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

THE 2020 TULANE MARDI GRAS INVITATIONAL
APPELLATE SPORTS LAW COMPETITION

BRIEF FOR THE PETITIONER

Team #3
Counsel for Petitioner

QUESTIONS PRESENTED

1. Under the First Amendment, can a state constitutionally restrict the use of a football team's mascot in response to a particular activist group claiming that the mascot appeals to prurient interest?

2. Can an athlete recover for an injury sustained on an opposing team's field when the athlete was bound by a collective bargaining agreement and was also warned of the condition on the field that was purported to have caused the injury?

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JURISDICTION

The United States Court of Appeals for the Fourteenth Circuit issued its opinion in the matter. R. at 4. The petition for writ of certiorari was granted on. R. at 1. This Court has jurisdiction under 28 U.S.C. § 1254(a) (2012).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I.

Article Six, Section Two ("The Supremacy Clause") of the United States Constitution provides: "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land. . . ." U.S. Const. Art. VI, § 2.

STATEMENT OF THE CASE

Statement of the Facts

On Thanksgiving Day, Petitioner, the Tulania Sirens football team ("Sirens"), and the New Orleans Green Wave ("Green Wave") were set to play their "all-important" division rivalry game. R. at 12. Members of both teams' communities looked forward to this game and enjoyed watching it, either in-person or on television. R. at 12. The Sirens recently recreated their mascot as a mermaid ("siren") whose breasts were exposed. R. at 5. The Sirens mailed out pamphlets depicting the mascot to promote the upcoming game and their rebranding. R. at 12. The promotions stated, "SHOW YOUR SUPPORT FOR OUR NEW MASCOT! PURCHASE SIRENS GEAR IN STORES AND ONLINE TODAY." R. at 12. Although he did not request

the promotional material, Respondent, Green Wave wide receiver, Ben Wyatt ("Wyatt"), also received a pamphlet in the mail. R. at 12.

Certain members of the community were concerned with the Sirens' new mascot. R. at 12. For example, Respondent, the Center for People Against Sexualization of Women's Bodies ("PASWB"), claimed that the mascot "appeals to prurient interest." R. at 12. In response, the City of Tulania enacted Section 12 of its Penal Code that punishes a 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, any obscene matter." R. at 12.

On the day of the big game, Wyatt was "flushed with nerves." R. at 12. He was the Green Wave's star receiver, and the team depended on him as a "critical pawn" to win games. R. at 17. This led to Wyatt being "on the field more times than not." R. at 17. When he entered the field, Wyatt saw the newly rebranded mascot. R. at 12. Wyatt claimed he was horrified by the sight. R. at 12. His wife and children were also present at the game. R. at 12. Wyatt was further upset by the mascot because of his wife's membership with the PASWB. R. at 12. That day, the Sirens promoted the rebranding of their mascot by decorating the stadium and handing out fliers to those passing by the stadium. R. at 12.

During pre-game warm-ups, a Sirens player dove for a catch and hit the ground ten feet behind the left side of the end zone. R. at 17. His face mask was shoved into the turf, partially exposing a patch of cement and creating a "divot." R. at 5, 17. To address this, the Sirens' staff placed a bright, orange cone over the affected area. R. at 8, 17. During the fourth quarter of this close game, Wyatt ran to catch a pass in the back corner of the end zone. R. at 17. His momentum carried him toward the cone over the exposed area. R. at 17. He attempted to avoid

the cone by making a sharp right, but his left foot landed on the divot. R. at. 17. Wyatt fell and injured his knee, ending his season and allegedly his career. R. at 5, 17.

Procedural History

Wyatt brought two consolidated actions against the Sirens in the District Court of Tulania. R. at 12. First, Wyatt and the PASWB sought to enjoin the Sirens from using their mascot. R. at 12. Second, Wyatt sought to recover for the injury he sustained at the stadium. R. at. 12. The district court denied the injunction but held that Wyatt could recover on his second claim. R. at 16, 20. On appeal, the Fourteenth Circuit Court reversed the first issue and affirmed the second. R. at 10. Certiorari was granted, and the standard of review is de novo. R. at 1, 2.

SUMMARY OF THE ARGUMENT

For the first issue in dispute, the Constitution protects the Sirens' display of their mascot. The First Amendment and its application to state and local governments prohibit legislatures from enacting laws that abridge freedom of speech. Accordingly, the Siren's mascot is protected for the following three reasons.

First, the Sirens' mascot enjoys constitutional protection because it is not obscene. To be obscene, a work must meet all three prongs of the *Miller* test. This test requires that a work (1) appeals to prurient interest to an average person applying contemporary community standards, (2) depicts or describes sexual conduct in a patently offensive way as described by state law, and (3) lacks political and artistic value. With consideration of contemporary standards, the Sirens' mascot does not appeal to prurient interest given that today's culture is consistently growing more tolerant of women being exposed in their natural form. Next, the mascot is not patently offensive, as defined by Tulania law, because the statute did not prohibit nudity nor was the

mascot portrayed as it was proscribed by *Miller*. Finally, the mascot held political and artistic value because it is an emblematic, feminine figure promoting enthusiasm for the Sirens.

