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

Attorneys for Petitioner: Team 5

QUESTIONS PRESENTED

I. Whether professional sports teams are protected by their First Amendment rights to display an obscene mascot?

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

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STATEMENT

The case before the Court originated as two separate actions. The first action was brought by Persons Against Sexualization of Women's Bodies ("PASWB") and Wyatt to seek enforcement of a state obscenity statute against the Sirens' mascot. The second action was a negligence case brought by Wyatt against the Sirens to recover from an injury which occurred while playing in a professional football game. The district court decided to consolidate the cases into the one before the court. R. at 12. The decision to consolidate was one of many procedural and substantive mistakes that the lower courts committed. Specifically, Federal Rule of Civil Procedure 42(a) allows consolidation for cases "involv[ing] a common question of law or fact[.]" These two actions share neither factual nor legal questions.

Specifically, as to the first action, the contested issue is whether the Sirens' new mascot – a historically accurate mermaid – is obscene solely because it includes exposed women's breasts. The second issue, on the other hand, relies on whether it was negligent of the Sirens to place a cone over a divot that was 10 feet behind the back of the endzone which caused Wyatt to slip and hurt his knee. Nevertheless, the district court consolidated on the basis that "Ben Wyatt and the Tulania Sirens are both named parties in both cases[.]" R. at 12.

The next mistake made by each lower court was the assumption of federal jurisdiction. Indeed, neither court included any discussion as to its jurisdictional basis. *See generally* R. However, a quick look into subject matter jurisdiction makes clear that this case should have been dismissed at the outset. This is especially true as to the first action which is solely based on the enforcement of a state obscenity statute against the Sirens. That action clearly contains no federal question, nor alleges any damages which is a required basis for diversity jurisdiction. This issue was, however, missed by both former appellants counsel and each of the judges to

have ruled. This Court now has the duty to correct this mistake. As to the second action, Wyatt's claim brings up a more complicated discussion about federal subject matter jurisdiction. Firstly, it seems like diversity jurisdiction is inapplicable because the parties are not diverse. This is indicated by the fact that Wyatt received the pamphlet of the Sirens' new mascot which was only distributed to citizens of Tulania. Therefore, both Wyatt and the Tulania Sirens are domiciliaries of Tulania and not diverse. This means that the only possible basis for subject matter jurisdiction over this claim is federal question. Neither of the lower courts acknowledged this crucial detail, however. Indeed, if the Court were to affirm the lower court's conclusion that Wyatt's negligence claim is independent of the collective bargaining agreement ("CBA") it would have to remand with instructions to dismiss as no federal question would be present.

The cases, however, went forward on their merits. As to the first action, the district court and court of appeals disagreed as to whether the Sirens' new mascot was obscene. The district court held that today's society would not find a topless woman obscene. R. at 15. The district court went even further, discussing the mascot's "serious artistic and political value." R. at 16, specifically referring to it is as a "depiction of a strong female mascot" and considering it "empowering[.]" R. at 16. Conversely, the court of appeals made the baseless assertion that the mascot was "a graphic depiction of the female body" and nothing more than "a boorish attempt to gain the viewership of those who view the mascot as a sex symbol." R. at 7. The court of appeals subsequently overturned the district court's holding and held that the mascot was obscene.

As to the second action, the district court summarily dismissed the application of the collective bargaining agreement to this case, while never citing to it. R. at 18. Instead, it went forward in applying "Tulania common law." R. at 18. However, it never cited to a Tulania court.

Rather it applied Missouri state tort law. R. at 18. Applying this random state's tort law, it quickly reached the conclusion that the Sirens were negligent. The court of appeals somehow found no issue with the district court's reasoning or application of Missouri state tort law and affirms while also applying Missouri state tort law. R. at 8-9.

The case now comes before this Court where appellant seeks the Court to vacate the court of appeal's decisions or to dismiss for lack of subject matter jurisdiction.

SUMMARY OF THE ARGUMENT

Federal courts are courts of limited subject matter jurisdiction – a constitutional mandate that can never be waived. Both the district court and the court of appeals failed to consider subject matter jurisdiction. The Court lacks diversity jurisdiction to hear Respondent Wyatt's claims because Wyatt and the Sirens are nondiverse. The Court likewise lacks diversity jurisdiction to hear Respondent PASWB's claim because it does not meet the amount-in-controversy requirement for diversity jurisdiction. Furthermore, the Court entirely lacks federal question jurisdiction over the claim against the Sirens mascot because the Respondents are seeking an injunction to enforce a state statute, raising no federal question under the well-pleaded complaint rule. The only possible basis for federal question jurisdiction is by interpreting Wyatt's negligence claim as being a suit to enforce the CBA.

Furthermore, an injunction against the Sirens mascot constitutes a violation of the Sirens' First and Fourteenth Amendments' protections. The protections of free speech are extremely broad with only a few narrow exceptions, one of which is obscenity. Under this Court's *Miller* test, material can be considered obscene only if it (1) appeals to the prurient interest; (2) lacks, on the whole, any serious political, literary, artistic, or scientific value; and (3) offensively depicts sexual conduct specifically defined by the applicable state law. The Sirens mascot meets none of these three requirements. First, it does not appeal to the prurient interest but instead follows society's progressive trend of not viewing women's breasts as sexual objects. Second, the work is faithful to the depictions of both sirens and mermaids in both art and literature. Third, Section 12 of the Tulania penal code is overbroad and requires state court interpretation because it does not specifically define sexual conduct.

