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 PETITIONER

Counsel for Petitioner
Team 8

Questions Presented

1. Whether the Tulania Sirens are protected by their First Amendment right to display their mascot, despite allegations that the display is obscene.
2. 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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Statutes and Federal Constitutional Provisions Involved

The following statutory and U.S. Constitutional provisions are relevant to the first Question Presented: Sec. 12 Tulania Penal Code (2019); 18 U.S.C. § 2246(2)(A)–(D); U.S. CONST. amends. I, XIV, § 1. These provisions are reproduced in Appendix A.

Standard of Review

For purposes of this review of issues arising under the United States Constitution and Tulania law, the Supreme Court reviews the district and circuit courts' determinations *de novo*. Page 2. Under *de novo* review, the court examines the legal questions at issue as if it is the first court to consider them. *See U.S. v. Williams*, 340 F.3d 1231, 1237 (11th Cir. 2003) ("Put simply, it is definitionally impossible to give deference of any sort to a decision being reviewed *de novo*").

Statement of the Case

The Tulania Sirens ("the Sirens" or "the organization") have been sued by respondent Ben Wyatt ("Wyatt"), star wide receiver for the New Orleans Green Wave, in two consolidated actions. Page 5, 12. In the first, Wyatt is joined by The Center for People Against Sexualization of Women's Bodies ("PASWB") in a claim to enjoin the use of their siren mascot, which respondents claim is obscene because it depicts a topless mermaid. *Id.* In the second, Wyatt is pursuing a negligence claim for a slip-and-fall that allegedly occurred during a Thanksgiving Day football game on the organization's premises. *Id.*

The organization has recently re-branded, and marketed its new Siren mascot while advertising for its contests. Page 12. These efforts included mailing pamphlets in the Tulania community, the team's primary fanbase, and depicting the mascot and advertising team apparel on such pamphlets. *Id.* Wyatt, whose wife is a member of the PASWB, claims offense at these

mailed depictions and the mascot's display in the organization's stadium on gameday. *Id.* Respondents filed this action to enjoin the use of the Siren mascot in the Southern District of Tulania, which found the organization's use of the mascot protected by the First Amendment. Page 16. The Fourteenth Circuit reversed, and Supreme Court granted certiorari.

During the same Thanksgiving Day game, Wyatt suffered a season-ending knee injury when he slipped and fell, allegedly due to "a divot in the turf" behind the endzone. Page 12, 17. The Sirens placed a bright orange warning cone at the site of the divot. Page 8. Despite this warning, Wyatt ran towards the cone at the conclusion of a touchdown play and slipped and fell after allegedly stepping on the divot. Page 17. He filed this negligence action against the Sirens, and the District Court found the Sirens liable. Page 20. The Circuit Court affirmed, and the Supreme Court granted certiorari.

Argument

A. The First Amendment protects the Tulania Sirens organization's right to display its mascot.

The First Amendment to the United States Constitution instructs, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. While the Amendment's plain language limits congressional action, its protections have been held to be incorporated through the Fourteenth Amendment's due process clause against the states, such that individuals are protected from impingements upon free speech by state actors. *See Stromberg v. California*, 283 U.S. 359, 368–70 (1931); U.S. CONST. amend. XIV, § 1. This Court has also made clear that free speech protections are not limited on the basis of a party's corporate identity. *See Citizens United v. FEC*, 558 U.S. 310, 343 (2010) ("Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster."). In

other words, individuals and corporations alike are protected by the First Amendment against intrusion by government actors.

The First Amendment's primacy in our constitutional order proceeds from Founding Era principles about the protection and dissemination of truth as tyranny-repelling measures and pre-requisites to self-government. *See, e.g.*, David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429 (1983); Alexander Meiklejohn, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960). With the wisdom of experience in applying the First Amendment throughout the first two centuries of the Republic, this Court, in an opinion by Justice Brennan, pronounced that "[t]he fundamental freedom of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth." *Roth v. United States*, 354 U.S. 476, 488 (1957).

That fundamental freedom, Justice Brennan would later write, is also unambiguously *not* subject to the whims of popular consensus: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (protecting anti-homosexual speech at military funeral protests by the Westboro Baptist Church) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (recognizing the First Amendment right to burn the American flag). Free speech is for everyone, and the government exceeds its legitimate authority when it acts to suppress speech merely because it finds such speech disagreeable.[1] This truth is not diminished when private citizens hale an organization like the Tulania Sirens into court seeking to enjoin lawful speech.

