THIS CASE HAS BEEN SCHEDULED FOR
ORAL ARGUMENT FEBRUARY 19-21, 2020

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 Supreme Court of the United States

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BRIEF FOR PETITIONER

January 21, 2020

Counsel for Respondent

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following are statutes are implicated in this case: Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. Section 12 Tulania Penal Code (2019).

This case involves U.S. Const. amend. I and XIV.

STATEMENT OF JURISDICTION

The United States District Court for the Southern District Court of Tulania and the United States Court of Appeals for the Fourteenth Circuit had subject matter jurisdiction and personal jurisdiction over this matter. Pursuant to 28 U.S.C. Section 1254 (1) upon granting petition for a writ of certiorari, this Court has jurisdiction to review the Court of Appeal's decision.

STATEMENT OF THE ISSUES

1. Whether a team's mascot is warranted First Amendment protection when it serves to further a political movement and does not appeal to the prurient interest?
2. Should a football team be held liable to an opposing player for their injuries sustained outside the regulation boundaries when he was on notice and his own actions caused the injury in question?

STATEMENT OF THE CASE

A. Statement of Facts

This case is about two issues: (1) a state's statute infringing on the right to free expression in furtherance of a political movement and (2) holding players accountable for their own actions in play. The facts surrounding each issue will be discussed in turn.

Issue 1:

Mascot. The Tulania Sirens recently recreated their mascot to depict an artistic expression of political significance. R. at 12-13. Their choice of expression was a mermaid in her natural state. R. at 12. The artistic expression of the mermaid as a natural water creature meant the mermaid was not drawn with clothing on her body. R. at 12.

Promotional Material. In order to promote their team and encourage attendance of the important Thanksgiving Day rivalry game between the New Orleans Green Wave and the Sirens, the Sirens mailed informational pamphlets to Tulania community members introducing their brand-new mascot and gave the time and date of the game. R. at 12. To encourage monetary support for the team, the Sirens displayed bolded words at the bottom of the pamphlet encouraging community members to support their team by purchasing gear depicting the new mascot of their home team. R. at 12. All members of the community were sent the informational packets. R. at 12.

Thanksgiving Game. In celebration of the Thanksgiving Day game and to encourage team spirit, the Sirens displayed their new mascot all over the stadium with decorations and handed out flyers to passersby. R. at 12. Families attended the game together and parents used routine caution in determining what their children were exposed to. R. at 5, 12.

Obscenity Claim. Ben Wyatt and his wife were sent promotional material as they are members of the community. R. at 12. Wyatt and his family along with some of the community members who

shared in their personal belief voiced their concerns over the mascot. R. at 12. As a result, the city of Tulania passed Section 12 of the Tulania Penal Code (2019) criminalizing the knowing exhibition and distribution of any obscene material. R. at 12. After the law was passed and after receiving the promotional material explicitly stating that the mascot would be celebrated at the game, Ben Wyatt still chose to attend the Thanksgiving Day game with his wife and children present. R. at 12. Ben Wyatt and the Center for People Against the Sexualization of Women's Bodies personally found the artistic expression obscene and therefore brought suit to enjoin the Sirens' from further use of their political artistic expression at games and in promotional materials. R. at 12. They claimed the Sirens' mascot was an obscene image and therefore was not warranted First Amendment Protection as a politically valuable artistic expression. R. at 5. The Sirens maintained that their mascot was an artistic expression of political significance. R. at 13.

Issue 2:

Collective Bargaining Agreement. A collective bargaining agreement exists between Respondent and the Sirens. R. 18. The agreement provides that Sirens have an obligation to provide physical examinations and education protocol to inform players of the primary risks associated with playing professional football. Id.

Game Play. Ben Wyatt is a wide receiver for the New Orleans's Football team, Green Wave. R. 17. As an asset to the Green Wave, Respondent spends most time on the field during offense drives, as the team relieves on his reliable hands and agile feet to score touchdowns. Id. On Thanksgiving Day, Respondent and his team were to play their rivals, the Tulania Sirens. Respondent prepared tirelessly for the upcoming game at Yulman Stadium in Tulania. R. 12.

During pregame warmups on the day of the game, a player on the Tulania Sirens dove for a catch, and when he hit the ground, his face masked was shoved into the turf, uplifting a portion

of the turf. R. 17. This left behind a partially exposed patch of cement. Id. Evidence suggests that this turf was inadequately patched prior to the game, making it unsafe. R. 19. While grounds crew are expected to be present on gamedays, and there was a possibility that the crew could have fixed the area, a Tulania staff addressed the situation by placing an orange cone over the affected area. R. 17-19. The area which this occurred was about ten feet behind the end zone. R. 17.

Not until the fourth quarter did a player fail to avoid the area and make contact. Id. Respondent, while catching a proper pass to the back-left corner, ran into the endzone and he could not prevent himself from approaching the affected area. Id. To avoid the cone, Respondent made a sharp right, but he failed to properly side-step, and his left foot landed on the cement, where he then slipped and fell sustaining an injury to his left knee that ended his season. Id. Evidence tended to show that his injury resulted from the missing patch of turf, and not a bad side-step. R. 19.