Lastly, Wyatt's injuries are directly covered by the National Football League ("NFL") CBA's Articles 41 and 45. This Court has long recognized that CBAs completely preempt state law. Article 41 of the CBA provides that all NFL clubs provide workers compensation for football related injuries, while Article 45 provides additional protections for longer-term injuries. Wyatt received his injuries while carrying out his work duties as a wide receiver and therefore is governed by the CBA. Furthermore, Article 43 of the CBA provides a mechanism for Wyatt to pursue grievances, a process which Wyatt has neglected.

ARGUMENT

I. THE ONLY POSSIBLE BASIS FOR SUBJECT MATTER JURISDICTION FOR THIS CASE IS IF THIS COURT CONCLUDES THAT RESPONDENT WYATT'S NEGLIGENCE SUIT SOLELY SEEKS TO ENFORCE COLLECTIVE BARGAINING AGREEMENT BECAUSE THE PARTIES DO NOT QUALIFY FOR DIVERSITY JURISDICTION AND NO OTHER FEDERAL QUESTION IS PLEADED.

Federal courts are courts of limited subject matter jurisdiction; they can only hear certain cases. U.S. Const. Art. III; *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). This constitutional mandate cannot be waived and can be raised by any party, including the court *sua sponte,* at any point in litigation. *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 571 (2004) ("Challenges to subject-matter jurisdiction can of course be raised at any time prior to final judgment."). The two types of cases that federal courts may hear are (A) those involving diverse parties, and (B) those involving a federal question. 28 U.S.C. §§ 1331-32 (2018). Consolidated cases must be reviewed for jurisdiction separately. *Hall v. Hall*, 138 S. Ct. 1118, 1128 (2018) ("[E]ach constituent case must be analyzed individually on appeal to ascertain jurisdiction[.]").[1]

A. Diversity jurisdiction does not apply to this case because Wyatt is a citizen of Tulania which is where the Sirens are headquartered and the People Against Sexualization of Women's Bodies fails to meet the amount in controversy requirement.

Diversity jurisdiction requires that the Respondent and Petitioner must be domiciled in different jurisdiction. 28 U.S.C. § 1332. Additionally, there must be an amount-in-controversy of at least $75,000. *Id.*

[1] The present case comes to this Court as two separate actions which have been consolidated. The first action is PASWB and Wyatt's attempt to enforce Tulania's state obscenity law. The second action is Wyatt's claim of negligence. It is also worth noting that the consolidation does not meet the requirements set forth in Federal Rule of Civil Procedure 42(a). Specifically, each separate action share zero questions of fact or law meaning that these cases should never have been consolidated in the first place. Fed. R. Civ. Pro. 42(a) .

In this case, each action fails to meet the requirements for diversity jurisdiction. As to Wyatt's negligence action, he is a citizen of Tulania as demonstrated by the fact that he received the pamphlet which was only sent to citizens of Tualania. *See* R. at 12. As to the Sirens, it is abundantly clear that the team is headquartered in Tulania as it is where they play and where their stadium is located. R. at 12. Therefore, Wyatt and the Sirens are non-diverse as they are both domiciled in Tulania meaning that diversity jurisdiction cannot apply over Wyatt's negligence claim.[2] *See* 28 U.S.C. § 1332. As to PASWB, it is unclear from the record where their members are located; therefore, it is unclear whether the organization is diverse from the Sirens.[3] Regardless, the first action made by PASWB and Wyatt does not seek money damages; instead it seeks injunctive relief – the enforcement of a state statute, meaning that the action fails to meet the amount-in-controversy requirement. *Id.*; R. at 12. Therefore, diversity jurisdiction is inapplicable to either action in this case.

B. This case presents, at most, only one federal question, which would be that Wyatt's negligence action is a claim to enforce the collective bargaining agreement as it otherwise would be a state tort action and the other action only seeks to enforce the state obscenity law.

A federal question must be pleaded in the complaint, unless jurisdiction is based on diversity jurisdiction, to invoke federal subject matter jurisdiction. *See Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 153 (1908). One exception, however, is in cases where the federal law completely preempts the state law claim being asserted which turns the original state law claim into federal claim. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393-94 (1987). It is well established under LMRA § 301 that a claim to enforce a CBA completely preempts state law.

[2] It is conceded that Wyatt meets the amount-in-controversy requirement, although it is not stated in the record how much he is hoping to recover. 28 U.S.C. § 1332.

[3] The only documented member is Wyatt's wife who is also a citizen of Tulania meaning that if she is the only member then the organization would not be diverse. 28 U.S.C. § 1332; *see generally* R.