Second, the Tulania statute is facially invalid because it is both vague and overly broad. Vague statutes are struck down because of due process concerns. Here, the Tulania statute failed to put citizens on notice of the conduct it sought to bar. The statute prohibits engaging in commercial transactions of obscene material, but it does not provide a definition or test for what constitutes obscene material. Furthermore, without a clear definition, the statute is overly broad and can potentially reach constitutionally protected material. Protecting such speech outweighs the cost of invalidating the Tulania statute. The statute is incompatible with the Constitution.

Third, even if the mascot is found to hold no political or artistic expression, it is still protected as commercial speech. Under the *Central Hudson* test, commercial speech must concern lawful activity and not be misleading. To regulate such speech, the government must have a legitimate interest and its regulation must advance this interest through a narrowly tailored statute. Commercial speech proposes a transaction. The Sirens' speech was commercial because it advertised buying the Sirens gear. While protecting juveniles from exposure to nudity is a legitimate interest, the statute aimed at regulating the Sirens' speech was not narrowly tailored to achieve that interest. The statute is instead focused on commercial transactions and makes no references to nudity or juveniles, making it an unconstitutional regulation of speech.

For the second issue in dispute, the Sirens were unjustly held liable for an injury that a visiting football player sustained in their stadium for the following two reasons. First, the lower courts failed to adequately analyze whether Wyatt's CBA preempted his state-tort law claim. Second, the Sirens fulfilled their duty of care while the district court did not reasonably consider Wyatt's actions when assessing liability.

A CBA will preempt state law when the CBA's terms are inextricably intertwined with the claim at issue. Before preemption can be ruled out, a thorough analysis of a CBA's specific provisions is necessary. Both lower courts failed to show that Wyatts's CBA was not susceptible to an interpretation that would cover Wyatt's liability claim. By doing so, the courts disregarded federal labor laws, subverting the Supremacy Clause, requiring this Court to reverse and remand.

Additionally, had the CBA been properly analyzed, the courts should have then evaluated Wyatt's claim under a premises liability standard, where they would have found that the Sirens' provided their duty of care. On the day of the big game, Wyatt was not employed by the Sirens, but rather was at the stadium for business purposes, so the Sirens owed him a duty of care as an invitee. As such, Wyatt had the burden of proof to show that the Sirens failed to use ordinary care in removing or warning of the danger. However, the facemask-sized divot was not a dangerous condition. Nevertheless, the Sirens exercised their due care by placing a bright orange over the exposed cement. Also, it cannot be said with certainty that the divot was the proximate cause of Wyatt's injury. Wyatt's stress and physical strain during this game were far more significant factors that should have been considered by the lower courts as the proximate cause of his injury.

Lastly, Wyatt was aware of the divot on the field and assumed the risk of playing. Assumption of the risk is a defense when the defendant can show that the plaintiff knew of the risk and consented to it. Wyatt played all four quarters as the bright orange cone was on the divot. When catching the touchdown pass, he tried to avoid the cone but failed to stop. Even if Wyatt did not see the cone until the touchdown play at issue, it would still be predictable to any star football player that similar divots would naturally occur during the course of game day. This

assumption of the risk provides the Sirens a full defense to its liability because Wyatt could have avoided the divot by exercising his freedom of volition. Therefore, both claims must be reversed.

ARGUMENT

I. THE SIRENS ENJOY FIRST AMENDMENT PROTECTION TO USE THEIR MASCOT.

Beyond political interests, the First Amendment protects self-expression. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974). Self-expression, as illustrated by Justice Thurgood Marshall, is necessary for the development of identities and ideas. *Id*. at 427-28. He believed that this Court's role included protecting the "precious personal rights" afforded by freedom of speech. *Id.* Markedly, Justice Harlan expressed the challenges in evaluating the principles governing speech, as it is often the case that "one man's vulgarity is another's lyric." *Cohen v. Cal.*, 403 U.S. 15, 25 (1971). Accordingly, this Court has used the First Amendment as a tool to disable states from punishing certain speech, thereby continuing the promotion of a free and diverse body politic. *Id.* at 23.

A. The Sirens Mascot Is Not Obscene Under The *Miller* Test And Is Constitutionally Protected.

To be deemed obscene, a work must satisfy all three prongs of the *Miller* test. *Miller v. Cal.*, 413 U.S. 15, 24 (1973). First, an average person applying present-day community standards must find that the work as a whole "appeals to prurient interest." *Id*. Second, the work needs to depict or describe sexual conduct in a "patently offensive way" as described by state law. *Id*. Last, the work as a whole must "lack serious literary, artistic, political, or scientific value." *Id*. Only when the court finds that a work satisfies all prongs will the work be deemed obscene.

1. With the progression of society in applying contemporary community standards, an average person would find that the Tulania Sirens' mascot does not appeal to prurient interest.