[1] Ken White, a prominent First Amendment activist, defense lawyer, and legal commentator recently summed this point by remarking on Twitter that all citizens get free speech protections,

The Supreme Court's Free Speech jurisprudence has produced a variety of categories, and the Court engages in a category-dependent analysis in any given case. One such category is speech that is purportedly sexually explicit. In this realm, the Court has developed a continuum of protection for various sub-categories, which can be positioned along a spectrum from no protection to full protection. At the extreme end are sub-categories of sexually explicit speech that warrant no constitutional protection: obscenity and child pornography. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 484 (1957) (holding that obscenity warrants no First Amendment protection where it is "utterly without redeeming social importance); *see also, e.g.*, *New York v. Ferber*, 458 U.S. 747, 764 (1982) ("the category of child pornography . . . like obscenity, is unprotected by the First Amendment.").

Moving along the spectrum toward full constitutional protection are the sexually explicit speech categories that receive intermediate scrutiny treatment: regulation of establishments that purvey pornography, *Renton v. Playtime Theatres*, 475 U.S. 41, 43–44 (1986) (upholding a zoning ordinance that restricted where pornography could be sold in relation to residential areas), and broadcast indecency, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), (upholding on intermediate scrutiny an FCC civil complaint related to a single afternoon radio broadcast involving a monologue rife with offensive vulgarities that dealt with sex and excretion). *Pacifica* was unique, in that it involved a one-off broadcast of a particular radio show at a time when the audience was likely to include many young children. *Pacifica*, 438 U.S. at 749.

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including even "anti-deodorant bigots and shrill hobgoblins." Popehat (@Popehat), Twitter (Apr. 22, 2017, 8:06 PM), https://twitter.com/Popehat/status/855935797177982977?s=20.

Finally, this Court has held that those sexually explicit categories that garner the greatest constitutional protection, and are analyzed under strict scrutiny, include cable and internet indecency and violent video games. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997) (striking as overbroad a provision prohibiting transmission of obscene or indecent communications by means of a telecommunications device to children); *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 802–04 (2011) (striking down under strict scrutiny a California statute that restricted children's access to violent video games). The difference in the indecency treatment of speech broadcast over the radio airwaves versus through cable or the internet is attributable to scarcity and availability: cable and internet media are sought out directly for consumption, whereas the radio broadcast in *Pacifica* was much more invasive because of the lack of alternative programming available and its invasiveness.

Obscenity is therefore remote from the more protected classifications of sexually explicit speech; it, along with child pornography, goes without First Amendment protection. *See Kois v. Wisconsin*, 408 U.S. 229 (1972); *United States v. Reidel*, 402 U.S. 351 (1971); *Roth v. United States*, 354 U.S. 484 (1957). Determining whether speech is obscene turns on "(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." *Miller v. California*, 413 U.S. 15, 24 (1973) (internal quotations omitted).

Respondents' First Amendment claims are fatal under *Miller*, and the Tulania Sirens' ("the Sirens") mascot is not obscene.

1. *The Sirens' mascot is not obscene because the average person, applying contemporary community standards, would not find that the work, taken as a whole, appeals to the prurient interest.*

Miller instructs that the relevant community standard is local, not national: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Miller v. California*, 413 U.S. 15, 32 (1973). There is no indication in the record that the people of Tulania or New Orleans would find that the topless Siren mascot appeals to the prurient interest.

The district court concluded, somewhat recursively, that the measure of the degree to which an image may appeal to the prurient interest turns, in part, on the level of obscenity it depicts. *See* Page 15. That analysis is not particularly helpful, as the definition of obscenity relies on the level of appeal to the prurient interest inherent in the depiction. However, the fact that a federal district court sitting in Tulania remarked that "we do not believe that the state of Tulania in today's modern day and age would set a standard where a topless mermaid is considered obscene" is instructive, as these learned judges know the land in which they sit and the people they serve. *Id.* Absent any evidence in the record of the actual image at issue, the district court's own words are highly relevant in determining the beliefs held by Tulanians.

Furthermore, there is nothing in the record to suggest that the Siren mascot appeals to the prurient interest. One of the most well-recognized brands in the United States has, as its feature trademark, a topless siren; people associate the Starbucks logo with consistently decent-tasting coffee, not with "[i]tching; longing; uneasy with desire or longing; of persons, having itching,

morbid, or lascivious longings; of desire, curiosity, or propensity, lewd" in a sexual context.[2] Page 15 (quoting *Roth*, 354 U.S. at 487 n. 20). While it may be argued that proof of the Sirens' mascot's greater tendency to appeal to the prurient interest can be found in Ben Wyatt's reaction to the mascot–he becomes "flushed with nerves" and "upset" at the sight of it; his wife and her group, the Center for People Against Sexualization of Women's Bodies ("PASWB") were offended by it–these are not average people in Tulania. Page 12. Ben Wyatt is a professional athlete who was under pressure to perform in an important game. And the PAWSB, as a special interest group, does not represent beliefs shared by the average person in the community. Because the mascot does not appeal to the prurient interest, it does not meet the obscenity test of *Miller* prong one.