See 29 U.S.C. § 185(a); *Caterpillar Inc.*, 482 U.S. at 393-94. Therefore, when a claim is made under state law to enforce the CBA, it presents a federal question. *Caterpillar Inc.*, 482 U.S. at 393-94. A state claim seeks to enforce the CBA when the state law claims are "substantially dependent upon analysis of a CBA."[4] *Id.* Otherwise, a federal court should apply state tort law meaning that Tulania law would govern the negligence claim.[5] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72-73 (1938): *see also West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). When, however, the CBA is raised as a defense to an independent state law claim, the well-pleaded complaint rule governs. *Caterpillar Inc.*, 482 U.S. at 393. The well-pleaded complaint rule rejects subject matter jurisdiction on the basis that a federal question is raised by the defense. *See Mottley*, 211 U.S. at 153.

In this case, the question of federal question jurisdiction requires the Court to make a ruling as to whether Wyatt's injury is covered by the NFL and National Football League Player's Association ("NFLPA") negotiated CBA or by state tort law. If Wyatt's claim is merely seeking enforcement of the CBA, then the complete preemption rule morphs his state tort law claim into a federal question of federal labor law. *Caterpillar Inc.*, 482 U.S. at 393-94. If, however, the

[4] Section III of this brief argues that Wyatt's negligence claim is "substantially dependent upon analysis" of Articles 43 and 45 of the NFL CBA. *Caterpillar Inc.*, 482 U.S. 386 at 393-94.

[5] It is worth noting that both the Fourteenth Circuit and district court failed to cite to Tulania negligence precedent. See generally R. Indeed, both the Fourteenth Circuit and district court applied Missouri state law while providing no rationale for why. *Id.* The lack of application of the appropriate state law should be enough for an order to remand. *See West*, 311 U.S. at 237 ("State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of general law and however much the state rule may have departed from prior decisions of the federal courts.") (quotation marks omitted). Otherwise, if the Tulania state rule is unclear, *Pullman* abstention would apply to address this important issue of first impression and avoid "making a tentative answer which may be displaced tomorrow by a state adjudication." *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941).

Court holds Wyatt's action is independent of the CBA, then Wyatt has failed to plead a federal question because his actions would be based on state law as a state tort negligence claim. 28 U.S.C. § 1331; *Erie R.R. Co.*, 304 U.S. at 72-73. Therefore, unless this Court holds that Wyatt's claim is merely seeking to enforce the CBA, the Court must remand with instructions to dismiss the case for lack of subject matter jurisdiction.

Additionally, as to the other action, by PASWB and Wyatt, the parties only seek injunctive relief to enforce a state statute meaning that they failed to plead a federal question in their complaint. 28 U.S.C. § 1331. Furthermore, under the well-pleaded complaint rule, the Siren's use of federal defenses, specifically that the CBA governs Wyatt's negligence claim and that the state statute violates the First Amendment, is inconsequential. *See Mottley*, 211 U.S. at 153. Therefore, the Court must dismiss the first action, brought by PASWB and Wyatt, to enforce the state obscenity statute because it fails to meet the requirements of diversity jurisdiction or raise a federal question in its complaint.

II. THE SIRENS MASCOT IS PROTECTED BY THE FIRST AMENDMENT BECAUSE IT BOTH DOES NOT APPEAL TO THE PRURIENT INTEREST AND HAS SERIOUS ARTISTIC AND POLITICAL VALUE.

The First and Fourteenth Amendments together protect the freedoms of speech and expression from infringement by the States. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). This protection recognizes the value of free speech and its importance to the country's free exchange of ideas. *See generally id.* This protection, which is extremely broad and covers a vast majority of speech, is not absolute. *Breard v. City of Alexandria, La.*, 341 U.S. 622, 642 (1951). There are a few narrow categories of speech that are unprotected, *id.*, with one of these narrow categories being obscene speech. *Miller v. California*, 413 U.S. 15, 23 (1973).

Material is obscene only if meets three requirements. *Id.* at 24. First, it is necessary to determine whether "an average person, applying contemporary community standards, would find

that the work, taken as a whole, appeals to the prurient interest." *Id.* Second, the factfinder must determine "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* Third, the factfinder must inquire whether the work offensively depicts sexual conduct specifically defined by the applicable state law. *Id.*

In *Jenkins v. Georgia*, the Court addressed whether nudity without further sexual activity in the film 'Carnal Knowledge' was sufficient to make the film obscene under the *Miller* test. 418 U.S. 153 (1974). Overall, the Court held that "nudity alone is not enough to make material legally obscene" because nudity does not appeal to the prurient interest on its own. *Id.* at 161 (noting that another factor to consider is whether the work focuses on the genitals).

A. The Sirens mascot is protected by the First Amendment because women's breasts are not sex objects and the mascot is both artistically accurate and a strong political statement by being the first woman to be a professional football mascot.

1. Exposed breasts as part of a full body mascot do not appeal to the prurient interest because the mascot does not focus on the breasts and society has accepted that women's breasts are not sex objects.