B. Course of Proceedings and Disposition in the Court Below

The United States District Court for the Southern District Court of Tulania consolidated two case for review. In the first case, Ben Wyatt and the Center for People Against Sexualization of Women's Bodies brought an action to enjoin Tulania's football team, the Sirens, from utilizing their new mascot. R. 12-13. The second case involved Ben Wyatt, a player of the Green Wave, the Tulania football team negligent for his injuries sustained on the football field. R. 17. The District court was correct in ruling not to enjoin the Siren's use of their mascot. R. 16. However, the court erred in finding the Siren's negligent for Ben Wyatt's injuries. R. 20

Ben Wyatt and the Center for People Against Sexualization of Women's Bodies appealed the ruling of the District's court's decision on the enjoinment of the Siren's mascot, and Tulania Sirens Football team appealed the District Court's decision on a finding of negligence on their behalf. R. 3-4. The United States Court of Appeals for the Fourteenth Circuit reversed in part and affirmed

in part. R. 10. The court reversed the District court's decision the Siren's First Amendment right to display their mascot, concluding that the image was obscene and therefore, not protected. R. 10. The court affirmed the District court's decision regarding Wyatt's injury, concluding that it was the result of negligence on the part of the Sirens. R. 10.

The Tulania Sirens football now appeals to this Court. R. 1.

C. Standard of Review

For the purposes of this review, this Court should review all matters *de novo*.

SUMMARY OF THE ARGUMENT

The Tulania Sirens cannot be enjoined from using their mascot as it would infringe on their First Amendment rights. The First Amendment right has been read to include freedom of expression and protect works of art that may depict offensive or controversial work. The Sirens' mascot is protected under the First Amendment because it is not defined as obscene for three reasons.

First, the mascot in the form of a mermaid would not be found by an average person applying Tulania's contemporary community standards to appeal to the prurient interest. The mascot is not engaged in any lewd or sexually charged behavior and is simple picture in which the mermaid is in a natural state, not wearing clothing.

Second, the mascot is not patently offensive as specifically defined by Section 12 Tulania Penal Code because the code is overly broad and does not define the difference between acceptable nudity and lewd nudity. As such, individuals who are not offended by nudity and want to celebrate it in their artistic work or privately in their home may be charged with a misdemeanor simply for wanting to share their work or home with other individuals. The law also does not limit the viewership to those who are legally not allowed to view certain nude or

pornographic images.

Lastly, the mascot has significant political value as the current feminist movement has long celebrated the female figure as more than just a sexual image. The mascot can serve to enhance those who are protesting, even topless, for acceptance of women's bodies and fighting the notion that a woman who exposes part of her body is asking to be sexualized.

The Tulania Sirens cannot be found negligent for an opposing player's injury. The Collective Bargaining Agreement, which outlines duties and rights of the player and teams, require interpretation to resolve Ben Wyatt's ("Respondent") common law claims, and as such, these claims are preempted by federal law under Section 301 of the Labor Management Relation Act. Should the claims not require CBA interpretation, Sirens cannot be found liable under common law for Respondent's injuries for two reasons.

First, Respondent assumed the risk of his injury. Sirens cannot be found liable for failing to protect and expose the Respondent from appreciated risks of which he voluntarily consented to assume. The potential for less than optimal field conditions is an inherent risk of a sport. By electing to participate in the game, Respondent assumed the risk associated with the field conditions. As a professional athlete, Respondent unequivocally had appreciation for the nature of the risks of such conditions and likely had knowledge that this condition existed, given his substantial playing time on the field near the condition. With the orange cone, Sirens made the field as safe as it appeared to be, and by his participation, Respondent consented to this condition, thereby relieving Sirens of any obligation to protect him against those conditions.

Second, Sirens did not fail to perform a duty to protect Respondent from injury, and thus, were not the cause of his injuries. Under premise liability or general negligence theory, Sirens owe no duty to Respondent. Because there is no evidence to conclude that Sirens controlled the stadium

or Respondent or created the dangerous condition, Sirens owe no duty under premise liability. Nor should a duty be recognized under general negligence. Imposing a duty for teams to identify and protect against every possible condition on the field and surrounding area would be overly burdensome on the teams and NFL as well as compromise the social utility of football, a cornerstone of American culture. Moreover, it was not foreseeable that a player would not heed a warning, and risk of injury was not unreasonable, as any possible injury resulting from the area was not above and beyond what players ordinally encounter during play.

Even if a duty is recognized, Siren fulfilled that duty by acting with reasonable care to prevent Respondent's injuries. Because the turf was inadequately patched prior to the game, temporarily patching the turf could have created a more dangerous condition. So, once Sirens in became aware of the field conditions, it properly satisfied its duty to protect athletes by putting them on notice of the area. Sirens adequately warned players of the area with an orange cone - a common knowledge sign of warning and caution – on top of the affected area. Even supposing, Sirens did breach their duty, they were not the legal cause of the injury. Respondent's fatigue and diminished agility from tireless practices prior to the game coupled with his four-quarter competitive play in a close rivalry game was likely the substantial cause of his injuries, and it was not foreseeable that players would not heed a warning to avoid the area. Therefore, Sirens cannot be found liable for the risks Respondent sustained.

