
YALE LAW & POLICY REVIEW

The Rooney *Suggestion*: How the “Rule” Has Failed to Defeat Institutional Barriers to Equitable Hiring Practices in the NFL and Recommendations for Meaningful Reform

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- * DeMaurice F. Smith recently completed his 14th and final year as the Executive Director of the NFL Players Association (NFLPA) and Chairman of its wholly owned for-profit business, NFL Players Inc. The period of his tenure has included some of the most tumultuous moments in NFL history, from Colin Kaepernick and the anthem issue, to a myriad of legal battles over the authority of the NFL Commissioner, to navigating the successful completion of two NFL seasons during a worldwide pandemic. At the same time, the players’ partnership with NFL ownership has been extremely profitable—for both players and NFL owners—as player salaries, revenue, and television viewership reached record annual numbers. The two Collective Bargaining Agreements (CBAs) negotiated during Smith’s tenure span over twenty-years, and the 2011 CBA reflected significant gains for players after the most hostile labor and management battle in professional sports since the mid-1990s. Smith’s tenure has also included uniquely close interaction with NFL owners; he has negotiated directly with NFL owners, been privy to many of their internal business operations, and negotiated or engaged with many of the NFL’s business partners. Smith was elected as Executive Director of the union in 2009 as “the non-sports candidate.” His tenure also included contentious battles with the NFL owners including numerous player discipline cases, lawsuits regarding the application of the CBA, public battles regarding the NFL’s anthem policy, collusion cases, and contentious interactions regarding the health and safety of NFL players. Before representing the NFLPA, Smith served as an Assistant U.S. Attorney in Washington, D.C. for nearly a decade, where he focused on violent crime and terrorism enforcement; he later became Counsel to then-Deputy Attorney General Eric Holder. Smith has also worked as a trial lawyer and litigation partner for Latham & Watkins and Patton Boggs, where he chaired the government investigations and white-collar practice groups. During his

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The National Football League (NFL) and its member teams have failed to implement any policies that are capable of effectuating sustainable racial and gender diversity in their coaching and executive ranks. This article presents a list of reforms the NFL should and must make to rectify years of deliberate inaction and argues that, given the lack of internally driven effective change, federal, state, and local governments should exercise their lawful oversight capacity to ensure reform. The article begins by analyzing and addressing the NFL and its teams' unfair hiring practices and presenting a stark record of these practices, untethered from the myths and untruths perpetuated by the League and its defenders. It reviews the construct of the NFL's operations, assesses the NFL's failure to diversify, and evaluates the history and failure of the Rooney Rule—the NFL's self-imposed structure to rectify discrimination and improve diversity by requiring every NFL team to interview at least one diverse candidate before filling a leadership position. It also presents results from a confidential survey of current and former coaches of color, reviews hiring decisions and rationales presented by NFL owners, and examines strategies the NFL uses to insulate team owners from accountability. The article concludes by identifying potential legal and oversight-based claims that could be pursued by various stakeholders against the League and its teams if they fail to reform their hiring practices. In doing so, it presents a list of twelve recommendations for NFL owners to adopt or policymakers to impose to spur change.

career, Smith has tried over 100 criminal and civil cases and represented companies and individuals in criminal, regulatory, antitrust, toxic-tort, employment, insurance coverage, and class action litigation, as well as in congressional investigations. His perspective provides unique and at times brutal insight into how the NFL, its leadership, and team owners operate, and the obstacles they present to a fair hiring system.

** Carl Lasker is a J.D. Candidate at Yale Law School ('24), who, as co-author and teaching assistant to Professor Smith, provided invaluable research, writing, and insight that were indispensable to this article.

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This scholarship reflects historical, factual, and statistical analysis that includes personal observation. Where opinions are expressed, they are those of the authors.

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Dedicated to my third great-grandparents,
William Fitzgerald and Amarietta Gregory, who were born into
the institution of slavery, and to their descendants, who fought and
continue to fight against its legacy.

DeMaurice Fitzgerald Smith

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I. INTRODUCTION

The National Football League (NFL) and its member teams have failed to implement any policies that are capable of effectuating sustainable racial and gender diversity in their coaching and executive ranks. This article presents a list of reforms the NFL should and must make to rectify years of deliberate inaction and argues that, given the lack of internally driven effective change, federal, state, and local governments should exercise their lawful oversight capacity to ensure reform. The article begins by analyzing and addressing the NFL and its teams' unfair hiring practices and presenting a stark record of these practices, untethered from the myths and untruths perpetuated by the League and its defenders. It reviews the construct of the NFL's operations, assesses the NFL's failure to diversify, and evaluates the history and failure of the Rooney Rule—the NFL's self-imposed structure to rectify discrimination and improve diversity by requiring every NFL team to interview at least one diverse candidate before filling a leadership position. It also presents results from a confidential survey of current and former coaches of color, reviews hiring decisions and rationales presented by NFL owners, and examines strategies the NFL uses to insulate team owners from accountability. The article concludes by identifying potential legal and oversight-based claims that could be pursued by various stakeholders against the League and its teams if they fail to reform their hiring practices. In doing so, it presents a list of twelve recommendations for NFL owners to adopt or policymakers to impose to spur change.