Material appeals to the prurient interest "only if it is . . . erotic." *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 579 (2002).[6] Prurient has been defined by this Court as "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd." *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957). In other words, material that appeals to the prurient interest would exhibit, or arouse, "inappropriate, inordinate, or unusual sexual desire." *Prurient*, Black's Law

[6] This Court has stated that when a publisher's dissemination of material is localized in nature, the Court should apply local community standards to determine whether the material appeals to the prurient interest. *See Miller*, 413 U.S. at 32 (holding that "it is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of" the more progressive parts of the country be governed by the standards of the most puritan regions and vice versa. Because the Sirens targeted their dissemination of their material locally, R. at 12, this Court should apply a localized standard. Unfortunately, partly because of the lack of a jury verdict in these proceedings, there is scant evidence of what the local standards are. Because of this, we base our arguments on both the standards of a nearby community, Louisiana, and a more nationalized standard.

Dictionary (11th ed. 2019). As noted above, this Court has held that nudity alone is not enough to make a film appeal to the prurient interest. *Jenkins*, 418 U.S. at 161.

The mere exposure of breasts on the Sirens mascot is not enough to appeal to the prurient interest. As the district court correctly noted, we live in a modern, progressive society. R. at 15. Society no longer sexualizes female breasts. While there is scant information on what Tulanian society views as appealing to the prurient interest due to the lack of a jury trial, there is much information available on what the nation as a whole and on what Louisiana, which has a stake in this litigation,[7] view as appealing to the prurient interest.

It is not unusual to see business using topless women as their mascots or logos.[8] Famously, the Starbucks logo is a topless, twin-legged siren; although the logo currently does not have any exposed nipples, the original Starbucks logo from its inception in 1971 until 1987 had exposed nipples; until 1992, the siren's legs were fully shown. *See* Michelle Flandreau, *Who is the Starbucks Siren*, Starbucks, https://stories.starbucks.com/stories/2016/who-is-starbucks-siren/ (Dec. 23, 2016). The Starbucks logo, far from being called obscene or brought to court civilly or criminally, has become a nationally and internationally celebrated image of a siren and one of the most recognizable logos worldwide. *See The 50 Most Iconic Brand Logos of All Time*, Complex, https://www.complex.com/life/2013/03/the-50-most-iconic-brand-logos-of-all-time/starbucks (Mar. 7, 2013) (ranking Starbucks at number 22).

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[7] Louisiana's stake arises from the fact that the New Orleans Green Wave, a domiciliary of Louisiana, played a game at the Sirens' stadium. R. at 12.

[8] This includes the Maltese soccer team, Sirens F.C., which has a siren's body from just below the waist up, with the nipples covered by thin strands of hair. *See* Sirens FC Official Page, https://www.facebook.com/SirensFCOfficialPage/ (last visited Jan. 9, 2020). Malta is historically socially conservative but has seen recent changes towards a more progressive culture. *See Once-Conservative Malta Leaps Ahead on LGBTQ Rights*, NBC News, https://www.nbcnews.com/feature/nbc-out/once-conservative-malta-leaps-ahead-lgbtq-rights-n716206 (Feb. 2, 2017).

The United States Patent and Trademark Office also allows individuals and businesses to register trademarks for logos featuring nude women. *See* TM Code 02.03.19, USPTO Design Search Code Manual, http://tess2.uspto.gov/tmdb/dscm/dsc_02.htm#02 (last visited Jan. 13, 2020). Trademarks registered or applied for under TM Code 02.03.19 include logos for businesses such as a retail store for items such as clothing and handbags, *see* Fleur de Mary Natures' Art Trademark Application, Trademark Electronic Search System, http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4810:p5827o.2.11 (last visited Jan. 13, 2020), and plastic surgery practitioners, *see* S. Val Plastic Surgery P.C. Trademark Registration, http://tmsearch.uspto.gov/bin/jumpto?f=doc&state=4810:p5827o.2.156 (last visited Jan. 13, 2020). These trademarked logos and the companies that trademarked the logos show that a woman's breasts are viewed as a natural part of a woman's body which does not appeal to the prurient interest; they are certainly not viewed as a "sex symbol" as the Fourteenth Circuit alleged. R. at 7.

Another example of society's progressive view on women's breasts can be seen in the way that the Motion Picture Association of America ("MPAA") has rated film releases. The MPAA rates films on a scale from G, meaning general audience, to NC-17, which bars audience members under the age of 17. *See* The Film Rating System, FilmRatings.com, https://www.filmratings.com/ (last visited Jan. 8, 2020). The ratings between G and NC-17 consist of PG, parental guidance suggested, PG-13, parents strongly cautioned (and film may contain content unsuitable to those under the age of 13), and R, restricted. The MPAA has acknowledged that it may give PG ratings to films with brief nudity, *see* Classification and Ratings Rules, Motion Picture Association of America, https://www.filmratings.com/content/downloads/rating_rules.pdf (Jan. 1, 2010), and has done so

in the past with films such as *Airplane!*,[9] meaning that children can view or purchase the films without their parents present. *See* Airplane! (DVD), Target, https://www.target.com/p/airplane-dvd/-/A-52375285 (last visited Jan. 13, 2020) (selling the film with an MPAA rating of PG). *Titanic*, one of the most popular films of all time, has a PG-13 rating, which likewise allows children of any age to view or purchase the film, despite its famous extended scene featuring a topless woman. *See* Titanic (DVD), Target, https://www.target.com/p/titanic-dvd/-/A-14081469 (last visited Jan. 13, 2020) (selling the film with an MPAA rating of PG-13). These films provide further evidence that society has decided exposed breasts do not appeal to the prurient interest.

