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

PETITIONERS'S BRIEF ON THE MERITS

TEAM: 9

Counsel for Petitioner

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QUESTIONS PRESENTED

I. Whether the Tulania Sirens Football Team's use of a literary symbol as their mascot is impermissibly obscene such that it offends the First Amendment.

II. Whether the Tulania Sirens can be found negligent for an opposing player's injuries that occurred outside the field of play from a damaged piece of turf which the Sirens marked with a cone to warn players of the danger.

STATEMENT OF THE CASE AND FACTS

This Court must resolve two distinct yet consolidated issues: first, an action concerning the censoring of a professional football team's mascot and second, a negligence claim against the same football team for an injury sustained on the team's premises.

The first action relates to the Tulania Sirens football team ("Sirens") recently rebranding their mascot to a topless mermaid. R. at 12. The Sirens continued to promote their team publicly using this new mascot. R. at 12. The release of this new mascot caused some controversy, as many people in the community were offended by the mermaid. R. at 12. Of those offended were the People Against the Sexualization of Women's Bodies ("PASWB"). R. at 12. As a result of the disapproval of several groups in the community, the city of Tulania passed a law criminalizing the distribution of "any obscene matter." R. at 12.

On Thanksgiving day of 2019, the Sirens were set to play the New Orleans Green Wave. R. at 12. A player for the Green Wave, Ben Wyatt ("Wyatt"), had previously received Sirens promotional material in the mail and was distressed to see the Sirens new mascot promoted during the game. R. at 12. Wyatt's wife, Leslie Knope, is a member of the PASWB, and together they filed this action to enjoin the Sirens from using their new mascot. R. at 12, 13. The district court ruled that the mascot was not obscene because it did not appeal to the prurient interest. R. at 15. The Fourteenth Circuit Court of Appeals reversed, finding the mascot to be obscene. R. at 8. The Sirens filed a writ of certiorari seeking a review of this judgement by the Supreme Court. The Sirens respectfully ask this Court, in reviewing the case de novo, to reverse the judgement of the lower court on the issue of obscenity and protect the Sirens' mascot from censorship.

The second action concerns events that happened during the previously mentioned Thanksgiving day football game. During pregame warmups, a Sirens player dove for a catch on

the far-left side of the endzone. R. at 17. When the player hit the ground, his face mask was shoved into the turf. R. at 17. The player got up, but a portion of the turf was stuck in the player's facemask, leaving a partially exposed patch of cement. R. at 17. The missing patch of turf was ten feet beyond the left boundary of the endzone. R. at 17. To address the damaged area, Tulania staff placed a bright orange cone over the area, marking the damaged turf. R. at 8, 17.

During the fourth quarter, Wyatt ran into the endzone to catch a pass in the back-left corner of the endzone. R. at 17. As Wyatt was catching the ball, he continued to run through the pass and toward the bright orange cone. R. at 17. Wyatt, who was unable to stop because of his forward momentum, planted his left foot on the cement patch where the turf was missing, despite the bright orange cone that was placed over most of the affected area. R. at 8, 17. He slipped and fell, injuring his left knee, which Wyatt maintains was a season- and career-ending injury. R. at 8, 17.

Wyatt filed suit in the United States District Court for the Southern District Court of Tulania, claiming that the Sirens had a duty to protect him from injury, the Sirens failed to perform that duty, and the Sirens' failure proximately caused injury to Wyatt. R. at 17. The district court held in favor of Wyatt that the Sirens had a duty, the Sirens breached the duty, and the breach was the proximate cause of the knee injury. R. at 20. The circuit court affirmed the lower court's decision that Wyatt's injury was the result of negligence attributable to the Tulania Sirens. R. at 10.

The Sirens filed a writ of certiorari seeking a review of this judgement by the Supreme Court. The Sirens respectfully asks this Court, in reviewing the case de novo, to reverse the judgement of the lower court as to the issue of negligence on the part of the Sirens, and to remand with instructions to enter judgement in favor of the Sirens.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Fourteenth Circuit improperly reversed the District Court's ruling on the issue of whether the Tulania Sirens' mascot was impermissibly obscene under traditional First Amendment jurisprudence. The Sirens should not be enjoined from using their mascot because the mascot does not appeal to the prurient interest under contemporary community standards, is not patently offensive, and has both literary and political value. Additionally, the Tulania state statute is not sufficiently narrowly tailored such that it justifies infringement on a First Amendment fundamental right.