2. *The Sirens' mascot does not depict or describe sexual conduct, nor does any known applicable Tulania law define sexual conduct.*

Respondents' obscenity claims also fail on the merits because the Sirens' mascot does not depict sexual conduct, nor does any Tulania law define sexual conduct. As evidence of widespread outrage over the mascot, the opinions below cite to the passage of Sec. 12 Tulania Penal Code (2019), which reads, "[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."

[2] *See* Ronald Holden, Mermaid, Siren, Princess: How the Starbucks Logo Evolved, Forbes (Mar. 4, 2017) https://www.forbes.com/sites/ronaldholden/2017/03/04/mermaid-siren-princess-how-the-starbucks-logo-evolved/#a7bdc0458bd4.

The Circuit Court's opinion seems to assume that this statute defines sexual conduct. *See* Page 7. It does no such thing. It defines a specific misdemeanor offense purporting to govern the dissemination of obscene material. The statute offers no guidance on what members of the Tulania community consider to be sexual conduct, let alone what they consider to be obscene. Absent any other law in the jurisdiction speaking to that issue, this Court is left with little guidance as to how Tulania defines sexual conduct.

However, this Court may consider borrowing from federal statutory provisions for instruction on that score. The federal criminal laws governing child sexual exploitation define "sexual act" to include several different modes of contact between sexual organs and other private body parts, as well as penetration and intentional touching. *See* 18 U.S.C. § 2246(2)(A)–(D) (reproduced in full in Appendix A). Like obscenity, depictions of such child exploitation are not protected by the First Amendment. See, e.g., *New York v. Ferber*, 458 U.S. 747, 764 (1982). Therefore, it is reasonable to consider these sexual acts, defined by Congress, alongside the meaning of sexual conduct under *Miller*'s obscenity test. The depiction of a topless siren mascot falls well short of any of the sexual conduct defined in these provisions. After all, there is no allegation that the Siren mascot is depicted as engaging in any particular conduct, sexual or otherwise. Because the Sirens' mascot does not depict sexual conduct, it is not obscene.

Further, another federal statute is instructive in this controversy, though not because it defines "sexual conduct." Under this Court's precedent, the United States Patent and Trademark Office ("USPTO") cannot withhold trademark protection under the Lanham Act to marks deemed "immoral or scandalous." *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 (2019) ("There are a great many immoral and scandalous ideas in the world (even more than there are swearwords), and the Lanham Act covers them all. It therefore violates the First Amendment.").

In *Brunetti*, the Supreme Court made clear that even marks bearing offensive ideas or words (the mark at issue was for the brand "FUCT") are covered by the federal Lanham Act. *Id.* Under respondents' view, the Sirens organization could successfully seek trademark protection for its topless siren mark at the USPTO, while it is simultaneously enjoined from using it by a federal district court on obscenity grounds. That is discordant with this Court's precedent and contrary to law. Therefore, the Sirens' mascot is not obscene, and the organization cannot be enjoined from displaying it.

3. *The Sirens' mascot, considered as a whole, does not lack serious literary, artistic, political, or scientific value.*

As this Court pointed out in *United States v. Stevens*, "*[m]ost* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation." 559 U.S. 460, 479 (2010) (emphasis in original) (striking down a measure that prohibited depictions of animal cruelty). Where there are claims of obscenity, Free Speech protection will not lie where such values are lacking. *See Miller*, 413 U.S. at 2. The Sirens' mascot, it is contended, lacks all serious literary, artistic, political, or scientific value, because it exposes people in public places to nudity. *See* Page 8. However, the mascot does have serious value, and there are good reasons to protect the Sirens' right to display it.

The district court below invoked a vague sense of evolving progressivism to bolster its conclusion, under *Miller*'s first and third prongs, that the relevant community would not find the Sirens' mascot to appeal only to the prurient interest, and that it may have serious value. Whether one generally subscribes to "arc of history" arguments, there are genuine indications, divinable from the cultural ether, of a movement toward greater libertinism with respect to gender norms, nudity, and women's role in sports traditionally dominated by men. For example,

the Sirens' mascot has political and artistic value in serving as the first primary female mascot in professional sports. *See* Carlos Mejia, It's Female Mascot Time!, FATHERLY (May 24, 2017) https://www.fatherly.com/play/sports/female-sports-mascots-psychology-girls/ (citing Mrs. Met, secondary mascot of the New York Mets, as the only female mascot in men's professional sports, "who recently returned to the field after, according to a spokesman for the Mets organization, 'her children were grown.'").