In evaluating the first prong of the *Miller* test, this Court disregards the views of a "particularly sensitive or susceptible person" and instead elects to judge the material based on the views of an average person within the community. *Miller,* 413 U.S. at 33. The function of community standards is analogous to the function of the reasonableness standard. *See Smith v. United States*, 431 U.S. 291, 302 (1977). Accordingly, juries are instructed to apply their understanding of the tolerance of an average person in the community rather than their subjective views. *Id.* at 305. With the understanding of community standards, juries must decide whether the work at issue appeals to prurient interest. A prurient interest is an "itching, morbid, or lascivious longing" feeling. *Roth v. United States*, 354 U.S. 476, 488 (1957). It is comparable to seeing a car crash on the freeway and not being able to look away. This feeling is one that is overwhelming, maybe even addicting. Here, the Sirens' mascot would not arouse such feelings from an average person in the Tulania community.

Wyatt and the PASWB's particularly sensitive views do not satisfy the community standard set in *Miller.* A group that advocates against the sexualization of women's bodies would hold inordinately sensitive views toward a depiction of a woman's natural form. This Court has expressly rejected prudent standards such as those held by Wyatt and the PASWB, emphasizing that such views would result in a constitutional error. *See Miller,* 413 U.S. at 32. Additionally, the adoption of state laws against certain material is not a controlling factor in the determination of community standards. *See Smith,* 431 U.S. at 310 (Powell, J., concurring). Therefore, whether the Sirens' mascot appeals to prurient interest must be evaluated by the standards of an average person in Tulania and New Orleans today.

While the record is silent as to the standards of an average Tulanian, an average person in New Orleans would not feel that a siren's breasts would incite a "lascivious longing." For

example, New Orleans annually celebrates Mardi Gras, a holiday that is typically associated with women exposing their breasts in exchange for beads thrown from floats. Some companies even manufacture Mardi Gras beads that resemble realistic female breasts. *ED LA Rules for Patentee in Suit Over Bare-Breasted Mardi Gras Beads*, 6 No. 7 ANDREWS INTELL. PROP. LITIG. REP. 7 (1999). It is safe to say that Wyatt and the New Orleans community are no strangers to the depiction of women's breasts or that the mascot appeals to abnormal interest in sex.

Nonetheless, the circuit court held that contemporary community standards that must be used reaches beyond the boundaries of Tulania and New Orleans. R. at 6. This Court has expressed similar concerns, stating that a national standard should apply; otherwise, "the constitutional limits of free expression in the Nation would vary with state lines." *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946). Nationally, there has been a social shift toward recognizing women's bodies as more than just sexual objects. While courts have been slow in recognizing the normalization of women's bodies, movements such as "Free the Nipple" have continued to garner momentum and support. *See Free the Nipple v. City of Fort Collins*, 916 F.3d 792, 799 (10th Cir. 2019); *Free the Nipple, et al. v. City of Springfield,* 923 F.3d 508, 511 (8th Cir. 2019); *State v. Lilley*, 204 A.3d 198, 204 (N.H. 2019). The Free the Nipple campaign vehemently fights for the liberation of the female form. Media and state legislation have also increased national tolerance.

Citizens of this country have been exposed to modern perceptions of women's bodies due to a wide array of media. Today, platforms such as television, tabloids, clothing advertisements, and movies contain scenes that would have been deemed obscene a few decades ago. Similarly, recent legislation now protects a woman's ability to expose her breasts. Marian Kousaie, Comment, *From Nipples to Powder*, 49 AKRON L. REV. 207, 228 (2016). For example, forty-nine

states allow women to expose their breasts for the purpose of public breastfeeding. *Id.* The Sirens' mascot may have been a problem in the late twentieth century, but with evolving community standards, the female body is no longer inherently offensive. Hence, it would be incorrect to hold that an average person in the United States would find that the siren at issue appeals to prurient interest.

2. The Sirens' mascot is not patently offensive.

Due to the "inherent danger" in suppressing free-expression, states must carefully limit statutes regulating speech. *Miller*, 413 U.S. at 24; *Redrup v. New York*, 386 U.S. 767, 770-71 (1967). Such laws must be limited to depictions or descriptions of sexual conduct. *Miller,* 413 U.S. at 24. For example, states may regulate speech by prohibiting "patently offensive representations or depictions" of sexual acts, masturbation, lewd exhibition of genitals, or excretory function. *Id.* at 25.

The City of Tulania failed to properly define the patently offensive material it sought to deter under its obscenity law. The statute prohibits knowingly possessing, publishing, exhibiting, distributing, sending, or bringing for sale or distribution of any obscene material. R. at 12. While the definitions provided by *Miller* are not an "exhaustive" list, a statute must indicate "the kinds of materials within its reach." *See Ward v. Illinois*, 431 U.S. 767, 773-774 (1977). If Tulania wanted to prevent the Sirens from displaying their mascot, the city would have needed to tailor the statute specifically to prohibit patently offensive depictions of women's breasts. Because Tulania's law lacked the clear definition required by *Miller*, it cannot constitutionally restrict the mascot's display.