The Court of Appeals for the Fourteenth Circuit also improperly affirmed the District Court's ruling which found that the Sirens should be held liable for the Respondent's injury. The Sirens should not be held negligent for delaying the repair of the missing patch of turf outside the field of play because the Sirens had no increased duty to ensure Wyatt's safety as an invitee, and Wyatt assumed the potential risk of injury. The Sirens have only a duty to provide players a reasonably safe field and do not serve as insurers of the absolute safety of players. In managing the Sirens duty to Wyatt, the Sirens did not breach their duty of reasonable care because they adequately and ordinarily managed the risk presented by the damaged turf by marking it with a bright orange cone, making the condition open and obvious to anyone. Additionally, the Sirens should not be held liable for Wyatt's injury because by participating in the game of football, Wyatt assumed, both explicitly and implicitly, all risks inherent to the game .

ARGUMENT

I. THE TULANIA SIRENS FOOTBALL TEAM'S USE OF A LITERARY SYMBOL AS A MASCOT IS NOT IMPERMISSIBLY OBSCENE UNDER THE FIRST AMENDMENT BECAUSE IT PASSES THE *MILLER* TEST FOR OBSCENITY AND SHOULD BE GRANTED PROTECTION UNDER THE FIRST AMENDMENT.

The First Amendment states that, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Freedom of speech must be afforded the utmost protection. *Roth v. U.S.*, 354 U.S. 476, 484 (1957) ("[T]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."). However, this right does not go unfettered. Obscenity is a specific type of speech that states are permitted to narrowly regulate. *See Miller v. California*, 413 U.S. 15 (1973). When regulating speech, lawmakers must be mindful of the "inherent dangers of undertaking to regulate any form of expression." *Id.* at 23.

The test used to evaluate whether a material is obscene was articulated by this Court in *Miller*, and it contains three distinct prongs:

> (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.

Id. at 24. A material must violate all three prongs in order to be considered obscene under this test. *Id.* Because the mascot does not violate all three prongs of this test, this Court should find that the Tulania Siren's mascot is not obscene and reverse the ruling of the Fourteenth Circuit Court of Appeals.

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

Because the Siren's mascot does not appeal to the prurient interest, thereby failing to satisfy the first prong of the *Miller* test, this Court should reverse the ruling of the Fourteenth Circuit Court of Appeals. The difficulty courts face in determining "community standards" is apparent. As Justice Harlan noted, "the subject of obscenity has produced a variety of views among members of the Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 704 (1968) (J. Harlan, dissenting).

The Court has tried to toe the line between the two extremes of personal preferences and nationwide standards.[1] In *Miller*, a nationwide standard was explicitly rejected. *Miller*, 413 U.S. 15 at 24. The Court elaborated on this point a year later stating, "our holding in *Miller* that California could constitutionally proscribe obscenity in terms of a 'statewide' standard did not mean that any such precise geographic area is required as a matter of constitutional law. . . it would be the standards of that 'community' upon which the jurors would draw." *Hamling v. United States*, 418 U.S. 87 (1974).

Additionally relevant to this prong is the word "prurient". The Court still uses the same definition with which it evaluated materials over sixty years ago. Prurient is defined as "itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd." *Roth*, 354 U.S. 476 at 487 n. 20. Black's Law Dictionary simplifies this by defining "prurient interest" as "a term that is used for a morbid interest in sex, nudity, and obscene or pornographic matters." *Prurient Interest*, BLACK'S LAW DICTIONARY, 2nd Ed. (1910).

[1] Smith v. California, 361 U.S. 147, (1959) (J. Frankfurter, concurring) ("There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges.").

The addition of the word "contemporary" to community standards reflects how these standards are ever-evolving. The evolution of tolerance in the area of female toplessness is reflected in the success of the "Free the Nipple" movement. Dhruti Shah, *Does the US have a problem with topless women?* BBC NEWS (Jan. 8, 2020), https://www.bbc.com/news/world-us-canada-50592811. Last year in Colorado, the Tenth Circuit determined that a Colorado statute criminalizing public topless nudity, which only targeted women, was unconstitutional under the Equal Protection Clause. U.S. CONST. amend. XIV. The court stated, "[w]e're left, as the district court was, to suspect that the City's professed interest in protecting children derives not from any morphological differences between men's and women's breasts but from negative stereotypes depicting women's breasts, but not men's breasts, as sex objects." *Free the Nipple v. City of Fort Collins*, No. 17-1103 (10th Cir. 2019).