The Court should reverse the Court of Appeals for the Fourteenth circuit decision on the First Amendment issues because the Siren's mascot is warranted First Amendment Protection, as it is not obscene. The Court should also revere the Fourteenth circuit's decision because the court erred in finding that Respondent did not assume the risk of his injury and that Respondent's injury was a result of Siren's negligence.

The Court should reverse the Court of Appeals for the Fourteenth Circuit's decision on the First Amendment issues because the Sirens' mascot is warranted First Amendment Protection, as it is not obscene. The Court should also revere the Fourteenth circuit's decision because the court erred in finding that Respondent did not assume the risk of his injury and that Respondent's injury was a result of Siren's negligence.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The United States Court of Appeals for the Fourteenth Circuit erred in determining that the Sirens' mascot is obscene and therefore is not warranted First Amendment protection because the mascot as a whole does not appeal to the prurient interest in sex, is not patently offensive and has serious political value, which this Court has recognized warrants First Amendment protection

To determine whether any kind of expression is obscene this Court put forth a three-prong test in *Miller v. California,* 413 U.S. 15, 16 (1973) which is still predominantly utilized to determine obscenity. In order to be considered obscene, all three prongs of the test must be satisfied.[1]

The Sirens' mascot is not obscene under the *Miller* test for three reasons: (1) the average person within the Tulania community would not find that the work taken as a whole appeals to the prurient interest; (2) the mascot does not depict in a patently offensive way, sexual conduct specifically defined in the state law as the law is overbroad; and (3) the mascot has serious political value as a statement meant to support women's rights and removing the stigma surrounding women's bodies and nudity in general.

[1] The test is as follows: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest….(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary." *Miller*, 413 U.S. at 16.

A. The Sirens' mascot when taken as a whole does not appeal to the prurient interest when applying contemporary community standards of Tulania because there is no display or encouragement of sexual conduct.

This Court has been wary of regulations that may infringe on constitutional rights but has limited the protection of the First Amendment deciding that it does not apply to obscene materials. See generally *Roth v. United States*, 354 U.S. 476 (1957). In order to be obscene, nudity and pornography must, at a minimum, depict or describe patently offensive and hard-core sexual conduct. *Miller* 413 U.S. at 27. The first prong in the Miller test sets forth that a work as a whole must appeal to the prurient interest in light of the contemporary community standards. *Id*. In *Kaplan v. California*, 413 U.S. 115 (1973), this Court further asserted that contemporary community standards meant the standard of the community in which the work was disseminated and that no national standard would have to be defined. Thus, the test for whether a work appeals to the prurient interest is determined on a case-by-case basis utilizing the known standards within the community involved. *Kaplan* 413 U.S.; see generally *Miller* 413 U.S. 15*; Roth* 354 U.S. 476.

To generalize obscenity and include any kind of nudity or display of the body would define the contemporary standard of Tulania to find any depiction of the body as sexual and therefore obscene, which is hyperbolic as medical and fictional books, trailers, television shows, billboards, and even drawings done by children or teens would be deemed obscene. Those images would not necessarily be deemed to appeal to the prurient interest and to encourage individuals to engage in prurient behavior.[2] The mermaid was a simple, if not accurate, image of a mythical creature, not defined as wearing clothing and was not as a whole appealing to the prurient interest as it was not

[2] Cairns, Robert B.; Paul, James C.N.; and Wishner, Julius, "Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence" (1962). Minnesota Law Review. 2209. (there is little empirical data to support that claim and further individuals may utilize forms of nudity that may not be obscene).

engaged in sexual or lewd conduct and was not encouraging those exposed to the image to engage in such conduct. Only some of the community groups and members found the Sirens' mascot to be offensive, but nothing further was said to determine if the community at large deemed the image of the mermaid as patently offensive or appealing to the prurient interest, defined as "itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd." R. at 12; *Roth*, 354 U.S. at 487 n. 20. This Court should determine that a few opinions in a community are not definitive of the community standards as a whole. *See Hoover v. Byrd*, 801 F. 2d 740 (5th Cir. 1986). The general trend amongst the community and a general survey could show that an average person would not find the depiction of the mermaid as patently offensive or appealing to the prurient interest.

B. The Sirens' mascot cannot be described as patently offensive as defined by Section 12 of the Tulania Penal Code (2019) because the law is overbroad as it threatens to infringe on rights of privacy and is not narrowly tailored to prohibit youths from viewing the film.

The second prong of the *Miller* test is whether work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law. *Miller* 413 U.S. at 27. The government is not permitted to determine which types of protected speech are sufficiently offensive to require protection for the unwilling listener or viewer, but has allowed for certain types of speech to be limited in certain times, places, and contexts in order to protect other constitutional rights. *See generally Erznoznik v. Jacksonville*, 422 U.S. 205 (1975). Nudity cannot be generalized as obscene and obscenity may vary according to the group whom the material was directed at since some forms of expression may be suitable for adults, but not children. *See generally Ginsberg v. New York*, 390 U.S. 629 (1968). If a law is not sufficiently narrowed to limit exposure of nudity to children or even sexually explicit nudity, it may be deemed overbroad.