The district court's findings are instructive on the serious value the Sirens' mascot carries: "We find great value in the first ever depiction of a strong female mascot in the sport of football. Such an important stride forward serves as a catalyst for women's strength in a sport clouded by male dominance." Page 16. These beliefs expressed by the district court are in line with other current social movements, of which the Sirens' mascot may be totemic: the call for women to be considered for professional sports coaching jobs,[3] the "Free the Nipple" campaign,[4] and debates over public breastfeeding.[5] Because of the nexus between these issues and the organization's celebration of the female form through its re-branded mascot, the Court of Appeals erred when it found the Siren mascot to lack all serious value. Granting PASWB's injunction would impede a sports franchise from contributing to the discourse on serious issues through its chosen means, and would be contrary to the First Amendment.

4. Displaying the mascot in view of children does not alter the obscenity analysis.

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[3] *See* Carol Hutchins, Edniesha Curry, Meredith Flaherty, *Where Are All the Women Coaches?*, N.Y. TIMES (Dec. 31, 2019) https://www.nytimes.com/2019/12/31/opinion/Women-coaching-sports-title-ix.html.

[4] *See* Julia Jacobs, *Will Instagram Ever 'Free the Nipple'?*, N.Y. TIMES (Nov. 22, 2019) https://www.nytimes.com/2019/11/22/arts/design/instagram-free-the-nipple.html.

[5] *See* Andrew Jacobs, *Opposition to Breast-Feeding Resolution by U.S. Stuns World Health Officials*, N.Y. TIMES (July 8, 2018) https://www.nytimes.com/2018/07/08/health/world-health-breastfeeding-ecuador-trump.html.

The appeals court below pointed out that the depiction of the mascot in the presence of children should weigh in favor of a finding of obscenity. Page 8 ("There is a reason that only legal adults can purchase playboys."). With children's access factoring into the analysis, the Fourteenth Circuit seems to conflate this obscenity claim with broadcast indecency and pornography zoning claims, which involve the display of indecent material in areas where children are present, and are analyzed under intermediate scrutiny. *See, e.g.*, *Renton v. Playtime Theatres*, 475 U.S. 41 (1986); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). While respondents may have perhaps considered pursuing such indecency claims, they have not, and the assertion that the topless siren mascot is forced onto viewers and patrons of football games is unavailing under a proper *Miller* analysis, especially in light of later cases involving broadcast indecency. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997).

Reno made plain that non-obscene indecent images broadcast via the internet are protected by the First Amendment because the chances of internet users "encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material." *Id.* at 867. Moreover, the *Renton*-style zoning rules were considered by the *Reno* Court, which held them inapposite: "Regulations that focus on the direct impact of speech on its audience are not properly analyzed under *Renton*." *Id.* at 868 (internal quotations omitted).

The Sirens' mascot is not obscene, but assuming *arguendo* that respondents had brought broadcast indecency claims, such claims would still fail under these precedents. Bringing a child to a football game is much more similar to seeking out content on the internet or cable television than being subject to a 1973 radio broadcast, as in *Pacifica*; one must pay for a ticket and take many affirmative steps to get there. Moreover, the zoning approach would not apply to the Sirens, despite the fact that they marketed the mascot in the community, because focusing on the

effect of speech on a listener is not a content-neutral approach to regulating speech. *See id.* Granting an injunction to keep the organization from using its mascot would therefore be a content-based regulation of speech, impermissible under *Reno* and *Renton*. *See id.* For these reasons, respondents' claims fail on the merits.

B. The Sirens cannot be found negligent in Wyatt's slip-and-fall case.

In the second matter before the Court, the Court must determine whether to reverse the Circuit Court for incorrectly applying Tulania's law of torts to Wyatt's slip and fall personal injury claim. Tulania has no codified statute law of torts or reported caselaw to guide this Court's analysis. Therefore, this Court must rely on available persuasive authority to predict how the Tulania's highest court would decide the issues presented here. *Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 177 (1940); *Garden City Osteopathic Hosp. v. HBE Corp*., 55 F.3d 1126, 1130 (6th Cir. 1995) "[R]elevant data also include the state's supreme court dicta, restatements of law, law review commentaries, and the majority rule among other states."). Given that the Supreme Court has undertaken the extraordinary task in this case of deciding a question purely of state law –apparently in the first instance – the Court should tread cautiously in divining the law of torts in Tulania. Accordingly, the Court should rely only on well-accepted traditional tort doctrines, such as is embodied by the Restatement (Second) of Torts. *Field v. Mans*, 516 U.S. 59, 70 (1995) ("Then, as now, the most widely accepted distillation of the common law of torts was the Restatement (Second) of Torts.") Application of such well-developed and widely-accepted common law principles of torts demonstrates that Wyatt has failed to set out a legally sufficient *prima facie* negligence case. Accordingly, his negligence claim should be dismissed as a matter of law and the lower court must be reversed.