Although many members of the Tulania community were offended by the new mascot, offense cannot be conflated with obscenity. R. at 12. This issue is subjective, and becomes increasingly difficult to determine the further removed from the community the case is decided. The definition of prurient remains largely unhelpful as the district court and circuit court judges in this case each applied this definition and came to complete opposite findings. R. at 5, 14. The mascot is not depicted in a sexual way, performing a sexual act, or participating in any sexual conduct. The mermaid merely exists. This Court cannot continue to perpetuate the distorted narrative that the female body is perverse in and of itself. Because the mascot does not violate the first prong of the *Miller* test, this Court should reverse the ruling of the Fourteenth Circuit Court of Appeals.

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

If this Court deems the mascot to offend contemporary community standards under prong one, it must proceed to the second prong of the *Miller* test. Once again, offensiveness is not an automatic gateway to obscenity. For example, the entire Native American population of the United States is offended by the Washington Redskins mascot. However, the Federal Communications Commission has explicitly ruled that the word and mascot are not obscene. Maya Rhoda, *FCC Rejects Claim That the Word 'Redskins' Is Obscene*, TIME (Dec. 18, 2014), https://time.com/3641087/fcc-redskins-radio-station-obscene/. Furthermore, this Court has recently affirmed that widespread offense is not enough to justify censorship. *See Matal v. Tam*, 582 U.S. ___ (2017) (holding that the U.S. Patent and Trademark Office's law denying trademarks to groups that disparaged racial or ethnic groups was unconstitutional). Notably, the law ruled unconstitutional in *Matal* was the same one used to prevent the Washington Redskins from registering trademarks. Darren Heitner, *Supreme Court Ruling Is Great For Washington Redskins In Trademark Battle*, FORBES, (Jun 19, 2017, 10:39am), https://www.forbes.com/sites/darrenheitner/2017/06/19/supreme-court-ruling-is-great-for-washington-redskins-in-trademark-battle/#152a49083910.

In this case, patent offensiveness is defined by state law. The statute in question states:

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

Sec. 12 Tulania Penal Code (2019). R. 12.

As this Court stated in *Miller*, "[s]tate statutes designed to regulate obscene materials must be carefully limited." *Miller*, 413 U.S. 15 at 23–24 (1973). For example, this Court articulated in *Miller* specific examples of how a state might construct a carefully limited statute: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; or (b) [p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at 25. Furthermore, Justice Stewart preceded his famous and oft-quoted line in *Jacobellis v. Ohio* with the observation that, "under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography." 378 U.S. 184 (1964) (J. Stewart, concurring).

Comparing the examples from *Miller* to the statute of Tulania show how overly broad the statute is. The circuit court erred in concluding that the mere distribution of the image was enough to meet the second prong without evaluating the statute itself. R. 8. The discussion of the first prong revealed how difficult determining "obscenity" can be, and how the standards with which we evaluate it change over time. The second prong of this test would be rendered superfluous if it could be answered by the findings of the first prong.

Additionally, the second prong requires sexual conduct to be "specifically defined." There is no sexual conduct depicted by the Sirens' mascot, and the Sirens had no notice that their mascot could be censored because the statute was not narrowly tailored. Because this statute was written in response to the mascot itself, the state of Tulania had an opportunity to specifically define the sexual conduct it wished to regulate. It is precisely because this mascot is not obscene that it does not fall into Tulania's criminal statute as it is written today. Because the state statute is unconstitutionally overbroad, the appellant does not fail the second prong and this Court should reverse the ruling of the circuit court.

In the alternative, this Court should reverse the decision of the lower court and remand the case for a jury to determine whether this material appeals to prurient interest and patent offensiveness because this Court has stated that the first two prongs "are issues of fact for the jury to determine applying contemporary community standards." *Pope v. Illinois*, 481 U.S. 497 (1987). The Supreme Court should not have to determine the localized community standards on behalf of the citizens of Tulania. The appellants should be given the opportunity to present evidence of contemporary community standards to a jury before being forced to completely overhaul their Siren representative.

