that primary assumption of the risk in a sports setting does not include an operator's failure to provide reasonably safe facilities. *See Sheppard*, 904 S.W.2d at 264-65 (stating that an athlete did not assume the risk of a negligently provided facility by participating in long jumping). In *Morgan v. State*, 685 N.E.2d 202, 210 (N.Y. 1997), a tennis player was injured when they tripped over a torn net. While the court stated that nets are inherent aspects of tennis, it clarified that "a torn or allegedly damaged or dangerous net—or other safety feature—is by its nature not automatically an inherent risk of a sport . . . ." *Id.* Therefore, the torn net constituted ordinary negligence of which the facility owner could not be exculpated. *Id.* However, a more recent decision held that failure by staff of a facility to act in a way that would lessen the potential for injury may constitute an inherent risk. *See Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263 (3d Cir. 2008). In *Bjorgung v. Whitetail Resort, LP*, 550 F.3d

263 (3d Cir. 2008), a skier who was injured during a race brought an action against the ski resort, alleging that they negligently designed and maintained the course. The court found that a failure by staff of a ski resort to "set netting in all spots where it might prove necessary" and fix the course "in a way that minimizes the potential for the competitors to lose control" were inherent risks of skiing. *Id.* at 269.

In the context of professional football, a court has expressly addressed another inherent risk related to the Respondent's injury—colliding with objects behind the end zone. *Gallagher v. Cleveland Browns Football Co.*, 638 N.E.2d 1082 (Ohio Ct. App. 1994). In *Gallagher*, a videographer was injured when two professional football players collided with him while he attempted to film a touchdown pass. *Id.* Although the decision was reversed on procedural grounds, the court stated that the videographers, who were free to roam around the sidelines and place equipment where they see fit, assumed the risk of collision because players "running out of bounds and colliding with players and sideline spectators are events that are foreseeable, customary parts of the sport of football." *Id.* at 1089.

In the present case, the Respondent was injured after he slipped on an imperfection in Yulman Stadium's turf. Although it is unclear whether the Sirens were owners, operators, or occupiers of the stadium, primary assumption of risk can still apply. As professional football is a contact sport with players constantly diving, falling, and pivoting, there is an inherent risk of playing upon an imperfect surface. The imperfection in this case was an open and obvious condition in the stadium and was, therefore, just as much of an inherent risk as the hole in the basketball court in *Sykes* or the cracked court in *Philius*. If anything, the hole in Yulman Stadium's turf was more open and obvious due to the bright orange cone drawing the Respondent's attention to it. Additionally, *Gallagher* emphasized that football brings with it an

inherent risk of colliding with videographers and equipment behind the end-zone. The inherent risk of colliding with a variety of objects, especially as an athlete travels further out-of-bounds, is ever-present and many of these obstacles could cause the Respondent to slip and injure his knee.

Therefore, slipping and falling due to an imperfection in the turf is an inherent risk of professional football.

ii. The Respondent was aware of the risk of slipping on an imperfection and appreciated the magnitude of this risk.

The analysis for a primary assumption of risk varies depending on the jurisdiction in which it is being asserted. For example, some courts require a participant to have subjective knowledge of inherent risks, while others do not. *Bennett v. Hidden Valley Golf and Ski, Inc.*, 318 F.3d 868 (8th Cir. 2003) (finding that the inherent risk rule is not incompatible with a knowledge requirement, but ultimately rejecting to delineate a subjective component); *Goodlett v. Kalishek*, 223 F.3d 32 (2d Cir. 2000) (finding that knowledge plays a role in determining whether an individual assumed a risk, but inherency is key); *Morgan*, 685 N.E.2d at 207 (stating that a participant needed to be aware of the risks and appreciate the nature of the risks in order for the doctrine to apply); *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992) (finding no subjective knowledge or appreciation of risk requirement). In jurisdictions where awareness and appreciation are considered, it is not necessary that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results. *Maddox*, 487 N.E.2d at 554.