As demonstrated below, we believe that the evidence overwhelmingly demonstrates that the lack of diversity in the NFL's coaching and executive ranks is not an accident but rather the result of a deliberate—or deliberately indifferent—policy of control exerted by the NFL owners. The Rooney Rule has failed. While numerous articles have discussed the obvious deficiencies of the Rooney Rule, this article attempts to answer the question of why it was doomed to failure from its inception, and why it should be abandoned and replaced with a set of bold leadership steps to limit the discretion of NFL team owners in order to ensure a more fair and inclusive hiring system. The NFL enjoys extraordinary advantages through tax benefits, special treatment vis-à-vis antitrust laws,¹ stadiums with

1. The Sports Broadcasting Act of 1961, for example, undergirds the NFL's multibillion-dollar broadcast revenue. 15 U.S.C. §§ 1291–1295 (2018). Legislation granting limited immunity from antitrust law also enabled the merger of the AFL and NFL in the 1960s.

public funding, and other federal and state governmental benefits. It is only fair, right, and lawful that such benefits come with meaningful oversight to ensure that the NFL's multibillion-dollar business, and the NFL team owners who are the primary economic beneficiaries of this landscape, are responsive and accountable to laws requiring fairness in hiring.

A. Statement of Interest

Although the fair treatment of NFL former, current, and prospective coaches and executives is outside of the normal purview of a professional athletes' union, the last fourteen years have provided the authors with unique insight regarding League operations, NFL owner dynamics, and most importantly, how critical a labor union is to the protection of workers in a closed and largely unaccountable business system. In short, despite annual revenue that will reach nearly \$20 billion this year and individual teams worth more than \$6 billion apiece, the NFL and its teams face little to no oversight by any governmental authority, and there are few mandated public disclosures by the teams or the League office. Sports labor unions like the NFL Players Association (NFLPA) remain one of the few stakeholders with the ability to act as a "check" against this multibillion-dollar entity that operates unlike most businesses in the world.

Our motivations for this article are threefold. First, while many commentators have discussed the hiring disparity among coaches and executives in the NFL, almost none of these commentators have first-hand insight into how the NFL really operates. This article attempts to synthesize previous scholarship with the authors' unique knowledge and understanding of NFL operations, along with contemporary data from recent lawsuits and surveys. Based upon these perspectives, we contend that many of the often-mentioned proposals to correct the status quo (i.e., internal task forces, brand attacks, increased minority ownership of teams, and punishments of teams in the form of draft selections) have failed or will fail because the NFL is designed to withstand such proposed solutions. Instead, we make recommendations that the NFL should embrace not as the "end" of the discussion but as the beginning. We believe that the recommendations proposed in this article should be addressed by the state agencies, state attorneys general, local governments, and the congressional committees that are central to the uninterrupted success of the League.

Moreover, at the time of publication of this article, the Supreme Court reversed decades of precedent and ruled that using race as a factor in

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college admissions is unconstitutional. This will lead some people, likely including some NFL owners, to believe that racial diversity efforts no longer have a clear defense in federal law or that there is no longer a need to focus on fair and equitable hiring practices. As a strictly legal matter, the Supreme Court's ruling does not directly impact private businesses. Nonetheless, the ruling's possible impacts beyond the specifics of that case are troubling. The need, therefore, for fair, equitable, and lawful hiring practices in the NFL has never been greater. Similarly, government investigation and oversight of the NFL, as well as the enforcement of equitable hiring practices, has never been more necessary.

Second, for those who love the game, we believe that it is important to set forth an argument that there needs to be equity and fairness off the field as much as fans demand it on the field. The League imposes a myriad of rules and regulations on the playing field, on the players, and on "football operations" among its teams that are designed to ensure "competitive balance"; that competitive balance among teams is acknowledged as being vital to sustaining fan interest and the overall business model. At the same time, off the field, the lack of binding rules or true accountability with respect to hiring results in a system that is clearly unfair. This wildly economically successful business ecosystem has failed to develop systemic rules or regulations that effectuate fair and equitable hiring of diverse coaches and executives and impose them on its team owners. Simply, there is no corresponding set of "off the field" rules to ensure fairness in hiring and to promote diversity despite the litany of rules for the game.