C. The work, taken as a whole, does not lack serious literary, artistic, political, or scientific value.

If the court believes that the mascot appeals to prurient interests and is patently offensive, then it must evaluate whether the work lacks serious literary, artistic, political, or scientific value. *Miller*, 413 U.S. 15 at 24. If the court finds that the mascot holds value of any of these varieties, the mascot cannot be deemed obscene. While this standard is not to be taken to the extreme of *Memoirs v. Massachusetts,* which required the affirmative establishment that the material is 'utterly without redeeming social value', the terms within this standard can be applied to a wide range of areas. 383 U.S. 413 at 459 (1966). For example, the Third Circuit in *US v. Various Articles of Merch*., found a nudist magazine to contain political value because it "championed nudists alternative lifestyle," which it deemed a form of advocating for '"political and social change'". 230 F.3d 649, 658 (3d Cir. 2000) (quoting, *Miller*, U.S. 413 at 34-35).

The Sirens' mascot is wrought with literary, artistic and political value. Sirens are creatures from Greek mythology who enticed sailors with their irresistibility. *Siren*, ANCIENT HISTORY ENCYCLOPEDIA, https://www.ancient.eu/Siren/. The most famous incident occurred during Homer's *The Odyssey*, in which Odysseus narrowly escapes an encounter with the

creatures. *Id.* This foundational work of literature is often taught in schools, and was called by Goethe as one of the two most important books in the world. *Id.*

Female nudity was not always condemned or taboo. American's opposition to female nudity stems from "evangelical Christian opposition to the display of the body that goes back to the arrival of the Puritans in New England." Amy Werbel, *Lust on Trial: Censorship and the Rise of American Obscenity in the Age of Anthony Comstock* (2018). The connection between female nudity and the story of Adam and Eve has created a shamefulness around the female form because it allegedly "holds the responsibility for the fall of humankind." *Id.* While this theology was permitted to influence laws hundreds of years ago, it should not be permitted to do so today.

Beyond the classical literary value is the critical political value this mascot holds. While the circuit court dismisses the notion of a football mascot as anything worth valuing, football has been a vehicle for political change recently. R. 8. Colin Kaepernick's protests during National Football League (NFL) games to highlight the treatment of minorities sparked difficult conversations, formal legal action, and public comments from multiple Presidents. Victor Mather, *A Timeline of Colin Kaepernick vs. the NFL*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/sports/nfl-colin-kaepernick-protests-timeline.html. A public showing of tolerance of female nudity in such a popular sport would spark conversations and force the public to reconcile with the disparate treatment of the female body.

The fear of female nudity stems from the misconception that every part of a woman's body is for sex. This is evident in the circuit judge's opinion, in which he described female toplessness as a "graphic depiction of the female body." R. at 7. Only by normalizing it through material such as the Tulania Sirens' mascot can we begin to chip away at the stereotypes that are used to shame and demean women. As district court judge Brees noted, it is "hard to believe that

a society with such a growing respect for the human body would find a topless woman vehemently offensive and obscene." R. at 15. Because of both her literary and political value, the Tulania Siren passes the third prong of the Miller test and should be protected under the First Amendment. Therefore, this Court should reverse the ruling of the lower court and find that the Tulania Siren's mascot is not obscene and deserves the protections of the First Amendment.

II. THE TULANIA SIRENS WERE NOT NEGLIGENT IN DELAYING THE REPAIR OF THE MISSING PATCH OF TURF OUTSIDE OF THE FIELD OF PLAY BECAUSE THE SIRENS HAD NO INCREASED DUTY TO ENSURE WYATT'S SAFETY, AND WYATT ASSUMED THE RISK OF POTENTIAL INJURY.