Additionally, there are no facts to suggest that the siren's image rose to the level of obscenity prohibited by the examples given in *Miller. Miller*, 413 U.S. at 25. While the siren's

breasts were exposed, nudity alone is not inherently obscene and will not in itself warrant the denial of constitutional protection. *Roth,* 354 U.S. at 487; *See United States v. 1,000 Copies of Mag., etc.,* 254 F. Supp. 595, 595 (D. Md. 1966) (holding that a magazine contained eighteen pages of photographs of nude women was not obscene because the women did not pose in a lewd manner). For example, this Court held that a movie portraying sexual acts was not patently offensive because it did not depict genitals or conduct proscribed by *Miller*. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974). Like the movie in *Jenkins*, the siren's depiction was not patently offensive because it similarly lacked the prohibited content. The record does not suggest that the siren was in any way lewd or even that its nipples were shown. The team created the mascot for its rebranding and not for the sole purpose of exhibiting nudity. R. at 12.

The Sirens' advertisements did not pander to erotic interests. They were not centered on the mascot's breasts. Instead, they were intended to promote the team and the big game. R. at 12. Such advertising efforts would be expected when a team introduces a new mascot. In *Ginzburg v. United States*, advertisements for magazines were obscene because they "stressed the sexual candor" of the publications and boasted that the publishers would take "unrestricted license" in the depiction of sexual matters. *Ginzburg v. United States*, 383 U.S. 463, 468 (1996). Here, no facts indicate that the Sirens stressed the sexual candor of the mascot or exercised unrestricted license in portraying its nudity. The team simply displayed the siren in its natural form. Therefore, neither the Sirens' mascot nor their advertisements can satisfy the second prong of the *Miller* test.

3. The Sirens' mascot holds political and artistic value.

A work that holds literary, artistic, political, or scientific value is protected by the First Amendment. *Miller*, 413 U.S. at 22. This last prong of the *Miller* test is determined by a national

standard. *Pope v. Illinois*, 481 U.S. 497, 499 (1987). For example, a book was protected because the risk of its sexual content being exploited was outweighed by the book's minimal redeeming social value. *Memoirs v. Massachusetts,* 383 U.S. 413, 421 (1966). Ultimately, obscene content does not contain meaningful ideas. Symposium, *Adult Entertainment: The Obscenity Conundrum, Contingent Harms, and Constitutional Consistency*, 23 STAN. L. & POL'Y REV. 31, 38 (2012).

In today's rapidly progressing society, it is important to protect strong, female depictions. Empowering figures must not be pushed aside when their presence supports "political or social changes." *United States v. Various Articles of Merch.*, 230 F.3d 649, 658 (3d Cir. 2000). Generally, a siren is an emblematic symbol. This is echoed in Starbucks' iconic logo featuring a topless siren. Although its siren's breasts are almost fully covered by her hair, the outline of her breasts are still visible. Historically, the siren stands for more than a beautiful creature; she stands for being "good to people and good to the world," as described by Starbucks' creative director. Michelle Flandreau, *Starbucks Stories & News*, STARBUCKS (Dec. 23, 2020), https://stories.starbucks.com/stories/2016/who-is-starbucks-siren/. Here, the Sirens' mascot represents the Tulania football team. Its presence on the field, like that on the coffee cup, serves as a beacon of goodwill in such an aggressive, male-dominated sport.

Tulania's mascot is more than just a display of a siren with exposed breasts. This Court stated that any courts reviewing such material must look at both the content and the context. *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972). In *Kois*, nude photos in a newspaper were not obscene because the newspaper was not a "mere vehicle for publication of the pictures." *Id.* In this case, the Sirens recreated their mascot in order to promote their rebranding. R. at 12. The siren's exposed breasts are merely incidental to its traditional and established form. The artistic value of

this mascot is not diminished by its exposed breasts and is therefore protected by the First amendment. Thus, the siren is not obscene pursuant to the *Miller* test.

B. Even If The Mascot Is Found To Be Obscene, The Tulania Statute Is Facially Invalid.

The Tulania statute should be struck down because it is both vague and overly broad. The "void for vagueness doctrine" requires that statutes provide notice of the prohibited conduct and standards to govern law enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A law is constitutionally required to sufficiently inform a person as to what conduct will result in liability. *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). If a statute is so vague that a reasonable person would not understand what conduct is being prohibited, then that statute violates due process. *Id.* A law that does not provide both of these requirements results in unjust, selective prosecution. *Kolender,* 461 U.S. at 357.

Vagueness standards are especially strict in the area of expression. *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 432 (1838). Vague laws will ultimately suppress the exercise of free speech for fear of prosecution. *See Button,* 371 U.S. at 433. In *Smith v. Goguen*, a statute prohibiting contemptuous treatment of the American flag was unconstitutional because the statute's language failed to "draw reasonably clear lines" between criminal and non-criminal conduct. *Smith v. Goguen*, 415 U.S. 566, 574 (1974). Thus, laws regulating speech must then be tailored with "narrowed specificity" in order to pass constitutional muster. *Button,* 371 U.S. at 433.