The fundamental error of the courts below was a failure to carefully and systematically apply the doctrines of tort law in evaluating Wyatt's claim. In fact, even the Circuit Court recognized that the District Court's negligence opinion is "difficult to follow in a step-by-step manner." Page 9. But the Circuit Court made the very same error by jumping headlong into the *interesting* legal questions raised – like what dangers inhere in contact football – without fully working through the boring but necessary foundational elements of any negligence action: duty, breach, and causation. *Howard v. Spradlin*, 562 S.W.3d 281, 286 (Ky. Ct. App. 2018). Despite the grandeur of a professional football game, a stadium full of fans, and questions about the true meaning of football, this case is really no different from any other routine slip and fall case. Thus, the Court should apply the well-worn principles of a premises liability, which will allow it to easily dispatch with Wyatt's claim. This section will examine each of the elements of negligence disputed in this case.

1. Duty

Under the common law of torts, "[n]o liability exists . . . unless the person from whom relief is sought owed a duty to the allegedly injured party." *First Bank of Lincoln v. Land Title of Nez Perce Cty., Inc.*, 452 P.3d 835, 844 (Idaho 2019). Thus, the first question in the inquiry is whether the Sirens owed a legal duty to Wyatt to protect him from harm.

It is well established that there is generally no duty to affirmatively act to protect another. *See* Restatement (Second) of Torts § 314 ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); *Baccus v. Ameripride Servs., Inc.*, 179 P.3d 309, 313 (Idaho 2008) ("Ordinarily, there is no affirmative duty to act, assist, or protect someone else."). Thus,

omissions to act are considered differently from affirmative acts, which generally do confer an attendant duty to avoid harm to others. Restatement (Second) of Torts § 302 cmt. a (1965) ("In general, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act."). Unlike the default duty to avoid causing harm that accompanies affirmative acts, there is only a duty to affirmatively act to protect others when "there is a special relation between the actor and the other which gives rise to the duty." Restatement (Second) of Torts § 302 cmt. a (1965).

Here, Wyatt alleges a theory of negligence grounded only in the Sirens' alleged "failure to replace or repair a missing patch of turf." Page 8. The record contains no indication that Wyatt has alleged any negligent *affirmative* act by the Sirens. Thus, the Sirens only have a duty to protect Wyatt from harm to extent that such a duty arises from a special relationship. *See W. Innovations, Inc. v. Sonitrol Corp*., 187 P.3d 1155, 1159 (Colo. App. 2008) ("[I]n limited circumstances the law may impose on [an] alleged tortfeasor a duty to take affirmative action for another's aid and protection. Such a duty may exist where there is a 'special relationship' between the actor and the injured party . . . .").

The only special relationship giving rise to an affirmative duty to act here is the duty that property owners owe to invitees to remedy or warn against unreasonably dangerous conditions on the premises. The opinions below refer variously to a "dut[y] to maintain a safe working environment" for "employees," "the common law duty of care that sports teams owe their invitees," and a "duty to provide a reasonably safe facility." Page 17-19. These haphazard references to such amorphous duties only hinder the courts' analyses. The lower court's instance on the duty owed to employees by their employer is peculiar, in particular, because the record is

clear that Wyatt is *not* an employee of the Sirens. Page 12 (Wyatt is an employee of the Green Wave). Thus, this Court would be well served by clearly articulating the specific duty that the Sirens may have owed to Wyatt.

The only special duty which might have required the Sirens to act to protect Wyatt is the duty a property owner owes to his invitees to protect them from or warn them of dangerous conditions on the property – i.e. premises liability. *Henkel v. Norman*, 441 S.W.3d 249, 251 (Tex. 2014) ("Generally, premises owners . . . have a duty to protect invitees from, or warn them of, conditions posing unreasonable risks of harm . . . ."). Premises liability has four required elements: "(1) the property owner had actual or constructive knowledge of the condition causing the injury; (2) the condition posed an unreasonable risk of harm; (3) the property owner failed to take reasonable care to reduce or eliminate the risk; and (4) the property owner's failure to use reasonable care to reduce or eliminate the risk was the proximate cause of injuries to the invitee." *Id.* at 251-52. "The third element is negated if the property owner either adequately warned the invitee about the condition or took reasonable actions designed to make it reasonably safe." *Id.* at 252.

Although the opinions below hint at premises liability duty, the courts cloud their analyses by conflating principals of general negligence, which is not alleged by Wyatt, with premises liability negligence, which is. Wyatt has only alleged injuries alleged to have been caused by the Sirens' "failure to replace or repair a missing patch of turf." Page 8. Indeed, Wyatt claims his injuries resulted "due to a divot in the turf." Page 5. Such an allegation is exclusively the province of premises liability law. *Woodall v. Christian Hosp. NE-NW*, 473 S.W.3d 649, 653 (Mo. Ct. App. 2015) ("Injuries occurring due to a dangerous condition on a landowner's property are appropriately pleaded in a theory of premises liability."); *Haney v. Fire*