An individual's awareness of a risk must be "assessed against the background of the skill and experience of the particular plaintiff," and courts have imputed a higher degree of awareness to a professional than one with less than professional experience in a particular sport. *Morgan*, 685 N.E.2d at 208. In *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. 1986), a highly experienced jockey

was said to be aware of and appreciate the inherent risks of the condition of a racetrack. Additionally, in *Maddox v. City of New York*, 487 N.E.2d 553 (N.Y. 1985), a professional baseball player who knew that the prior night's game was cancelled due to weather and observed water and mud on centerfield during his game was held to be aware of and appreciate the risks of slipping in mud. The court emphasized that professional athletes are highly trained and in a better position to recognize defects than other individuals, but this notion that water on a field could create mud was only a matter of common experience. *Id.* at 556.

The Respondent is a professional football player with the New Orleans Green Wave and, therefore, is assumed to have a higher degree of awareness of the risks associated with the game. It would be hard to believe that—throughout the Respondent's entire football career—he never knew that a field and the surrounding area may have imperfections, such as holes, and that stepping into these areas could cause an injury. It is also likely that the Respondent, particularly in college and professional football, had seen participants collide with videographers, equipment, and other objects, thereby causing injury. Such experience supports that the Respondent knew that there could be a variety of obstacles ten feet out-of-bounds, and that slipping on them could result in injury.

Thus, the Respondent was aware and appreciated the magnitude of slipping on an imperfection in the field.

iii. The Respondent voluntarily participated in the game between the New Orleans Green Wave and the Tulania Sirens.

In the context of primary assumption of risk, an athlete's consent to relieve a defendant of negligence for inherent risks is implied by the athlete's *voluntary* participation in an activity. *Turcotte*, 502 N.E.2d at 968. Courts have pointed out that it would be "rare" to find that the participation of a professional athlete in "a sport at which he makes his living could be said to be

involuntary." *Id. See Maddox*, 487 N.E.2d at 557 (holding that a professional baseball player's continued participation in a game despite a wet and muddy field constituted assumption of risk, notwithstanding his contention that he had no choice but to continue to play).

In the present case, the facts indicate that the Respondent was a voluntary participant in the game between the Green Wave and the Sirens. The Respondent was a star receiver who was on the field more frequently than not during offensive drives. There is nothing in the record that demonstrates he participated unwillingly and, therefore, the voluntary aspect of the primary assumption of risk doctrine is met.

iv. Public policy supports finding that primary assumption of risk bars the Respondent's negligence claim.

The primary assumption of risk doctrine is applied in sports "to facilitate free and vigorous participation in athletic activities" *Benitez v. New York City Bd. of Educ.*, 541 N.E.2d 29, 33 (N.Y. 1989). Applying this doctrine to sports allows such activities to flourish by shielding activity sponsors and venue owners from potentially crushing liability. *Custodi v. Town of Amherst*, 980 N.E.2d 933, 935 (N.Y. 2012). If every professional football player were able to recover for every injury stemming from an imperfection in the field or colliding with objects out-of-bounds, teams and facility owners would be overwhelmed with constant litigation.

Because the Respondent was injured due to an inherent risk, the Respondent was aware of an appreciated the risk, and the Respondent voluntarily participated in the game, the doctrine of primary assumption of risk bars the Respondent's negligence action. Further, applying this doctrine to the present case is supported by public policy.

B. Even if the Respondent did not assume the risk and the Sirens owed him a duty of care, the Sirens fulfilled their duty to the Respondent.

If the doctrine of primary assumption of risk does not apply to the Respondent's negligence claim, then the Sirens may have owed him a duty. In that case, the Sirens fulfilled their duty to the Respondent and, therefore, the Sirens were not negligent.

Although the lower courts analyzed the duty owed to the Respondent under an employer-employee common law standard, that standard is incorrect. The lower courts fail to recognize that the supporting cases are fundamentally different than the present case. The case of *Green v. Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014), for example, involved an action between former professional football players and their former team—in other words, their former employer. In this case, the Respondent may have been acting in the scope of his employment when he was injured, but the Sirens were not his *employer*.