Tulania's statute is impermissibly vague because it does not inform citizens of what is patently offensive so as to be deemed obscene. Like the statute in *Smith*, this statute does not adequately distinguish what is or is not prohibited. The statute lacks specific language or

examples of offensive conduct like those set in *Miller* and ultimately leaves the citizens and law enforcement guessing what the statute actually prohibits.

Unlike pornography, we do not know obscenity when we see it. *United States v. Loy*, 237 F.3d 251, 264 (3d Cir. 2001). An average citizen would not go through the three-prong *Miller* analysis in order to discern whether their actions would violate the statute provided by Tulania. Allowing such a statute to stand would greatly affect the ways that citizens express themselves for fear of prosecution. Police would also lack the guidelines to determine who should be prosecuted, authorizing discriminate enforcement of the law. Such a statute is incompatible with the Constitution.

Next, the overbreadth doctrine strikes down statutes that prohibit a "substantial amount of protected speech." *United States v. Williams,* 553 U.S. 285, 292 (2008). A statute is overly broad when the costs of invalidating a law are outweighed by the benefits of protecting the free exchange of ideas. *Id*. In *Williams,* the use of the phrase "sexually explicit conduct" rather than "merely sexual conduct" allowed for a stronger defense against a facial attack. *Id.* Tulania's statute merely prohibits obscene matter but does not provide a definition or test for what constitutes obscene matter.

With varying definitions of obscene matter, the overbreadth of Tulania's statute risks reaching constitutionally protected speech. The government could potentially abuse this law by preventing the sale of explicit books, magazines, and other articles protected by this Court. *See Kois,* 408 U.S. at 229-31 (holding that nude photographs attached to poems were constitutional); *Memoirs,* 383 U.S. at 418 (finding that a book about a woman's sexual pleasure is constitutional); *Various Articles of Merch*., 230 F.3d at 658 (concluding that a nudist magazine was constitutional). The statute could also take away merchants' rights to manufacture or sell

these items and adults' rights to possess such material. The cost of allowing such a statute to stand is too high, and it should be struck down under the overbreadth doctrine. Therefore, the Tulania law is facially invalid.

C. The Tulania Statute Fails The *Central Hudson* Test And Is Therefore Protected Commercial Speech Under The First Amendment.

Since 1975, this Court has recognized that commercial speech is afforded protection under the First Amendment. *See Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). Commercial speech seeks to "propose a commercial transaction." *Va. State Bd. Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Here, the Sirens' promotion of their new mascot was commercial speech. The pamphlets that were distributed proposed a commercial transaction because they contained a statement urging its viewers to purchase Sirens' gear. R. at 12. Additionally, the rebranding and solicitation was done to draw in viewers to the Thanksgiving game. R. at 7. Therefore, the Sirens' promotional activities can be evaluated under commercial speech standards.

Courts utilize the *Central Hudson* Test to determine when the government can regulate commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 566 (1980). First, the speech must concern lawful activity and not be misleading. *Id*. Second, there must be a substantial government interest in regulating the speech. *Id.* Third, the regulation must directly advance the government interest. *Id*. Last, the statute must be narrowly tailored to advance that interest. *Bd. of Tr. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 469 (1989); *Cent. Hudson Gas & Elec. Corp.,* 447 U.S. at 566.

Under the *Central Hudson* test, the Tulania statute is an unconstitutional restriction of speech. There are no facts to show that the advertising of the new mascot and its associated gear were in any way misleading or illegal. While it is a legitimate interest to protect juveniles from

viewing nudity, the Tulania statute does not directly advance this interest nor does it do so narrowly. The statute restricted various stages of commercial transactions of obscene material but did not mention juveniles nor did the statute directly target the speech so as to keep it away from juveniles. R. at 12. In *Am. Civil Liberties Union v. Ashcroft*, the court upheld a statute restricting commercial speech because it specifically barred obscene imaging to minors. *Am. Civil Liberties Union v. Ashcroft,* 322 F.3d 240, 246 (3d Cir. 2003). In the case at hand, even the district court stated that it "would likely find a statute expressly barring specific obscene or sexual conduct along with a statute barring minors from viewing obscene images" to be narrow. R. 16. The statute fails because it does not satisfy the test that allows the regulations of commercial speech. Thus, the First Amendment allows for the Sirens' unrestricted use of their mascot.

II. THE DISTRICT COURT ERRED BY NOT PROPERLY ANALYZING THE TERMS OF WYATT'S CBA TO CONSIDER ITS PREEMPTIVE FORCE OVER STATE LAW AND NOT REASONABLY EXAMINING WYATT'S LIABILITY.