Another example of society's view that exposed breasts do not appeal to the prurient interest can be seen in the way that society treats breastfeeding mothers. All fifty states, plus the District of Columbia, Puerto Rico, and the Virgin Islands now have laws specifically allowing women to breastfeed in any public or private place. *Breastfeeding State Laws*, National Conference of State Legislatures, https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx (Apr. 30, 2019). Thirty states, plus the District of Columbia, Puerto Rico, and the Virgin Islands also exempt breastfeeding from public indecency laws.[10] *Id.* Among these states is Louisiana, where New Orleans sits, which exempts breastfeeding from Louisiana's obscenity laws. La. Stat. Ann. § 51.2247.1 (2001).

To hold that a topless female mascot appeals to the prurient interest would also further negative stereotypes about women's bodies. In a recent decision regarding a preliminary injunction, the Tenth Circuit persuasively held that public nudity laws that allow men to go

[9] *Airplane!* contains both scenes of nudity and scenes with suggestive language and actions. *See* Parents Guide on *Airplane!*, IMDB, https://www.imdb.com/title/tt0080339/parentalguide (last visited Jan. 14, 2020).

[10] These states range from the most liberal, such as Massachusetts, to the most conservative, such as Mississippi, showing society's widespread acceptance of exposed breasts to breastfeed.

shirtless while forbidding women from doing the same would likely be found unconstitutional on the merits. *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792 (10th Cir. 2019) ("*Free the Nipple*"); *but see Free the Nipple- Springfield Residents Promoting Equality v. City of Springfield, Missouri*, 923 F.3d 508 (8th Cir. 2019) (per curiam) (disagreeing based on prior circuit precedent without taking into account the harmful effects these negative stereotypes have on women).

In *Free the Nipple*, the Respondents brought suit after Fort Collins enacted a public nudity ordinance forbidding all females over the age of ten from knowingly appearing in public with their breasts exposed below the top of the areola and nipple, with an exemption for breastfeeding women. 916 F.3d at 795. After the district court granted a motion for a preliminary injunction, the city appealed to the Tenth Circuit, arguing that the ordinance's unequal treatment of male and female toplessness would survive constitutional scrutiny. *Id.* at 796. Applying intermediate scrutiny, the Tenth Circuit affirmed the district court. *Id.* at 799, 807. The Tenth Circuit astutely noted that the city's professed interest in protecting children derived from "negative stereotypes depicting women's breasts, but not men's, as sex objects." *Id.* at 803 (quotation omitted). The Tenth Circuit, in agreement with the district court, held that female breasts have been stereotyped as being akin to genitalia and that laws grounded in stereotypes about the way women are serve no important governmental interest. *Id.* Because "perpetuating the sex-object stereotype leads to negative cognitive, behavioral, and emotional outcomes for both women and men" and because research has linked "the sexual objectification of women to the view that, at younger and younger ages, women are appropriate targets of [sexual] assault," the Tenth Circuit concluded that continuing to treat women's breasts as sexual objects was harmful. *Id.* at 803-04.

The Fourteenth Circuit in its decision in the instant case sought to perpetuate this sexual stereotyping of women's breasts as being sexual objects. The Fourteenth Circuit, instead of engaging in the same type of thoughtful analysis as the Tenth Circuit did in *Free the Nipple*, stated without evidence that the Sirens mascot was a "graphic depiction" of a women's body, claiming that this was an attempt to gain the viewership of "those who view the mascot as a sex symbol." The Fourteenth Circuit erroneously adopted "the reactions of a sensitive . . . minority" by agreeing with the Respondents that the mascot is both intended to and in fact does appeal to the prurient interest. *Smith v. United States*, 431 U.S. 291, 304 (1977).

This Court should adopt the Tenth Circuit's reasoning in concluding that the Sirens mascot does not appeal to the prurient interest, disregarding the Fourteenth Circuit's unsupported assertions about the Sirens mascot. The stereotype that a woman's breasts, particularly her nipples, are akin to genitalia is both outdated and harmful to women of all ages. The Sirens mascot, being a full body of a topless mermaid, not just the torso and head, is neither erotic, *Ashcroft*, 535 U.S. at 749, nor meant to provoke morbid or lascivious thoughts. *Roth*, 354 U.S. at 487 n.20.

2. The Sirens mascot has serious artistic and political value because it is faithful to artistic and literary representations of sirens and mermaids and it is a progressive, strong female mascot.