Ins. Exch., 277 S.W.3d 789, 791 (Mo. Ct. App. 2009) (explaining that claims sound in premises liability negligence, and not general negligence, when they involve "assertions . . . that the cause of the injury or damage was an unsafe or defective condition of the property itself."). Furthermore, courts have recognized that claims of injury arising from conditions on property do not simultaneously support theories of general negligence. *Minjarez v. Wal-Mart Stores, Texas, LLC*, 363 F. Supp. 3d 763, 772–73 (W.D. Tex. 2019) ("Premises liability is a 'nonfeasance theory based on the owner's failure to take measures to make the property safe.' Accordingly, a plaintiff must proceed under a theory of premises liability where his or her claim concerns the condition of the premises rather than contemporaneous negligent acts. A case arising under a theory of premises liability cannot support . . . recovery under a theory of general negligence.").

The District Court, however, confused this analysis by suggesting that the Sirens had a duty to "provide a reasonably safe facility." Page 19. The court's confusion arises from its miscomprehension of *Sheppard by Wilson v. Midway R-1 Sch. Dist*. 904 S.W.2d 257 (Mo. Ct. App. 1995). The district court took *Sheppard* to mean that sports facilities owners owe a duty to invitees to provide safe facilities. Page 9. The *Sheppard* case, however, stands for the simpler, well-established *general negligence* principle that persons are liable for injuries caused by their affirmative acts that are done carelessly. Restatement (Second) of Torts § 297, cmt. a (explaining that "acts which are generally regarded as reasonably safe if properly done" may be negligent acts if performed "without reasonable care, competence, preparation, or warning."). In *Sheppard*, the property owner was liable not for failing to provide a safe facility, but rather because the property owner *actively* raked and prepared a landing pit in a dangerous manner. *Sheppard*, S.W.2d at 264 ("Sheppard contends her knee injury was the result of Midway's negligence in preparing and raking the long jump pit."). *Sheppard* is a general negligence case,

not a premises liability case. Because the claim at issue here depends only on the condition of the property, and not any affirmative act by the Sirens, *Sheppard* is inapposite, and premises liability principles alone must be applied.

Although premises liability does impose a duty on owners of property owed to their invitees, Wyatt's own actions relieved the Sirens of any duty. It is well-established that there is no duty to protect another from risks when the person consents to those risks. *See e.g. Gleason v. Cohen*, 368 P.3d 531, 535 (Wash. Ct. App. 2016) ("Plaintiff's consent to relieve the defendant of any duty is implied based on the plaintiff's decision to engage in an activity that involves those known risks."). Implied primary assumption of the risk, which operates as a complete bar to recovery by negating any duty, occurs when a party implicitly consents to the inherent risks of an activity. *Id.* at 536 ("The classic example of implied primary assumption of risk involves participation in sports, where a person knows that the risk of injury is a natural part of such participation."). Here, Wyatt implicitly assumed the risk of his injury.

Wyatt assumed the risk of injury in two distinct ways. First, he assumed the risk of tripping on the particular divot by playing football on a field which contained an open and obvious divot. Second, he assumed the risk of tripping on divots in general, as tripping on uncertain terrain or encountering obstacles outside the boundaries of the field is an inherent risk of football generally. First, Wyatt assumed the risk of tripping on the divot on the Siren's field when he chose to play football on a field containing a divot. As has been explained:

> A voluntary participant in a sporting or recreational activity is deemed to consent to "those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." (citations omitted) *This principle extends to those risks associated with the construction of the playing field and any open and obvious condition thereon* (citations omitted) If the risks are known by or perfectly obvious to the player, he or she has consented to them and the property owner has discharged its duty of care by making the conditions as safe as they appear to be.

Brown v. City of New York, 895 N.Y.S.2d 442 (N.Y. Sup. Ct. 2010) (emphasis added).

In fact, courts have often found athletes to have assumed the idiosyncratic risks of particular playing fields. For example, where a basketball player collided with a pole in the out of bounds area of a basketball court, the court found that "the proximity of the pole to the court was open and obvious, and thus the risk of collision with the pole was *inherent in playing on that court*." *Trevett v. City of Little Falls*, 849 N.E.2d 961, 961 (N.Y. 2006) (emphasis added). Another court similarly found that floor hockey players assumed the risk of collisions with bleachers near the playing surface, because "the proximity of the bleachers to the playing area was open and obvious, and the risk of collision with the bleachers was an *inherent risk in playing indoor floor hockey in the subject gymnasium*." *Krzenski v. Southampton Union Free Sch. Dist*., 102 N.Y.S.3d 693, 695 (N.Y. App. Div. 2019) (emphasis added). And, similar to the facts here, a court has found a football player to have assumed the risk of falling on a "cement strip which ran alongside the field approximately five feet outside of the sideline." *Brown v. City of New York*, 895 N.Y.S.2d at 442-44 ("The defendant demonstrated its *prima facie* entitlement to judgment as a matter of law by establishing that the plaintiff assumed the risk of injury by voluntarily participating in the football game despite his knowledge that doing so could bring him into contact with the open and obvious cement strip in the out-of-bounds area of the field.").