The city immediately passed a law banning any exhibition or distribution of obscene materials.[3] The text of the law would mean that any individuals possession obscene material who would wish to exhibit the material in their own home may be guilty of a misdemeanor as well as publishers of medical books, literature, magazines, and articles that display anything deemed obscene by the community. Even individuals who may choose to share their artwork containing nudity or other seemingly offensive material to their close friends or colleagues may be found guilty. The law does not only limit obscene material in the public arena, nor does it specify who it cares to limit the exposure of obscene material to. Obscenity as discussed above is defined based on the community standard and whether a work has any literary, political, scientific, or social value. Without the law defining obscene or even providing examples of obscene works such as those expressed in *Miller (*"patently offensive representations or descriptions of nudity, sexual acts, or pornographic acts and or depictions"), individuals or even corporations may feel limited in what they are able to publish which may be detrimental to the education of the community. See *United States v. Various Articles of Merch.*, 230 F.3d 649 (3rd Cir. 2000) (court held that nudist magazines were not obscene under the *Miller* test because the photographs were nonsexual of nudist children around the world which were not patently offensive).

The Court of Appeals argued that the law at hand was sufficiently limited and very clearly stated ways in which sexual conduct can be displayed. R. at 7. However, the law is not sufficiently limited. It does not define acceptable sexual conduct and in fact would capture many acceptable forms of sexual conduct. As mentioned above individuals would not be able to show their art or

[3] The text of Section 12 of the Tulania Penal Code reads: "every 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."

promote their art to their communities nor would they be able to display them at home and publishers could not distribute magazines or literature or accept ads that would depict obscene works. The right for individual's privacy and to choose what to do in their home has long been upheld as a Fourteenth Amendment right and has been guarded by this Court even in cases involving obscenity. *See Stanley v. Georgia*, 394 U.S. 557 (1969). Further this Court has also found that unnecessarily broad suppression of works addressed to adults cannot be justified as the Government may not reduce the adult population to view what is fit only for children. *See Reno v. ACLU*, 521 U.S. 844, 875 (1997). The sport of football although watched at times by families is not targeting children. The mere risk of exposure, no matter if it is a high risk, to minors is not sufficient cause for limiting works that are appropriate for adults. *See Reno*, 521 U.S. 844; *Ginsberg*, 390 U.S. 629. There is no universal standard for determining what may be appropriate for children in terms of nudity. Nudity since the 1990s has boosted in popularity across the nation and has even resulted in a naturist movement.[4] As courts navigate the contemporary world more comfortable with nudity they have drawn strong differences between general nudity and lewd nudity, with many states accepting general nudity without question.[5] The law of Tulania does not differentiate, but is including the general nudity of the mascot as lewd and therefore obscene. The generalization is dangerous and may lead to the suppression of works, including the Sirens' mascot, that would have literary, social, and political importance.

[4] Jennifer Hile. "The Skinny on Nudism in the U.S.". National Geographic July 21, 2004. https://www.nationalgeographic.com/culture/2004/07/the-skinny-on-nudism-in-the-us/#close

[5] Grossman, Joanna; Friedman, Lawrence, "A Private Underworld: The Naked Body in Law and Society" (2013). 61 Buffalo Law Review. 169.

C. The Sirens' mascot is political statement championing strong female characters and the movement to remove the stigma that women's bodies are sexual in nature and therefore has political and social value in regard to the nation as a whole.

Expressions under the First Amendment may not be limited simply because they are found to be offensive in some regard as speech and artistic work on important political movements may be offensive but necessary to preserve the core of First Amendment values. *See generally Pickering v. Board of Education*, 391 U.S. 563 (1968); *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Ideas that have even the slightest redeeming social importance even if they are unorthodox ideas, controversial ideas, or ideas hateful to the prevailing climate of opinion still have the full protection of the First Amendment unless they are regarded as obscene without serious social importance. *Roth*, 354, U.S. at 484-85. Even if individuals or the Government found the idea to be controversial or disagreed with the statement, it does not mean that the work is not given its First Amendment protections. *Id*. The third prong of the *Miller* test is not limited to the standards of the community of Tulania and can be considered in a broader context and it explores whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Court of Appeals argued that because the work is a mascot for professional sports team there could be no feasible political value and that the mascot in only meant to shock and offend individuals or appeal to those interested in nudity. R. at 8. However, as the court notes, football is a beloved American sport enjoyed all throughout the country. R. at 8. Mascots are the symbols that represent the teams and their legacies and can become well beloved by fans and memorable throughout time. They can also be seen as political in nature.[6] The Sirens chose a mermaid which is a creature known as a powerful feminine symbol since they act as free-spirited and powerful

[6] There have been a number of scandals and protests revolving around use of the Cleveland Indians' Mascot and Washington Redskins' chosen moniker.