Third, our last motivation is purely aspirational. There are NFL team owners and members of senior leadership who believe that the hiring systems should change to ensure fairness and the betterment of the NFL. The NFL is facing a crossroads; its senior leadership will change in the next five years. This presents an opportunity for those who inherited unfair hiring practices to make major decisions that resolve these long-standing issues. We propose that, in the absence of intervention by various government actors to force systemic change, the hope for sustainable, systemic, positive change for coaching and executive diversity will lie with senior owner leadership of the NFL and the Commissioner's ability to influence them to embrace necessary, important, positive change. For all these reasons, the recommendations are for the leadership of the NFL to embrace or eschew, knowing that their reputations will be inextricably tied to this issue, which has historical and social importance because of this sport's ability to impact culture far beyond the playing field.

B. Executive Summary

The most important concept to understand before having a meaningful discussion about the inequity inherent in the NFL's coaching hiring system is that this business is nearly impervious to outside influence. The NFL has escaped accountability for three reasons.

First, the NFL is a *closed* system of mostly non-minority billionaire owners of 32 privately operated business entities that enter into voluntary association with each other in order to maximize the value of the industry of professional football; those member businesses constitute the National Football League. Within that closed ecosystem, the owners of the private member businesses create and agree to adhere to the NFL's Constitution and By-Laws. The governance of that closed ecosystem enables certain powerful owners to act similarly to "majority shareholders" who make the key decisions that reflect the "shared rules" among the entities that comprise the NFL.

Each NFL team is organized in a hierarchical manner: a principal owner oversees a head coach, a general manager, and a president or CEO. Head coaches oversee teams' on-field product and performance. They instruct players and oversee offensive and defensive coordinators, who in turn oversee position-specific coaches like quarterback coaches.² General managers are charged with overseeing player personnel and contracts, drafting and trading players, and overseeing team scouts and analysts. Finally, team presidents or CEOs oversee teams' business ventures. They work alongside vice presidents and other chief executives who oversee specific branches of team activity such as legal, finance, human resources, public relations, corporate sales, business development, marketing, stadium operations, ticket sales, and media.³

While the NFL and its member teams appear to the public—and are often discussed in the media—as if they are structured as one regulated entity, and thus people may assume that this behemoth entity is subject to rigorous oversight and regulation like a publicly owned corporation, that is not the case. In fact, neither the League nor its member teams have any semblance of the accountability that many companies in the world have in their respective markets. The NFL faces neither shareholder nor consumer

2. See, e.g., *Coaches Roster*, BALTIMORE RAVENS, <https://www.baltimoreravens.com/team/coaches-roster/> [https://perma.cc/CV9K-T4PY].

3. See, e.g., *Front Office Roster*, BALTIMORE RAVENS, <https://www.baltimoreravens.com/team/front-office-roster/> [https://perma.cc/CZ6S-2QHM].

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accountability. There is no public board of directors, there are no public compliance or audit reports, and there are virtually no federal or state mandated public disclosures or other forms of government operational oversight. All of this should be surprising—and profoundly troubling—given the tax benefits, special antitrust treatment, stadium funding, and other publicly enabled benefits that the NFL and its member teams have enjoyed for generations.

Second, just as the lack of compliance or regulatory oversight in the NFL is unmatched, so is the special legal treatment given to the NFL to secure its economic position by disadvantaging or eliminating any substantial competitors. This means that on the front end of the economic flow chart, the NFL gets to share revenue, enter unique broadcast contracts, and, in the past, merge with competitors, while still enjoying the tax benefits of its teams being structured as distinct limited liability partnerships. NFL team owners profit from the performance of primarily non-white players and secure extraordinary public and taxpayer support for their stadiums. They employ armies of lawyers and lobbyists who effectuate their will at the federal, state, and local level. They take taxpayers' money and eschew any concomitant government accountability or oversight. This shields owners from meaningful consequences for improper or illegal behavior.

Third, and equally important, the unparalleled and persistent economic success of the NFL means that there is no economic consequence for owners' failure to abide by fair hiring practices, and worse, there is no fear held by NFL owners that they may ever face such a consequence. NFL owners hold a complete lock on professional football. The NFL's overall television ratings vastly outperform other television programming. NFL owners sell multi-year seat licenses that require fans to purchase tickets far into the future, and they have no concern about the League losing its rank as America's number one sport by viewership and revenue, or its status as the most profitable sports system to investors. Meanwhile, these owners and investors benefit from the use of special legislation and public funds to engineer multibillion dollar private fortunes and a system where there is no consequence for the failures to abide by fair or lawful hiring practices.