Instead, the appropriate duty of care owed to the Respondent was that of reasonable care under the circumstances—the same degree of care in the performance of its obligations arising from ownership as any other person in possession and control of land. *Shipley v. Rec. and Park Comm'n*, 558 So. 2d 1279, 1282 (La. Ct. App. 1990); *Godfrey v. Baton Rouge Rec. and Parks Comm'n*, 213 So. 2d 109, 113 (La. Ct. App. 1968). However, this does not mean that an owner is required to "eliminate every source or possibility of danger." *Godfrey*, 213 So. 2d at 113. Rather, the owner or "occupier of premises used for athletic events or amusements must maintain the premises in a reasonably safe condition and furnish such equipment or services as is necessary to minimize or prevent injury to others from conditions which probably, or foreseeably may cause damage." *Rosenberger v. Central La. Dist. Livestock Show, Inc.*, 312 So. 2d 300, 305 (La. 1975).

In *Politz v. Rec. and Park Comm'n*, 619 So. 2d 1089, 1091 (La. Ct. App. 1993), a softball player was injured after stepping on a loose base during a game. Evidence showed that the base

had been loose for multiple days and was covering up a sizeable whole. *Id*. at 1094. The court found that the owner of the softball field was negligent because they had a duty to repair a known unreasonable condition on the field, or warn players about the condition, and the owner breached that duty. *Id.* at 1095-96. Another court clarified what type of warning could be given to fulfill this duty after a rider exercising her horse seriously injured her knee on a guywire. *Uhler v. Evangeline Riding Club*, 525 So. 2d 550, 551 (La. Ct. App. 1988). The court in *Uhler v. Evangeline Riding Club*, 525 So. 2d 550, 553 (La. Ct. App. 1988), stated that the riding club may have been negligent in failing to remove or relocate the guywire in question or in failing to warn the horse show participants, by flags or otherwise, of its location.

In the present case, the Sirens acted with reasonable care in their handling of the imperfection in the turf. Unlike the loose base in *Politz*, the imperfection in the turf occurred during warmups for the game, rather than days before the game. Repairing artificial turf is a multi-step, delicate process that requires specific tools and adhesives. *Making Repairs to your Synthetic Turf,* SYNTHETIC GRASS WAREHOUSE, https://syntheticgrasswarehouse.com/making-repairs-to-your-synthetic-turf/ (last visited Jan. 21, 2020). Some of the adhesives can take 24 hours to dry and can be considered toxic. Turf Team, *Artificial Turf Glue: 5 Commonly Asked Questions*, ARTIFICIAL TURF EXPRESS (Sept. 26, 2016), https://artificialturfexpress.com/blog/artificial-turf-glue/. Appropriately repairing the turf would have required the game to be postponed at least one day, which would likely have been viewed as objectively unreasonable, so the Sirens decided to warn of the imperfection instead. Much like the court in *Uhler* stated that using flags could fulfill a duty to warn, the Sirens fulfilled their duty to warn with a bright orange cone. Placing the cone over the imperfection in the turf clearly showed participants the location of the imperfection. The Respondent clearly noticed this

warning, as he attempted to avoid the area by making a sharp right turn. The fact that the Respondent was not successful in avoiding the risk does not mean that the Sirens breached their duty to warn.

The Respondent's claim that the Sirens were negligent is unfounded because, even if they had a duty to repair or warn of the imperfection in the field, the Sirens fulfilled that duty by placing a bright orange cone in the area of the imperfection. Ultimately, the Respondent cannot prove one of the essential elements of a negligence action and his claim should be dismissed by the Court.

CONCLUSION

For the foregoing reasons, the Sirens respectfully asks that the Court reverse the judgment of the Fourteenth Circuit.

Dated January 21, 2020.

Respectfully submitted,

/s/ Team 2

Team 2

Counsel for the Petitioner