creatures.[7] Currently, the feminist movement has been keen to remove the stigma that women's bodies should be sexualized and that women and their sexuality should be repressed and punishable. Granted there is a split in how women across the nation have chosen to respond to battling the stigma, with some advocating for bringing focus to other accomplishments of women and shying away from utilizing nudity and others advocating for displaying nudity in a bid to emphasize that a woman's body does not need to be sexual in nature.[8] Many have taken the stance that shying away from nudity, even nudity considered degrading within the realm of pornography, would detract from the feminist movement as it would allow for the continued ideology that any depiction of the female form regardless of context should be considered sexual in nature and women must be ashamed of such depictions and their own bodies.[9] Female bodies are also now utilized worldwide in feminist protests and movements.[10] The idea that in order to prevent sexualization of women's bodies, women should cover up is an antiquated belief that resulted in laws and societal norms that prevented women from showing their ankles or any parts of their body in public. It has even resulted in the death of women in some cultures that deem women's bodies as obscene in public. The Sirens in choosing a mermaid with her chest exposed have taken the stance that women's bodies do not have to be sexual in nature and in fact should be celebrated and welcome so long as the depiction is not for sexual purposes but to further the agenda that women are strong individuals who are defined by more than their bodies. The Sirens' statement to

[7] GR Varner. *Gargoyles, Grotesques & Green Men: Ancient Symbolism in European and American Architecture*. 2008 (mermaids have been seen as those who can lure sailors to their deaths along with being a strong female character)
[8] Marie-Claire Chappet. "Why Female Nudity Is Still A Feminist Battleground". Glamour Magazine November 22, 2018.
[9] Meyer, Carlin, "Sex, Sin, and Women's Liberation: Against Porn-Suppression" (1994). 72 Texas Law Review. 1097.
[10] S.C.S. "Why are feminists going topless?". The Economist May 30, 2013.

be political does not have to be so impactful as to bring about political change but must only *tend* to bring about political and social change. *Various Articles of Merch* 230 F.3d at 658. A strong female mascot that would be seen on television and also represent a beloved American football team could have political impact as it supports those who believe that women's bodies should be celebrated, and the world should not sexualize women's bodies by making them taboo.[11] As such, the Sirens' mascot has political importance as an artistic work and artists are historically given autonomy to create work to make statements as they see fit.[12]

II. Sirens cannot be found liable for an opposing player's injury sustained on the field, because (1) Respondent assumed the risk of injury and (2) Sirens did not have a duty to protect respondent from injury or was the cause of his injuries.

Sirens are under no obligation to protect against the actions of an opposing player. Having such sweeping liability in football, would result in inherent changes in the sport and devastate the industry. However, when a dispute arises in the labor context where a Collective Bargaining Agreement exists (CBA), Section 301 of the Labor Management Relations Act preempts the state law claims. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 395 (1987). Should the court find that the claims can be resolved with interpretation of the CBA, the court adjudicates the claims in accordance with common law. *Id*. Here, Respondent alleges a negligence claim, which requires a showing of a duty and breach of that duty causing the harm. *L.A.C., ex. Rel. D.C. v. Ward Parkways Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 257 (Mo. banc 2002). The contractual and common law duties are discussed in turn.

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[11] Chappet, supra, at n. 5 (notable celebrities such as Kim Kardashian, Emily Ratajkowski, Emma Watson, and others have taken the stance that female nudity should not be offensive as it adds to the antiquated stigma that the female body is only for sexuality)

[12] Many political cartoons have contained lewd drawings or depictions of the current state of politics and have been protected by the First Amendment.

A. Section 301 of the LMRA preempts respondents claims as interpretation of the CBA is required.

Federal law governs breaches of Collective Bargaining Agreements. Textile Workers *Union v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957). It has long been established, that Section 301 of the LMRA preempts state law claims premised on the rights and obligations inherently intertwined with the CBA. *Caterpillar*, 482 U.S. at 395; 29 U.S.C § 185(a). Thus, the preemptive effect of Section 301 allows for a lawsuit raising only state law claims, including tort claims, to fall under federal law, when the resolution of such state claims are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." Allis-*Chalmers Corp v. Lueck*, 471 U.S. 202, 220 (1985); *Duerson v. National Football League, Inc.*, WL 1658353 at *2. To determine if the preemptive effect of section 301 is applicable to a state law claim, the court "must look beyond the face of the plaintiff's allegations and the labels used to describe [his] claims and… evaluate the substance of the plaintiff's claims." *Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 800 (7th Cir. 2013). The Fifth and Seventh circuits hold that interpretation of the CBA to determine the standard of care also results in preemption. Duerson at *4.