The Supremacy Clause provides that the U.S. Constitution, and any laws made in pursuance thereof, are the supreme law of the land. U.S. Const. Art. VI, § 2. Preemption is a well-established principle of the Supremacy Clause, invalidating state laws that interfere with or are contrary to federal law. *Gibbons v. Ogden*, 22 U.S. 1, 6 (1824). Federal preemption reaches farther than state statutes and regulations, also extending to common law duties and state law claims from civil actions. Richard E. Wiley, et al., *Preemption: communications-specific principles*, 9 BUS. & COM. LITIG. FED. CTS. § 97:33 (Robert L. Haig ed., 4th ed. 2019); *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-25 (2008). In particular, a collective bargaining agreement ("CBA") will preempt a state law when resolving the state-law claim depends upon

the meaning of a term in the CBA. *Lingle v. Norge Div. of Magic Chef, Inc*., 486 U.S. 399, 405-06 (1988).

In the instant case, the Sirens argued that "the collective bargaining agreement . . . eliminates the duty of care" which Wyatt's state-law claim depended upon. R. at 18. Despite preemptive implications that required careful consideration, the lower courts failed to cite any language from the CBA. R. at 4-20. Still, even if the courts had sufficiently determined that the CBA did not preempt the claim, both decisions did not reasonably consider Wyatt's liability in sustaining his injury. Accordingly, this Court must reverse and remand the case to properly evaluate this claim.

A. Without Showing That Wyatt's CBA Was Not Inextricably Intertwined With The State Law Upon Which His Claim Was Based, Remand Is Necessary.

If a conflict exists, federal labor laws and their policies will supersede state tort laws. 29 U.S.C. § 185. Section 301 of the Labor Management Relations Act preempts state law claims arising out of a CBA. *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.,* 463 U.S. 1, 23 (1983). Congress enacted Section 301 intending that federal labor laws be applied "uniformly to prevail over inconsistent local rules." *Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co*., 369 U.S. 95, 104 (1962). Section 301 ensures the uniform interpretation of CBAs to promote consistent resolution of labor-management disputes. *Lingle,* 486 U.S. at 404 (citing *Teamsters,* 369 U.S.at 102). It follows that inconsistent interpretations of contracts between state and federal law would result in a "disruptive influence upon both the negotiation and administration" of CBAs. *Teamsters,* 369 U.S. at 103.

While not every dispute involving a CBA is preempted by Section 301, a proper analysis is required to determine whether a state tort law claim is "inextricably intertwined" with the terms of the CBA. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211-13 (1985). As such, the

district court should have evaluated the language of Wyatt's CBA to determine if any of its terms were inextricably intertwined with the state tort law at issue. The lower courts' decisions failed both to reasonably examine the CBA and to include a proper analysis of its terms. The district court attempted to expedite its analysis by stating, "there is no establishment of a contractually agreed upon standard of care applicable to Plaintiff's claims." R. at 18. However, this conclusory statement was not backed up by any discussion of the CBA's language. Preemption of a state law is only ruled out after a thorough discussion of a CBA's specific provisions. *See Green v. Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1028 (E.D. Mo. 2014). In *Green*, the court provided extensive analysis to determine whether there was a need for interpretation of the CBA. *Id.* at 1028-29. Unlike the analysis in *Green*, the district court did not substantiate whether the CBA preempted the tort claim at issue. Even in cases where a CBA does not preempt a state law claim, courts are still required to have first evaluated whether the plaintiff's claim was substantially dependent upon an interpretation of the CBA. *Bush v St. Louis Reg'l Convention,* No. 4:16CV250 JCH, 2016 WL 3125869, at *2 (E.D. Mo. Jun. 3, 2016). Without any evaluation of the CBA's details, the Sirens' defense is unfairly dismissed.

The court goes on with its hollow stance by quoting the Eighth Circuit: "Mere reference to part of a CBA is insufficient for preemption." R. at 18 (citing *Green*, 21 F. Supp.3d at 1028). However, the Eighth Circuit originally used "mere reference" to delineate when a CBA is used for a transactional purpose, such as a reference to a wage provision, as opposed to when a CBA's interpretation is essential to a plaintiff's claim. *Williams v. Nat'l Football League*, 582 F.3d 863, 876 (8th Cir. 2009). But there is no indication that the Sirens raised the CBA to the lower court simply for a transactional or consultative purpose. In fact, the Sirens likely offered the CBA for its potential preemptive purposes to compel arbitration over the claim.

A recent state appellate court held that parties that work under a CBA must arbitrate unless it can be said with positive assurance that the agreement preempts a plaintiff's claim. *Houston NFL Holding L.P. v. Ryans,* 581 S.W.3d 900, 906 (Tex. App. 2019). In *Houston*, a football player suffered a career-ending injury on the opposing team's field because of purported defects in the use and construction of its turf. *Id*. at 910. The appellate court held that the player's premises liability claim required an interpretation of the field specifications under the CBA. *Id*. Unlike the analysis in *Houston,* the Tulania District Court did not provide positive assurance about the details of the CBA. They failed to show that the CBA was not susceptible to an interpretation that would cover Wyatt's premises liability claim.