Here, the divot was open and obvious to Wyatt, and represented a risk inherent in playing football on that field. As established above, athletes assume the open and obvious risks inherent in particular playing fields. "An open and obvious danger is one that is known to the invitee or is so obvious that the invitee might reasonably be expected to discover it, i.e., it is something that an average user with ordinary intelligence would be able to discover upon casual inspection." *Snover v. Menard, Inc.*, No. 270991, 2007 WL 1491293, at *1 (Mich. Ct. App. May 22, 2007).

Wyatt could have easily discovered the divot if he had done even a "casual inspection" of the field. *See id.* The divot was not concealed, and it in fact it was marked by the presence of a bright orange cone, a traditional symbol of danger and one that would have contrasted sharply against the green playing surface. Page 8*; Snover,* 2007 WL 1491293, at *1 (finding a risk was open and obvious because the "color contrasted with that of the floor"). In fact, Wyatt did notice the divot, even immediately after completing a touchdown pass while running at "full speed." Page 8, 17. (finding that Wyatt attempted to avoid the cone). If Wyatt could notice the divot while running at full speed in the middle of the game, he surely could have earlier noticed the divot as part of a casual inspection, before deciding to play football on that field. Indeed, as the Michigan courts have stated, where "there is no evidence that [plaintiff] could not have discovered [a risk] and realized its danger," a "defendant cannot be held liable" when a danger on the premises "created a risk of harm solely because plaintiff failed to notice it." *Snover,* 2007 WL 1491293, at *1.

Additionally, and in the alternative, Wyatt assumed the risk of tripping on divots generally, as tripping on uncertain terrain or encountering obstacles outside the boundaries of the field is an inherent risk of football. "The classic example of implied primary assumption of risk involves participation in sports, where a person knows that the risk of injury is a natural part of such participation." *Gleason v. Cohen*, 368 P.3d 531, 536 (Wash. Ct. App. 2016). Here, uneven surfaces and obstacles on the boundaries of the field are inherent risks of football. Football is a game that is often played on flat, grassy surfaces. But football is just as readily played in paved alleyways, on gravel parking lots, in dry drainage basins, in hardwood gymnasiums, or in concrete basements. All of these surfaces may be more or less uniform. Manicured and even playing surfaces are not an inherent aspect of football, even if some professional athletes may be

accustomed to such luxuries. Any professional athlete is likely to remember the games of his or her youth, which were likely played on all sorts of irregular surfaces. Courts have consistently recognized the qualities which inhere in a sport are not defined only at the highest levels of competition. For example, in determining the inherent qualities of baseball, courts have considered both the game as "between professionals at the World Series, [and] . . . as between children in the sandlot." *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 395 (Cal. 2006); *Kelly v. McCarrick*, 841 A.2d 869, 877 (Md. Ct. Spec. App. 2004) ("[Baseball's] contours are commonly understood, whether in the stadium or in the sandlot."). In that case, the court concluded that where professional baseball uses umpires, and sandlot games do not, that the risks associated with *not* having umpires is inherent in the game. *Id.* Similarly, because football can be played on either regular or irregular surfaces, just as baseball can be played with or without umpires, the risk of playing on irregular surfaces is an inherent part of football, and defendants have no duty to patch irregular surfaces for football players because irregular surfaces are an inherent risk of the game.

Furthermore, encountering obstacles of all kinds outside the boundaries of the football field is an inherent risk many sports, including football. Many sports fans will remember, for example, Derek Jeter of the New York Yankees diving head first into the stands to catch a pop fly. *See Yanks Top Red Sox in 13 for Sweep,* The Washington Post, July 2, 2004. After colliding with fans and stadium seating, Jeter "left the ballpark with the face of beat-up boxer, a bloodied chin and a red, swollen cheek." *Id.* Sports fan will also remember when Penn State football's head coach, Joe Paterno, suffered a broken leg after getting the worst of a collision with an opposing player making a sideline tackle. *See* Aaron Brenner, *Paterno injures leg in sideline collision*, The Badger Herald, Nov. 6, 2006. ("When Badgers linebacker DeAndre Levy tackled

Nittany Lions tight end Anthony Quarless on the PSU sideline, Levy's helmet hit the 79-year-old coaching icon square in his left knee, sending Paterno sprawling to the turf."). Indeed, "[n]obody is safe from harm when it comes to football . . . [w]hether you're on the field or not." *Id.* Such collisions with obstacles outside the lines is common many sports. Any casual sports fan knows that baseball players frequently trip over bullpen mounds in foul territory, or that football players might collide with coaches, players, or TV cameramen or camera equipment. Diving headlong into these obstacles and not only an inherent part of the game, they are particularly venerated parts. *See Yanks Top Red Sox in 13 for Sweep*, The Washington Post, July 2, 2004 (describing Derek Jeter's dive into the stands as "one of the greatest plays of his championship career" and quoting Yankees' Manager Joe Torre: "The stomach, the heart, there was no quitting . . . . Jeter, of course, scared the hell out of everybody. Hopefully, he'll be all right.").