Respondents negligence claims, although based on common law, do in fact arise under federal law, as the claim's resolution is dependent on the interpretation of the CBA's contractual obligations and rights. The CBA imputes an obligation on the Sirens to inform players of the risks of football as well as credits players with rights to have knowledge of this risk and to rights regarding their health and wellbeing, such as rights to physical examinations, and information regarding the risks of football. R. 17. This Court will need to interpret this provision to determine if this education protocol included warning players of field conditions as they relate to player safety, because this would shed light the scope of the team's duty and the reasonableness of their

actions as well as Respondent's reasonable expectations. *See Duerson* at *4. (holding that an argument regarding the standard of care is not a defense and does not preclude preemption). Thus, the nature and scope of Siren's duty is substantially dependent on an interpretation of the CBA.

History also favors preemption. *See Stringer v. NFL*, 474 F. Supp. 2d 894 (S.D. Ohio 2007); *Duerson* at *4; *Dent v. NFL*, 902 F.3d 1109 (9th Cir. 2018); *Maxwell v. Nat'l Football League*, No. 11-CV-08394, Order (C.D. Cal. Dec. 8, 2011). And, for good reason, as it ensures predictability and uniformity in interpretations CBAs. *Allis-Chambers* at 471 U.S at 211. Recently, a few courts have issued narrow holding rejecting preemption, but if this trend continues, teams will be financially devastated, and players will pay the cost in their salary and benefits. Francy, Morgan, "An Open Field for Professional Athlete Litigation: An Analysis of the Current Application of Section 301 Preemption in Professional Sports Lawsuits", 70 SMU Law Review. 475.

B. Respondent knowingly and voluntarily assumed the risk causing injury, precluding Sirens from liability.

Under implied primary assumption of risk, when a plaintiff voluntarily consents to a known and appreciated risk, a defendant owes no duty to protect him from those risks, thereby relieving the defendant from liability. *Scott v. Pacific West Mountain Resort*, 834 P.2d 6 (1992). With adoption of comparative fault statues, assumption of risk functions as a measure of the defendant's duty of care, but still operates as a complete defense, as the plaintiff consents to relieve the defendant of any duty. *Turcotte v. Fell*, 502 N.E.2d 964, 967 (1986) (citing Prosser & Keaton, Tort § 68, at 496 (5th ed. 1984).

Assumption of risk is applicable when a "consenting participant is aware of the risk; has an appreciation of the nature of the risk; and voluntarily assumes the risk." *Morgan v. State*, 90

N.Y.2d 471, 207 (1997). Generally, these are risks that are "known, apparent, or reasonably foreseeable." Id. One's awareness of these risk is relative to one's knowledge and experience with the activity. Id.

The consented to risks include those related to the construction or maintenance of the field. *Maddox v. City of N.Y.*, 487 N.E.2d 553, 556 (1985). "A defendant's duty under such circumstances is a duty to exercise care to make the conditions as safe as they appear to be." *Turcotte*, 502 N.E.2d at 968. The owner or operator satisfies this duty once the player becomes aware and consents to these risks by participating. Id. For instance, in *Maddox*, a professional athlete alleged that his career ending injury that resulted from a slip on a wet field was the result of the negligent maintenance of the stadium, and the court held that he assumed the risk by electing to play on such conditions. 487 N.E.2d at 557-58. *See also Steward v. Town of Clarkstown*, 224 A.D.2d 405 (App. Div. 1996) (finding a basketball player assumed the risk when sustaining an injury from making a jump shot on a court where he was aware that there was height differential between the edge of the court and the ground).

Here, as in *Maddox*, Respondent was a skilled and experienced athlete who had appreciation for and voluntarily assumed the risks associated with the field conditions, which he alleges was the cause of his injury. Given his professional status and experience, Respondent equivocally had knowledge of and could reasonably foresee risks of injury associated with playing on imperfect field conditions. R. 17. He also likely had an awareness of the divot in the field, considering it existed for nearly all four quarters, and it was located behind the endzone, where Respondent spent most of his game time as a star receiver. Id. With the appreciation of the conditions and its associated risks, Respondent voluntarily chose to participate in the game, thereby relieving Sirens

of a duty. *See Turcotte* 502 N.E.2d at 968 (finding that the professional athlete's participation in the sport in which he makes a living is voluntary).

The district court's opinion notes that an athlete does not assume the risk of which is the result of the sport team's negligence. R. 19. The court cites *Sheppard v. Midway R-1 Sch. Dist.*, in support, where a high school athlete sustains an injury which the court finds to be the result of the mats. 904 S.W.2d 257 (Mo. Ct. App. 1995). This case is distinguishable from the current case in two ways. First, Respondent, as a professional athlete, is held to have more awareness and appreciation for the risks involved in a sport compared to that of an amateur athlete. *See Maddox* 487 N.E.2d at 557-58. Second, because risk of injury was not readily apparent to the plaintiff, as it was in the current case, she could not appreciate the associated risk, and as such, could not consent to that risk to relieve defendant of liability. Id. at 557.

Here, Sirens brought awareness of the condition by covering it with an orange cone to signal caution, and therefore satisfied its duty to make the condition "as safe as [it] appear[ed] to be." *Turcotte*, 502 N.E.2d at 968. Accordingly, Respondent was likely aware of the field conditions, appreciated the risk of injury that could result, and elected to assume this risk by participating, thereby relieving the Sirens from any duty to protect against those risks. As such, Respondent should be precluded from recovery.