The Sirens should not be held negligent for delaying the repair of the missing patch of turf outside the field of play because the Sirens had no increased duty to ensure Wyatt's safety as an invitee, and Wyatt assumed the potential risk of injury, including the risks associated with the construction of the playing surface. Under Tulania law, a negligence claim requires Wyatt to prove that the Sirens failed to perform a duty and that the Sirens' failure to perform that duty proximately caused the injury to the Plaintiff. *Green v. Ariz. Cardinals Football Club LLC*, 21 F. Supp. 3d 1020, 1027 (E.D. Mo. 2014). A defendant is only required to provide a reasonably, not absolutely, safe area to invitees. They do not owe invitees absolute safety because defendants, like the Sirens, are not insurers of the safety of invitees. *See Larrea v. Ozark Water Ski Thrill Show*, *Inc.*, 562 S.W.2d 790 (Mo. App. 1978). However, when a plaintiff assumes the risk in a sporting event, the defendant is relieved of any legal duty to the plaintiff, unless the defendant acts in a manner that unreasonably increases the risks to the plaintiff. *Buckley v. State*, 938 N.Y.S.2d 734, 742 (N.Y. Ct. Cl. 2011) (maintaining a student swimming at a university-operated pool assumed all risks related to diving off starting blocks, and the university's actions did not unreasonably increase the risks to the student).

Therefore, in managing the Sirens duty to Wyatt, the Sirens should not be held liable for Wyatt's injury because by participating in the game of football, Wyatt assumed, both explicitly and implicitly, all risks inherent to the game. Additionally, the Sirens did not breach their duty of reasonable care because they adequately and ordinarily managed the risk presented by the damaged turf by marking it with a bright orange cone, making the condition open and obvious to any and everyone.

A. Because the Sirens only duty was to provide a reasonably safe field to Wyatt and not to ensure Wyatt's absolute safety outside the field of play, the Sirens should not be held liable for his injury.

The Sirens have only a duty to provide players a reasonably safe field, not to ensure the absolute safety of players. Possessors of premises only have a duty to first, provide invitees with a reasonably safe area and second, exercise ordinary care. *Larrea v. Ozark Water Ski Thrill Show*, Inc. 562 S.W.2d 790, 793-794 (Mo. App. 1978) (holding the water ski show operator only owed the duty to provide a reasonably safe parking lot, and had no duty to be the absolute insurer of the invitees' safety). Possessors of premises are not required to anticipate that invitees exercising ordinary care will fail to acknowledge the potentially dangerous obstacles that are generally inherent and exist as obvious conditions. *Id.*at 794. Invitees are responsible to be attentive to their surroundings, even though the circumstances and conditions and the environment itself are evaluated on a case-by-case basis. *Id.* For example, in *Larrea*, the operator of a water ski show was not liable to a business invitee who fell in a parking lot due to an open and obvious imperfection. *Id.* The court held that the invitee should have been aware of the condition and consequences, and therefore, the invitee could not recover. *Id.*

In the instant case, the Sirens should not be held to a higher or absolute standard of safety as they do not serve as the insurer of the safety of participants. Similar to *Larrea*, the Sirens took

all reasonable measures to provide notice to individuals in the vicinity that the section of turf outside the field of play was damaged by placing the cone over the damaged area before the start of the game. R. at 17. Further, the damaged area existed on the area surrounding the playing surface, on which the Sirens arguably owed less of a duty to the players compared to the actual playing surface. *Id.* The Sirens are not required to anticipate that Wyatt would not be attentive to his surroundings. Similarly, the Sirens were not under any duty to provide any player with a facility free of imperfections, and should not be held negligent for Wyatt's lack of attentiveness outside the field of play. Therefore, this court should reverse the ruling of the Fourteenth Circuit Court of Appeals.

B. Because Wyatt assumed the risks which are inherent to the game of football, the Sirens should not be held liable.

The Sirens should not be held liable for Wyatt's injuries because, by participating in the game of football, Wyatt expressly and implicitly assumed all risks inherent to the game. Inherent risks to playing football include those risks associated with the construction of the playing surface, including imperfections which may be present, created, or increased over the course of the game. *Corona v. City of New York*, 954 N.Y.S.2d 92, 93 (N.Y. App. Div. 2012). Further, the Sirens did not breach a duty of reasonable care because they adequately and ordinarily managed the risk presented by the damaged turf by marking it with a bright orange cone, making the condition open and obvious to spectators and players. R. at 17.

1. Wyatt assumed the risks associated with the construction of the playing surface, including damage by helmets, facemasks, cleats, and other activities inherent to the game of football.