When determining whether allegedly obscene material has serious literary, artistic, political, or scientific value, the proper inquiry is "whether a reasonable person would find such value in the material, taken as a whole." *Pope v. Illinois*, 481 U.S. 497, 500-01 (1987). The mere "fact that only a minority of a population may believe a work has serious value does not mean the 'reasonable person' standard would not be met." *Id.* at 501 n.3. This allows jurors to consider whether the predominant local view is reasonable or not. *Id.*

Historically, artistic (and literary) depictions of mermaids and sirens alike have been topless with breasts exposed. For example, the famous Little Mermaid statute, completed in 1913 and on display in Copenhagen, Denmark, is topless. *See* The Little Mermaid, VisitCopenhagen, https://www.visitcopenhagen.com/copenhagen/planning/little-mermaid-gdk586951 (last visited Jan. 10, 2020). In an 1899 American printing of Hans Christian Andersen's fairy tales, including *The Little Mermaid*, there are illustrations of topless mermaids, with breasts exposed. *See, e.g.*, Hans Christian Andersen, *The Fairy Tales of Hans Christian Andersen* 138 (J. B. Lippincott Co. 1899), digitized by New York Public Library (https://archive.org/details/fairytalesofhans00ande/page/138).

Depictions of sirens and mermaids as being topless do not date solely from the late nineteenth and early twentieth centuries but can be found dating back to both the sixteenth century and much earlier, to the first century B.C.E. For example, a bronze half-length statue from Rome in the late sixteenth century bears a striking resemblance in many ways to the original Starbucks logo of a siren. *See* Siren ca. 1571-1590, Metropolitan Museum of Art, https://www.metmuseum.org/art/collection/search/210103?sortBy=Relevance&ft=siren&offset=0&rpp=20&pos=1 (last visited Jan. 10, 2020). A Greek statue of a funerary siren meanwhile, dating from the first century B.C.E. depicts the siren as being fully nude. *See* Funerary Siren, Louvre Museum, http://cartelen.louvre.fr/cartelen/visite?srv=car_not&idNotice=8180 (last visited Jan. 10, 2020).

The Sirens mascot stays true to this artistic history of depicting sirens and mermaids as either nude or topless. A reasonable person would find that the Sirens mascot has serious artistic

value. The Sirens mascot is merely a topless mermaid.[11] R. at 12. The Sirens did not go outside the norm of how mermaids and sirens are depicted in order to intentionally "use . . . a graphic depiction" of a mermaid as a "boorish attempt to gain" viewership and "shock and gain" attention from viewers, as the Fourteenth Circuita erroneously believed. R. at 7. The Sirens instead remained faithful to the way that mermaids and sirens have historically been depicted in art, making no changes, but paying homage to the team's namesake in a serious and artistic way. As the district court stated, "[t]here is no basis to restrict [an] artist's creative liberties simply because their work is displayed in conjunction with a popular national football team." R. at 16.

This Court should also adopt the Third Circuit's holding on what constitutes serious political value. In the Third Circuit, political value is "broad enough to encompass that which might tend to bring about 'political and social changes.'" *United States v. Various Articles of Merchandise*, 230 F.3d 649, 658 (3rd Cir. 2000). Adopting the Third Circuit's holding would allow the free marketplace of ideas that this Court values in its free speech cases to flourish more fully. *Cf. Cohen v. California*, 403 U.S. 15, 24-26 (1971) (holding that a shirt saying "fuck the draft" was protected under the First Amendment because it contributed to the marketplace of ideas). Under this standard, the Sirens mascot has serious political value. As the district court stated, it is the "first ever depiction of a strong female mascot in the sport of football," utilizing a female figure who is unashamed to display her breasts fully. R. at 16. The mascot need not be viewed as having serious political value by a majority of the population, but only by a rational person. *Pope*, 481 U.S. at 501 n.3. The Sirens mascot clearly meets this standard by expressing society's progressing views and depicting a strong female mascot, R. at 12, similarly to the way

[11] Although the record is unclear, it is likely that it is a full-bodied mermaid. *See generally* R. at 12.

a shirt saying "fuck the draft" may have not have been viewed as having serious political value by a majority of the population but did in fact have such value to a rational person. *Cohen*, 403 U.S. at 24-26.

B. Section 12 of the Tulania Penal Code is overbroad in its language and requires state court analysis to determine its breadth.

Under *Miller*, a work is only obscene if it meets all three factors of the test. The third factor requires the Court to determine whether the work offensively depicts sexual conduct specifically defined by the applicable state law. *Miller*, 413 U.S. at 24. The state law in question, Section 12 of the Tulania Penal Code, states in relevant part:

> "[e]very person who knowingly: sends or causes to be sent, or brings or causes to be brought into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his/her possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

Tulania Penal Code § 12 (2019).

A statute is overbroad when it may prohibit a substantial amount of protected speech, deterring the legitimate exercise of First Amendment rights. *United States v. Williams*, 553 U.S. 285, 292 (2008); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). The first step in the overbreadth analysis once an overbreadth challenge is made is "to construe the challenged statute." *Williams*, 553 U.S. at 293. When the challenged statute is a state statute, the Court defers to the state courts in their traditional authority to interpret state statutes. *See United States v. Stevens*, 559 U.S. 460, 474 (2010); *cf. Erznoznik*, 422 U.S. at 216 (holding that state courts did not interpret or restrict the reach of the statute in question despite numerous opportunities to do so, including in an overbreadth challenge).