C. Sirens cannot be found negligent because it did not have a duty to protect Respondent from injury, did not fail to perform, and was not the cause of his injury.

Should this court find Respondent did not assume the risk of the conditions, this Court will assess Respondent's negligence claim. "In any action for negligence, the plaintiff must establish that the defendant had a duty to protect the plaintiff form injury, the defendant failed to perform that duty, and the defendant's failure proximately caused the injury to the plaintiff." *L.A.C., ex.*

Rel. D.C. 75 S.W.3d at 257. Respondent failed to meet this burden for each element of the claim, and as such, Sirens cannot be found negligent.

1. Sirens did not owe a duty to respondent.

A prerequisite all tort liability is the existence of the defendant's duty to protect the plaintiff from harm at the time of the plaintiff's injury. *Erdamn v. Condaire. Inc.*, 97 S.W.3d 85, 88 (Mo. App 2002). Respondent alleges that Sirens did not maintain a safe workplace, unreasonably exposed him to dangers, and failed to warn him of such dangers. R. 18. Because Sirens did not owe Respondent a duty, it is not liable for these claims.

Sirens, also, do not owe a duty under premise liability theory of negligence. Employers have a non-delegable duty to provide employees a reasonably safe work environment. *Carman v. Wieland*, 406 S.W. 70, 73 (Mo. App. 2013). While Respondent was functioning in his employment during the game, he was not playing under the direct and control of the Sirens, and therefore, not an employee of the Sirens. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). In the absent of an employee-employer relationship, Sirens do not owe the non-delegable duties to maintain a safe workplace.

Similar to employers, a land possessor or someone in control of a property owes a duty to exercise reasonable care to maintain the premise in a safe condition or warn of unsafe conditions. *Guthrie v. Reliance Constr. Co.*, 612 S.W.2d 366 (Mo. Ct. App. 1980). The crux of premise liability is not ownership, but rather possession and control. *Smith v. Dewitt & Assocs.*, 279 S.W.3d 220, 224 (Mo. Ct. App. 2009). For premise liability for contractors, for instance, when a defendant subcontractor does not create the injurious condition or retain control over the premises, defendant owes no duty to other contractors. *Mino v. Porter Roofing*, 785 S.W.2d 558, 562 (Mo. App. W.D. 1990). In *Mino*, a subcontractor was hired to resurface the roof for an air conditioner unit. *Id.* He

used a pre-formed opening, which was later covered with plywood and Styrofoam. *Id.* An employee of the air conditioning contractor stepped on the opening, fell through, and sustained injuries. *Id.* The court found that the roof subcontractor was not liable because there was no evidence that he created the condition that caused injury, it was not in a common work area, and he did not control over the work of the other employee. *Id.*

The record does not indicate that Sirens owned or had exclusive control Yulman stadium or created the dangerous condition on the field. This case is analogous to *Mino*. 785 S.W.2d at 562. First, no evidence indicates that Sirens inadequately patched the turf, thereby creating the dangerous condition. Second, the affected area was outside the endzone, and thus, not in a common area. R. 17. Third, no evidence suggests that Sirens control or are responsible for the actions of the Green Wave, including the Respondent. Absent of control and responsibility, Sirens owed no duty.

Sirens, further, do not owe a duty under a claim of general negligence. Even under a theory of general negligence, Sirens still would not owe a duty to use reasonable care to maintain a safe workplace. To assess if the defendant does in fact owe a legal duty to the plaintiff, the court considers "the risk, foreseeability and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant." *Ayala v. US*, 49 F.3d 607, 611 (10th 1995). In light of these factors, a duty to Respondent should not be recognized. Each of these factors are discussed in turn.

First, contact with the area of missing turf was not a foreseeable, as players were on notice of the area because it was covered with an orange cone – a universal symbol for caution and warning. R. 17. Moreover, the exposed area was not located on the area of regulation play, but rather, ten feet behind the endzone, decreasing the likelihood of players encountering the area. *Id.*

The likelihood of players being able to avoid the area is high in light of the size of the endzone. The fact that Respondent failed to do so, was a luckless accident that was remote and unforeseeable.

Second, the risk of injury posed by the field conditions was not unreasonable, as such possible resultant risks were not beyond the risks that players ordinally encounter during play or practice in this contact sport. Nor should the exposed hard surface be considered unreasonably safe. Several other sports, such as basketball, tennis, and track, involve high speed running on a hard surface without increased risk for injury.

Third, imputing a duty on the teams for merely every imperfection on their field would be devasting to the teams, and thus the NFL. Moreover, if a duty were imposed on the teams to foresee, identify, and protect against every condition, person, equipment, and players on the field and surrounding area for the entirety of the game, it would be unjustifiably burdensome and unnecessarily interruptive. *See Akins v. Glens Falls City Sch. Dist.*,424 N.E.2d 531 (1981) (placing a limit on facility owner's duties to spectators). Teams would take sweeping measures to avoid litigation that would alter the inherent nature of the sport, or their insurance would raise to levels that would be cost prohibitive. Either of which would place a devasting financial burden on the teams, which in turn would affect the entire industry of professional football.[1]

Fourth, the measures taken to alleviate a duty, should it be imposed, would compromise the social utility of football to this nation. Football is fundamental to American culture. It is a sport that brings Americans together every Monday, Thursday, and Sunday. The social utility of football and the nature and scope of the burden that a duty would impose on teams far outweighs any foreseeability and likelihood of risk of injury.