Wyatt, through his participation in the game, assumed all risks inherent with the construction of a playing surface, which included those imperfections to the field created by player's facemasks and helmets. Inherent risks to playing football include those risks associated

with the construction of the playing surface, including imperfections which may be present, created, or increased over the course of the game. *Corona*, 954 N.Y.S.2d 92, at 93.

In *Corona*, the court found a player in a recreational softball league had assumed the risk of injury after stepping in a rut in the field during a softball game. *Id.* The court found that the player had enough experience to know that imperfections might be present, and indeed may have been created or increased over the course of the game. *Id.* Further, courts have held as long as the surface is safe and the condition at issue is not concealed – as to unreasonably increase the risk assumed by the players – the owner of the premises is shielded from any potential negligence liability. *Cotty v. Town of Southampton*, 880 N.Y.S.2d 656, 659 (N.Y. App. Div. 2009) (holding as long as the defendant's conduct does not unreasonably increase the risks assumed by the plaintiff, the defendant will be shielded by the doctrine of primary assumption of risk).

In the instant case, Wyatt, a professional football player, is even more likely than a recreational sports participant to have the experience necessary to be aware that imperfections that may be created on the playing surface through the course of a football game. In football, players are often shoved into the ground helmet first, causing damages and divots in the turf. Football players also wear spiked cleats which lead to imperfections all over the field. Even more so, the imperfection to the field existed outside the field of play, ten feet beyond the endzone, which is itself thirty feet deep and 160 feet wide. R. at 17. Over the course of a game time totaling sixty minutes, it is reasonable to assume that players are aware of those potential field imperfections which may be created or increased over the course of the game, especially in the fourth quarter. R. at 17. Moreover, consistent with *Corona*, there is no evidence that the Sirens attempted to conceal the imperfection as to unreasonably increase the risk to players. In fact, the Sirens had the damaged portion marked with a bright orange cone to provide notice to any

participants or individuals around the area that there was a potentially dangerous imperfection in the playing surface. Therefore, the Sirens did not owe a duty to Wyatt because the risks of an imperfect field are inherent to the game of football, as are subsequent risks concerning the construction and maintenance of the playing surface.

Even if the Court was to conclude that the Sirens did have a duty of care regarding the condition of the field, the Sirens should still not be held negligent because Wyatt impliedly assumed the risk, constituting a secondary assumption of risk, where the party deliberately chose to accept the known risk and those risks are foreseeable. *See Kelly v. McCarrick*, 841 A.2d 869 (Md. App. 2004).

With respect to athletes injured during play, voluntary participants in any lawful game, sport or contest, by the essence of their participation assumes all risks incidental to the game, sport or contest which are obvious and foreseeable. *Id*. at 875. In *Kelly*, a high school softball player injured her ankle while sliding into a base, severely fracturing her ankle. *Id*. at 872. The court rejected the plaintiffs arguments regarding negligent coaching, failure to warn of potential risks and other negligence issues, like the school's failure to use arguably safer "breakaway bases." *Id.* The court maintained, "the law does not make a school the insurer of the safety of pupils at play[,]" *Id.* at 878.

In the instant case, Wyatt proposes similar arguments to those found in *Kelly*, offering that the risk at issue was beyond those inherent to the sport and the team had a duty to acknowledge and take remedial measures in order to provide a reasonably safe field of play for participants. 841 A.2d 869 at 872; R. at 18. However, like the ruling in *Kelly*, Wyatt, with his experience as a professional football player, was likely aware of the risks and is presumed to know that there are risks of injuries which may result from participation in an inherently violent

contact sport, including those relating to the playing surface and the facility. *Id.* The player in *Kelly* was aware that the school did not use breakaway bases. 841 A.2d 869 at 872. Wyatt likely had past experiences with this specific turf field, as his team plays the Sirens multiple times a year as they were division rivals. R. at 12. A professional athlete should have the same – if not more – acumen as a high school athlete. Because Wyatt assumed the risks of playing the game, this Court should reverse the ruling of the Fourteenth Circuit Court of Appeals and find that the Sirens were not negligent.

2. The Sirens adequately addressed the damaged piece of turf by marking the damaged area with a bright orange cone, making the condition open and obvious to those around that there was a potential risk of injury.