Section 12 is overbroad in its language. It prohibits the preparation, printing, exhibition, distribution, or possession with intent to distribute of "any obscene matter," classifying it as a misdemeanor crime. Tulania Penal Code § 12 (2019). The statute makes no attempt to define

what an obscene matter is, leaving interpretation up to the reader and significantly deterring the legitimate exercise of the First Amendment rights of those who may self-censor rather than run afoul of the law. *Williams*, 553 U.S. at 292. Section 12 stands in stark contrast to the obscenity statute in force in New Orleans, which goes into detail of what entails the crime of obscenity, including defining what genitalia and sexual acts are. La. Stat. Ann. § 14:106 (2017). Section 12 lacks any reference to this Court's obscenity standard in *Miller*, not mentioning that a work containing serious literary, artistic, political, or scientific value is also protected by the First Amendment regardless of whether the work appeals to the prurient interest, a standard conspicuously present in the Louisiana statute. 413 U.S. at 24; Tulania Penal Code § 12 (2019); La. Stat. Ann. § 14:106 (2018)

Conceivably, the state courts, once faced with Section 12, may limit its breadth, bringing it more in line with an obscenity statute along the lines of the Louisiana statute. But the state courts have not yet had the chance to interpret Section 12. Even if this Court were to find that the first two *Miller* standards were met, the Court should remand to the district court with instructions to certify the question of interpretation of Section 12 to Tulania's court of last resort. To do otherwise would be to give a tacit affirmation that Section 12 lacks any overbreadth concerns and would disregard the right of state courts of last resort to interpret state law. *Cf. Johnson v. United States*, 559 U.S. 133, 138 (2010) (holding that the Court is bound by state courts of last resorts' interpretations of state law).

III. THIS COURT SHOULD REVERSE THE HOLDING OF THE FOURTEENTH CIRCUIT AS TO THE INDEPENDENCE OF WYATT'S NEGLIGENCE CLAIM BECAUSE HIS CLAIM IS MERELY SEEKING DAMAGES WHICH ARE GOVERNED BY ARTICLES 41 AND 45 OF THE COLLECTIVE BARGAINING AGREEMENT.

This case is covered by the CBA which creates a specific mode of recovery for Wyatt's injury. As stated earlier, it is well established under LMRA § 301 that a claim to enforce a CBA

completely preempts state law. *See* 29 U.S.C. § 185(a); *Caterpillar Inc.*, 482 U.S. at 393-94. Complete preemption is present when state law claims are "substantially dependent upon analysis of a CBA." *Caterpillar Inc.*, 482 U.S. at 393-94. When, however, the CBA is raised as a defense to an independent state law claim, the well-pleaded complaint rule governs.[12] *Id.* at 393. Therefore, the issue at hand is whether the Wyatt's negligence claim "substantially [depends] upon analysis of [the NFL] CBA[.]" *Id.*

In this case, two Articles of the CBA directly apply: (A) Article 41, which requires NFL clubs to guarantee Workers' Compensation coverage or equivalent benefits, and (B) Article 45, which provides financial protection for prolonged injuries. Furthermore, the application of either, or both, Articles requires the use of the procedures prescribed by Article 43, which governs non-injury grievances. The application of both Articles 41 and 45 require the Court to remand with instructions to dismiss and require Wyatt to follow the prescribed procedures.

A. Article 41 governs Wyatt's negligence claim because it ensures that either Workers' Compensation or a like remedy is available for injuries accrued while working for an NFL team which is how Wyatt's injury occurred.

Article 41 applies to this case as it mandates all NFL clubs to guarantee Workers' Compensation or an equivalent benefit. Collective Bargaining Agreement, NFL Labor, Art. 41 (Aug. 4, 2011). This system is predicated on the risk that NFL players will suffer an injury within their employment, which requires them to practice or play the sport. *See Lloyd v. Shady Lake Nursing Home, Inc.*, 92 So. 3d 560, 564 (La. Ct. App. 2012) ("Except for intentional acts, the rights and remedies afforded by workers' compensation provide the exclusive means for

[12] This means, as stated before in the section discussing subject matter jurisdiction, *see supra* Section I, that unless the Court holds that Respondent Wyatt's claims for negligence are "substantially dependent upon analysis of [the NFL] CBA" there is no federal question present and the Court would be required to dismiss for lack of subject matter jurisdiction. 28 U.S.C. § 1332.

redressing workplace injuries or compensable sickness or disease.").[13] Furthermore, under Louisiana workers' compensation law, the only way that a tort claim would not be barred would be if it was alleged to be intentional. *Id.*

In this case, Wyatt should be restricted to filing a claim for workers' compensations as that is the agreed upon remedy for injuries sustained while working for the NFL as a player, which includes playing in NFL football games. If Wyatt's negligence claim is allowed, then it would create a double standard where players on the road would be able to sue the road team for negligence, but home players would be restricted to workers' compensation. Given the nature of NFL football games and the requirement that players play in all games, both home and away, this seems impracticable and unlikely what the NFL and NFLPA intended. Therefore, by restricting Wyatt's recovery to workers' compensation, the Court would show respect to the scheme adopted by the NFLPA and the NFL to compensate players for their football injuries.

B. Article 45 also governs Wyatt's negligence claim because it prescribes the monetary compensation scheme for long-term injuries of the sort that Wyatt has suffered.