The district court's basis for minimizing the CBA's relevance was not warranted. It asserted that the "fact pattern does not lend itself to an analysis of contracts between the player and the league in which they play." R. at 18. But after reviewing the detailed and thorough analysis of the respective CBA provisions in the *Bush*, *Green,* and *Houston* cases, it becomes clear that the lower court improperly disregarded Wyatt's CBA. The opinion went on to state, "the Sirens' duty to warn exists independently of any contractual obligation for physical examinations or any obligation for educational protocol to inform players of the primary risks associated with playing professional football." R. at 18. Without any details of the CBA included in its opinion, these statements are not reasonably concluded. The court ignored the critical federal labor policies and disregarded its obligations to adhere to a basic constitutional principle, the Supremacy Clause. Failing to reverse and remand this case to correct this error would subvert the federal authority ordained by the Constitution.

B. If The CBA Did Not Preempt, Wyatt's Claim Required A Premises Liability Evaluation, Under Which The Sirens Met Its Duty Of Ordinary Care To Warn All Invitees About The Divot, Eliminating Liability Of Wyatt's Injury.

Had the lower court properly examined the CBA and found that it did not carry preemptive force, only then could it evaluate Wyatt's state-law tort claim. The circuit court correctly characterized the district court's decision as "difficult to follow." R. at 9. The district court stated that Wyatt's negligence claim was "premised upon the common law duties to maintain a safe working environment." R. at 18. However, an employer-employee analysis is incompatible with this case. Wyatt clearly had no employee status with the Sirens, so the team merely owed him a duty of care as an invitee. Nevertheless, the circuit court also made the same mistakes as the district court in misunderstanding the parties' relationship in this dispute. The circuit court stated that Wyatt's "workplace," the field, should have been free of unreasonable risk of harm. R. at 9. While this was an accurate statement, it is not relevant to the relationship of the parties or in determining liability for Wyatt's claim. This indication of confusion by the lower courts provides worthy cause to posit whether they misunderstood the facts and misapplied the law. Ultimately, it would have been appropriate to analyze Wyatt's claim under premises liability law, not general negligence standard applied by the district court. R. at 17-18. Wyatt's claim fails either way: The Sirens fulfilled their ordinary duty of care by sufficiently warning of the divot on the fiend, and Wyatt's contributions were likely the proximate cause of his injury.

1. **The lower courts improperly accepted Wyatt's general negligence premise, but under the more-appropriate premises liability elements, the Sirens indeed met their duty of care to warn any invitee.**

For the purposes of this case, Wyatt was designated as an invitee. R. at 17. An invitee is defined as "a person who goes onto premises with the expressed or implied invitation of the occupant, on business of the occupant or for their mutual advantage." *Blanks v. Murco Drilling Corp.,* 766 F.2d 891, 894 (5th Cir. 1985). Wyatt was on the Sirens' field in order to play a football game, which is a business purpose. R. at 17. Therefore, he was an invitee. A duty of care

is owed when there is a foreseeable harm due to certain acts or omissions. *Cupp v. Nat'l R.R. Passenger Corp*., 138 S.W.3d 766, 772 (Mo. Ct. App. 2004). The scope of that duty is measured by "whether a reasonably prudent person would have anticipated danger and provided against it." *Id.* To establish a premises liability claim against the Sirens, Wyatt had the burden of proving that (1) a dangerous condition existed on the field, (2) the Sirens knew or should have known of the condition, (3) the Sirens failed in using ordinary care in removing or warning of the danger, and (4) Wyatt was hurt as a result. *Griffith v. Dominic*, 254 S.W.3d 195, 198 (Mo. Ct. App. 2008).

The exposed cement at issue was not a dangerous condition. Courts have considered dangerous conditions to be in the realm of "hidden dangers, traps, snares, pitfalls, and the like." *Cook v. Smith,* 33 S.W.3d 548, 552 (Mo. Ct. App. 2000). Additionally, a dangerous condition is an artificial one rather than a negligent act by the inhabitants of the property. *Griffith,* 254 S.W.3d at 198. Here, the cement exposure was caused by the ordinary and predictable actions of a football player. R. at 17. During warm-ups, a player dove for a catch that led his facemask to be shoved into the turf. R. at 17. The impact resulted in the cement being exposed. R. at 17. The facemask-sized divot from the impact cannot be considered a dangerous condition because it did not create the same risk as would a snare or a pitfall.