The Sirens did not breach a duty of reasonable care because they adequately and ordinarily managed the risk presented by the damaged turf by marking it with a cone, making the condition open and obvious to anyone who acknowledged it. R. at 17. Under *Blackwell v. J. J. Newberry Co.*, there is no exact test for how a court shall determine whether a condition is open and obvious, and the determination rests on each cases facts and circumstances. 156 S.W.2d 14. (Mo. App. 1941) (holding that an owner of the premises is presumed to know qualities, capacities, and tendencies of average man or woman).

An alleged failure to maintain the premises is not sufficient to establish a breach of duty when the injury resulting from the imperfection of the premises is still an inherent risk to the sport. *See Bjorgung v. Whitetail Resort, LP*, 550 F.3d 263 (3d Cir. 2008). In *Bjorgung*, the court held that the alleged failure by the staff of a ski resort or racing association to set netting in all spots along a downhill racecourse in a manner that would minimize the potential for the competitors to lose control were risks inherent to the sport and found the ski resort not negligent. *Id.*

When a plaintiff assumes the risk in a sporting event, the defendant is relieved of any legal duty to the plaintiff, unless the defendant acts in a manner that unreasonably increases the risks to the plaintiff. *Buckley v. State*, 938 N.Y.S.2d 734, 742 (N.Y. Ct. Cl. 2011) (maintaining a claimant at a pool assumed the risks related to diving off competition starting blocks, and the university's actions did not unreasonably increase the risks to the claimant). In *Buckley*, the court considered whether the conditions caused by the defendant are "unique and created a dangerous condition over and above the usual dangers that are inherent in the sport." *Id.* at 741.

In the instant case, it is reasonable to assume that any individual in the vicinity of the damaged turf marked by the orange cone was of the normal capacities of the average man or woman and would avoid the potentially dangerous area. The Sirens were not under a higher duty to prevent a player running from being protected from the potential dangers, just as they were not under a duty to fix the damaged piece of turf as to absolutely protect from injury.

Further, although the lower courts assert that repairing the turf at some point during the game was not an unreasonable burden on the Sirens, there is no requirement for the team to make such a repair to the field in order to not breach any alleged duty. Similar to the facts in *Bjorgung*, the Sirens were not required to fix all damaged turf outside the playing surface in order to minimize the possibility of potential injury to the players, especially when the risks of damaged turf was inherent to the sport. Further, similar to the professional skier in *Bjorgung*, Wyatt, as a professional football player, is expected to be aware of the risks inherent to the game, including conditions and dangers along the field or track. Therefore, the placing of the cone over the damaged area as opposed to complete repair and replacement of the damaged turf during the game was an appropriate measure taken by the Sirens which does not constitute a breach of their duty.

Failing to repair the area of damaged turf outside the field of play did not unreasonably increase the risks to Wyatt, because the area at issue was outside the primary field of play and because the risk of damaged turf was inherent to the sport, it was not a unique and dangerous condition under the definition used in *Buckley*. Therefore, considering all the facts and circumstances which led to Wyatt's injury, the condition itself was open and obvious, and it was not a unique or dangerous condition over and above the usual dangers inherent to football. As a result of these factors, the Sirens did not breach their duty of care, rather, they satisfied it by their use of the bright orange cone to mark the area of danger. Therefore, this Court should reverse the ruling of the Fourteenth Circuit Court of Appeals and find that the Sirens were not negligent in their management of the field conditions.

CONCLUSION

By reversing the Fourteenth Circuit Court of Appeals' decisions on both actions, this Court would be promoting and protecting the rights of individuals from government overreach. Much like the dissenting Justices in *Miller*, we must sound the "alarm of repression" whenever the state seeks to overly regulate protected speech. *Miller,* 413 U.S. 15 at 34. Here, the state has sought to regulate a mascot that, while perhaps controversial, is not obscene according to First Amendment jurisprudence. If an overbroad statute is permitted to stand, other forms of speech are irreparably put in harm's way. This cannot be permitted, and for these reasons this Court should reverse the ruling of the Fourteenth Circuit on Issue 1. Furthermore, property owners cannot be held to impossible standards of perfection. Professional athletes are aware of and agree to the inherent risks of their sport. The Sirens took reasonably appropriate steps to warn of the risks presented by the open and obvious condition and should not be held liable for Wyatt's unfortunate injury. Therefore, this Court, on de novo review, should reverse the rulings of the Fourteenth Circuit Court of Appeals.