2. If a duty is recognized, Sirens satisfied that duty by acting with reasonable care to prevent injuries.

For arguments sake, if Sirens did owe a duty to maintain the field in a safe condition and warn of any dangers, it did not breach that duty. Here, the scope of the duty is measured by whether a reasonably prudent person would have anticipated danger and provided against it. *Dewitt*, 279 S.W.3d at 224.

Contrary to the District Court of Appeals' opinion, as the above-mentioned states, the likelihood and foreseeability of injury was remote, and the risk of injury was nothing more than what professional athletes experience in play. *See St. Joseph's Hosp. v. Cowart*, 891 So.2d 1039, 1041 (Fla. 2d Dist. Ct. App. 2004) ("the mere occurrence of an accident does not give rise to an inference of negligence"). While the grounds crew was available the day of the game and could have possibly patched the divot, temporarily patching could have created a more dangerous condition as the divot would not have been visible. R. 18. Initially, the turf was incorrectly patched, so hurriedly patching it again before the game could have resulted in another imperfection. Thus, once Sirens became aware of the affected area, it properly and fully discharged its duty to warn to protect athletes, like respondent, from the area. Thus, the team, did in fact, meet the standard of reasonable care.

A land possessor can satisfy its duty by making the condition reasonably safe or issuing a warning. *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996). If the defendant properly warns of a condition, they cannot be found negligent as a matter of law. A warning is adequate if, "given the totality of the surrounding circumstances, the warning identifies and communicates the existence of the condition in a manner that a reasonable person would perceive and understand." *Henkel v. Norman*, 441 S.W.3d 249, 253 (Tx 2014). For instance, in *Golden Corral Corp. v. Trigg*,

land possessor was not liable for the patron's slip and fall because it adequately warned with a wet floor yellow cone near the affected area. 443 S.W.3d 515, 518.

Here, as in *Trigg*, Sirens adequately warned of an affect area with a cone, satisfying its duty. Sirens placed an orange cone directly atop the affected area to warn of the field condition. R. 17. As stated above, this orange cone was a sufficient warning, as it is common knowledge a cone functions to caution as to the surrounding area, and thus, is dislike a sticky note as the Court of Appeal suggests. While, this cone was not particularized, it need not to be to convey its message. Even Respondent knew to avoid the area, as evidenced by his attempted side-step. R. 17. Moreover, given the cone was located directly on top of the exposed area, the players were understood where the condition was located. Accordingly, the warning was sufficient, and Sirens did not breach their alleged duty.

3. There was no causal relationship between Siren's actions and Respondent's injury.

The Supreme Court defines proximate cause to mean any cause which in natural or probable sequence produced the injury of which was complained. *CSX Transp., Inc. v. McBride*, 564 U.S. 685 (2011). Proximate cause entails foreseeability and cause in fact. *Donnell v. Spring Sports, Inc.*, 920 S.W.2d 378, 384-85 (Tex.App.1st Dist. 1996). "Foreseeability requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. Id. "Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury which would not have otherwise occurred." *Id.*; *Benitez v. N.Y.C. Bd. of Educ.*, 541 N.E.2d 29, 32 (App. Div. 1988). For example, in Benitez, a high school athlete suffered an injury while properly performing a block during his football game when playing against a more advanced team. Id. The athlete played in the majority of the plays on offense, defense, and special teams and admitted he was fatigued at the time of the injury but did not tell his coach. *Id.* The court

held the player's fatigue was the proximate cause that produced the injury, not the defendant's failure to approve of a mismatched game and allow the player to play under fatigue. *Id.*

Here, as in Benitez, Respondent was likely fatigued and had a diminished endurance from his tireless practices preparing for the rivalry game and his substantial participation in the game during all four quarters. His exhaustion, resulting in his diminished agility, was the substantial cause in bringing about the injury, as he was unable to control his movements and avoid the area, and thus prevent injury. Respondents decision to play under such fatigue caused his injury and is of no fault of the Sirens. Had the condition not existed, Respondent, as wide receiver, was still likely to sustain a knee injury playing under such conditions. In regard to foreseeability, as stated above, it was not foreseeable that a player would disregard an orange cone that signals warning and caution and approach the area on which it sits. Thus, Respondent's encounter with the area was not a "natural and probable" event to occur after he was on notice to avoid the area. Accordingly, Sirens' actions were not the cause of Respondent's injury.

CONCLUSION

For all of the foregoing reasons, Petitioner, Tulania Sirens Football Team, requests this Court to reverse the Court of Appeals' Opinion and Order on both issues.

Dated: January 21, 2019

Respectfully submitted,

/s/ Team 7