Even so, the Sirens adequately warned Wyatt of the exposed cement when they placed the bright orange cone over the area. R. at 17. The cone served its purpose, given that Wyatt attempted to avoid it while running for the touchdown pass. R. at 17. Through its prophylactic action, the Sirens and their staff at the game acted as cautiously as is customarily required by large sports organizations. For example, in the NFL Operations Guide, there is nothing that orders a team to fix and certify its field as ready for play any sooner than "within 72 hours" or

"before game day." *NFL Field Certification*, https://operations.nfl.com/the-game/game-day-behind-the-scenes/nfl-field-certification (last visited Jan. 20, 2020). In addition, the FIFA Safety Regulations contain no mention of a timeline or a standard to which field maintenance should be performed. *FIFA Stadium Safety and Security Regulations*, FIFA, https://resources.fifa.com/mm/document/tournament/competition/51/53/98/safetyregulations_e.pdf (last visited Jan. 20, 2020). Holding the Sirens liable, in spite of having provided ordinary care, would amount to holding them strictly liable. However, strict liability is reserved for narrow and necessary areas of tort law that are not applicable in this case. Thus, the Sirens met their duty to adequately warn all invitees of the divot on the day of the big game.

2. The court failed to evaluate the proximate cause of Wyatt's injury.

Lastly, it would be unfair to claim that only the Sirens were the proximate cause of Wyatt's injury. Proximate causation is defined as "a substantial factor in bringing about the plaintiff's harm." *Bouriez v. Carnegie Mellon Univ.,* 585 F.3d 765, 771 (3d Cir. 2009); *see also Hamil v. Bashline,* 392 A.2d 1280, 1284 (Pa. 1978); Restatement (Second) of Torts § 431 (1965). When Wyatt arrived on the field the day in question, he was "flushed with nerves," likely because of the "all-important" division rivalry game against the Sirens. R. at 12. The Green Wave relied on Wyatt as their star receiver, and the team depended on him as a "critical pawn" to win games. R. at 17. This led to Wyatt being "on the field more times than not." R. at 17. When he entered the field, Wyatt saw the newly rebranded mascot, and he claimed that he was horrified by the sight. R. at 12. His wife and children were also present at the game. R. at 12. Wyatt was further upset by the mascot because of his wife's PASWB membership. R. at 12.

The combination of Wyatt's personal stress and physical strain on his body were substantial factors that would have naturally led to bringing about his injury. It is unclear

whether a patch of exposed cement ten feet away from the end zone was the proximate cause of his injury, or if his body had finally buckled under the pressure from his efforts during the game, specifically, during that fourth quarter play touchdown. Nevertheless, the district court held the Sirens liable despite its lack of diligence to require that Wyatt reasonably show his burden of proof through any sort of medical expert testimony. Without such an expert to confirm the causation, the court surely could not have reasonably found a preponderance of the evidence.

The courts compounded this error by inaccurately describing the status of the field. The circuit court stated that Wyatt's injury was caused by an issue on the field that could have "easily" been fixed. (R. at 9). But this is problematic since there were no facts to justify such a conclusion. R. at 9. And yet, the court maintained that no football player would go into a game with the assumption or awareness that there was a "sizeable ditch" within ten feet of the end zone. R. at 9. The court referring to the particular divot in this case as a "ditch" is a mischaracterization of the exposed area's size. In fact, Wyatt assumed the risk that a divot, not a ditch, would be present as a natural consequence of playing football. An assumption of risk defense is available when a plaintiff knew of the risk but nevertheless assumed the risk that caused his injury. *Owens v. Union Pac. R. Co*., 319 U.S. 715, 719 (1943). The assumption of risk doctrine is premised on the idea of "freedom of volition." Francis H. Bolhen, *Voluntary Assumption of the Risk*, 20 HARV. L. REV. 14, 22 (1906). Thus, if one knowingly and voluntarily assumes the danger, then the defendant is free of liability. *Id.* Wyatt ultimately assumed the risk when he chose to play football at the level and intensity he did, putting him in a position where he could not have avoided *any* divot that may have been on the field. Any reasonable football player would expect such a divot in the turf to be possible, anywhere on the field. A facemask

hitting the ground is a common and foreseeable part of a football game. Thus, Wyatt should not be allowed to recover for an injury he could have avoided, under his freedom of volition.

Therefore, considering all the errors by the lower courts, the Sirens should not be liable for Wyatt's injury. Overall, both of the lower court opinions included significant misunderstandings of the relationship and duties between the parties. Even if the district court had evaluated Wyatt's claim under proper premises liability standards, the Sirens provided all invitees their ordinary duty of care. Wyatt chose to play football and assume these specific risks.

CONCLUSION

This Court should reverse the lower court's decision on both issues in dispute. First, the Sirens' mascot is protected under the First Amendment because it carried artistic and political value. Also, it could have only been regulated as commercial speech through a narrowly tailored statute. However, Tulania's statute fails to meet this condition, as it is both vague and overly broad. Therefore, the Sirens' use of their mascot was constitutionally protected.

Next, the court failed to adequately analyze the applicable CBA's potential power to preempt Wyatt's state law claim under federal labor law. But even if the CBA had been properly analyzed, Wyatt was an invitee, and his claim required the application of a premises liability standard. If so, the Sirens met their duty of care by giving proper warning, and Wyatt's significant stress and physical strain indicated that the court did not reasonable evaluate the proximate cause of his injury. Thus, this case should be remanded to determine the parties' fault.