Finally, football players assume the risk that the condition of the playing surface will deteriorate over the course of play. A premises owner has "a duty not to increase the risks inherent in the sport, not a duty to decrease the risks." *Avila v. Citrus Cmty. Coll. Dist.,* 131 P.3d 383, 395 (Cal. 2006). Football is frequently played in extreme conditions, including severe rain, snow, ice, and cold. These conditions are of course likely to cause a deterioration of the playing surface, making these surfaces even more risky to play on. Accordingly, courts have held that players assume the risks of deteriorating field conditions. *See Schiffman v. Spring*, 609 N.Y.S.2d 482, 484 (N.Y. App. Div. 1994) (Plaintiff . . . voluntarily participated in the soccer game with knowledge and appreciation of the risks inherent in playing on a field that was wet, slippery and muddy."). Here, the divot formed as a result of a diving catch, which is of course part of the game. Given that deteriorating field conditions are also part of the game, that a divot might have

formed as part of the contest between the Green Wave and the Sirens is an inherent risk that Wyatt accepted by his participation in the game.

For these reasons, the only duty which the Sirens might have owed to Wyatt was the duty that a premises owner owes to his invitees, but even this duty does not apply because Wyatt assumed the risk that he would be injured in a slip and fall due to a divot on the playing surface. Accordingly, Wyatt has failed to make out a *prima facie* negligence case and his claim should be dismissed.

2. Breach

Additionally, even if the Sirens did owe Wyatt a duty, the Sirens fulfilled that duty by adequately warning Wyatt of the possible danger associated with the divot by placing a bright orange cone at the location of the divot. Page 8. "Premises owners and occupiers owe a duty to keep their premises safe for invitees against known conditions that pose unreasonable risks of harm . . . . This duty is discharged by warning the invitee of unreasonable risks of harm." *Reyes v. Brookshire Grocery Co.*, 578 S.W.3d 588, 593 (Tex. App. 2019). "If the evidence conclusively establishes that the property owner adequately warned the injured party of the condition, then the property owner was not negligent as a matter of law." *Id.* 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." *Id*. Here, the Sirens placed a conspicuous orange cone at the site of the divot, adequately warning invitees of the potentially hazardous terrain, and satisfying any duty owed to plaintiff. *See* Page 8; *Golden Corral Corp. v. Trigg*, 443 S.W.3d 515, 518 (Tex. App. 2014) ("In this case, there is no dispute that [Defendant] warned of the condition, as the surveillance video conclusively establishes that a tall yellow sign was present in the area when

[plaintiff] fell."). Neither the district nor circuit court even considered the adequacy of the warning. This failure demonstrates the courts' misapprehension of the applicable duty and standard of care for premises liability. Accordingly, the lower court should be reversed.

3. Proximate Cause

Even if Wyatt did not assume the risk of his own slip and fall, and even if the Sirens had not placed an orange cone warning of the divot, the Sirens still are not liable for his injuries because the Sirens did not proximately cause Wyatt's injuries. Although the district court defines proximate causation as "something that in the natural or probable sequence, produced the injury complained of," Page 19 (citations omitted), proximate causation also embraces policy concerns similar to those considered in analyzing duty. "Legal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise." *Schooley v. Pinch's Deli Mkt., Inc*., , 951 P.2d 749, 755 (Wash. 1998). Indeed, "some of the policy considerations analyzed in answering the question whether a duty is owed to the plaintiff are also analyzed when determining whether the breach of the duty was the legal cause of the injury in question. *Id.*

Because proximate causation analyses embraces policy concerns also embraced by the duty analysis, the arguments from part 1 of this section concerning assumption of the risk are incorporated here. For these reasons, given the importance of football to the people and culture of Tulania, proximate cause should not found here where Wyatt voluntarily participated in a dangerous but socially valuable sport.

Conclusion

For the foregoing reasons, the Tulania Sirens respectfully request that this Court reverse the judgments of the Court of Appeals for the Fourteenth Circuit because (1) respondents' First Amendment claims fail under *Miller* and other binding precedent, and (2) respondents fail to establish a *prima facie* negligence case.

Appendix A

Sec. 12 Tulania Penal Code (2019).

[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.

U.S. CONST. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. § 2246(2)(A)–(D).

(2) the term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person