Additionally, Article 45 is applicable because it applies to any "severe football injur[ies] in an NFL game or practice" which prohibit a player from playing in "all or part of his Club's last game of the season" and require off-season rehabilitation that extends to the next season. Collective Bargaining Agreement, Art. 45.[14] Furthermore, the CBA also sets rules for "Nonfootball Injur[ies.]" Collective Bargaining Agreement, Art. 20. This designation has only been used for injuries not associated with playing in NFL games or participating in practice. For example, it was used for a player who harmed himself from a fireworks accident. *See* Anthony

[13] Louisiana Workers' Compensation laws would apply because Wyatt's employer is based in Louisiana. La. Stat. Ann. § 23:1035.1(1)(a) (2001) (granting extraterritorial coverage when an employee is working outside of the state if its "employment is principally localized in this state[.]")

[14] An online copy of the NFL CBA can be found here: https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

R. Caruso, *The Non-Football Injury List and Compensation (Or Lack Thereof)*, Scarini Hollenbeck (Nov. 11, 2015), https://scarincihollenbeck.com/law-firm-insights/entertainment-and-sports/the-non-football-injury-list-and-compensation-or-lack-thereof-2/. It was also used for a player who was recovering from surgery to remove a brain tumor. Ethan Cadeaux, *Explaining the NFL's Non-Football Injury (NFI) list, which Trent Williams is now on*, NBC Sports (Nov. 7, 2019 at 4:09PM), https://www.nbcsports.com/washington/redskins/explaining-nfls-non-football-injury-nfi-list-which-trent-williams-now. Both of these examples show that clubs understand that a nonfootball injury is only something that happens outside of playing or practicing NFL football. Zach Links, *PFR Glossary: NFI List*, Pro Football Rumors (Jul. 4, 2019 at 3:00PM), https://www.profootballrumors.com/2019/07/nfl-non-football-injury-nfi-list.

In this case, Wyatt was hurt, while participating in an NFL football game, after catching a touchdown, which is the epitome of a football play. R. at 17. Specifically, Wyatt had already been playing for over three quarters of the game and received his injury after slowing down from scoring a touchdown. R. at 17. This is clearly unlike any of the stated examples of what a non-football injury is; it happened in direct service to the club. Additionally, out of the last four clubs playing in the playoffs this season, there were a combined seventeen players who had suffered season ending knee injuries as a result of playing football, making Wyatt's injury less than unique.[15] *See Current NFL Injuries*, Pro Football Reference (last visited Jan. 18, 2020), https://www.pro-football-reference.com/players/injuries.htm. In this case, Wyatt is paid to play football with the goal of scoring touchdowns. His injury came as a result of him completing his footballing duties and therefore is covered by this provision. If Wyatt's football injury is severe

[15] The other 28 NFL Clubs had a combined 89 knee injuries that ended a player's season and/or has them likely to miss the start of training camp. *See NFL Injuries*, CBS Sports (last visited Jan. 18, 2020), https://www.cbssports.com/nfl/injuries/.

enough that he will be required to rehab until the start of, or through, the next season, then he will be entitled to the benefits listed in Article 45.[16] If his injury, however, does not require as long of a recovery, then Article 45 suggests that the clubs and players agreed that the injury was not severe enough for added protection.

Furthermore, this system makes sense for several reasons. For starters, teams already have an incentive to keep the field as safe as possible – specifically, to protect both their players from injury and their reputation, which is important for getting new players to sign with the club. Additionally, this system provides clarity to both sides (club and player) about what the player receives when injured. This stops players from having to sue for tort damages which could be difficult if not impossible to ascertain. And most importantly, it stops players from having to prove negligence which can be difficult and vary largely from state to state.[17] Therefore, because Wyatt's injury is of the type considered when the NFLPA agreed to the CBA, his monetary recovery requires the Court's interpretation of the CBA. *See Caterpillar Inc.*, 482 U.S. at 393. The Court then in interpreting these provisions should require Wyatt to follow the procedures set forth in Article 43.

C. Application of the procedures of Article 43 require that this Court remand with instructions to dismiss and submit the claim to arbitration.

Articles 41 and 45 require the application of the procedures set forth in Article 43. See Articles 41, 45. Article 43 requires that the player begin by filing a complaint with the Management Council. Collective Bargaining Agreement, Art. 43. If the issue is not resolved at that time, then either the player or the Management Council can appeal to a neutral arbiter. *Id.*

[16] Wyatt does not allege any facts about his injury other than it ended his season. *See generally* R.
[17] Indeed, in this case whether the Sirens were negligent could vary from state to state meaning that players could be treated differently over the same conduct.

This means that this Court should remand with instructions to dismiss because the required procedure for Wyatt to make his claim under the CBA is to file a grievance as stated in Article 43. *Id.* Art. 43. If Wyatt decides that he would rather, or in addition, seek Workers' Compensation, then he is free to pursue that. *Id.* Article 41. One thing is clear: no federal court should be granting him damages in this case as his only potential remedies are the NFL Injury Protection scheme or state workers' compensation. *Id.* Art. 41, 45.

IV. CONCLUSION

For the foregoing reasons, the Petitioner respectfully request that this Court reverse the Fourteenth Circuit's decision and remand for further proceedings with instructions to dismiss.