When it comes to the issue of fair hiring, the NFL's unaccountability, special legislation, and profit structure perpetuate this "no consequence" ecosystem to insulate owners from any outside influence for change. The NFL has utilized the law, from its unique antitrust treatment to its former status as a nonprofit entity to its receipt of taxpayer funding of stadiums, to operate seemingly above the law. The result of this confluence of benefits is a system that gives NFL majority owners unfettered control

over all employment decisions and practices. History demonstrates that many of the owners are completely unwilling to adhere to any structure, let alone the Rooney Rule, that would operate to limit their autonomy and facilitate a fair, accountable, and equitable hiring system. Our analysis creates compelling legal, moral, reputational, and business justifications for change.

Our hope, therefore, is to lay out exactly why the Rooney Rule has failed to achieve its intended results and encourage either federal, state, or local governments to exercise some accountability given the lucrative benefits conferred upon the NFL. In the absence of reasonable governmental oversight, only individual lawsuits by aggrieved coaches, concerted action by NFL players, or the voluntary adoption of the recommendations presented below by the NFL teams has any real prospect of success.

This article examines the current state of diversity and inclusion in the NFL and establishes the immediate need for intentional, bold reform. Recently, a confidential survey was sent to sixty-five current and former NFL coaches of color. Forty-seven responded, revealing that:

- Nearly 90% of survey respondents reported that they believe the NFL and its owners do not adhere to federal statutes against discrimination.
- Nearly 70% of respondents reported that the NFL league office is not responsive to equity, discrimination, and fair hiring issues.
- 80% of respondents reported that they were never briefed on fair employment guidelines set forth by the United States Equal Employment Opportunity Commission or related laws and regulations governing fair employment.
- 90% of respondents said they believe that race plays a role in owners' decisions to hire their head coaches and coordinators.

This article includes an extensive review of reports, news articles, interviews, lawsuits, and academic scholarship, and demonstrates how this system disproportionately impacts coaches and coaching candidates of color based on their identity. The article explains that the Rooney Rule and other League-wide diversity policies have failed, and even worse, were doomed from inception. Next, it proceeds to describe how NFL teams truly operate with respect to decision-making and management, unblinded by the myths and untruths perpetuated by the League and others beholden to it. The article closes with a discussion of various laws the NFL and its owners may be violating and with specific recommendations designed to overhaul the NFL's approach to hiring, retention, and promotion based on

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transparent processes and protocols with clear goals and an accountability system that punishes non-compliance.

II. THE NEED FOR REFORM: BUILDING A RECORD

A. *The History of the Rooney Rule and Its Preordained Failure*

The NFL's flagship diversity and inclusion policy, the Rooney Rule, has failed to achieve its own stated goal of creating equitable opportunities for minority candidates seeking leadership positions. The Rooney Rule originally required every NFL team with a head coaching vacancy to interview at least one diverse candidate before making a new hire.⁴ When the policy first went into effect in 2003, only three NFL teams employed full-time Black head coaches.⁵ Today, approximately twenty years later and after several amendments to purportedly strengthen the policy, little has changed. NFL teams still only employ three full-time Black head coaches, and they only employed one full-time Black head coach when Brian Flores filed suit against the League in 2022.⁶

The NFL implemented the original version of the Rooney Rule after it was threatened with litigation for failing to embrace racial diversity on its own. At the end of the 2001 NFL season, the Minnesota Vikings and Tampa Bay Buccaneers fired Dennis Green and Tony Dungy, two well-respected Black head coaches who won nearly 60% of their games and led their teams to a combined twelve playoff appearances in sixteen seasons.⁷

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4. *The Rooney Rule*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/inside-football-ops/inclusion/the-rooney-rule/> [https://perma.cc/TB6G-GJ4S].
 5. Dave Sheinin, Michael Lee, Emily Giambalvo, Artur Galocha & Clara Ence Morse, *How the NFL Blocks Black Coaches*, WASH. POST (Sept. 21, 2022, 7:37 AM), <https://www.washingtonpost.com/sports/interactive/2022/nfl-black-head-coaches/> [https://perma.cc/U9XY-TDNW].
 6. *Id.*; First Amended Class Action Complaint at 2, *Flores v. Nat'l Football League*, No. 22-cv-00871 (S.D.N.Y. filed Apr. 7, 2022), <https://www.courtshousenews.com/wp-content/uploads/2022/04/nfl-amended-complaint.pdf> [https://perma.cc/R6G9-NXAF].
 7. *See Minnesota Vikings Franchise Encyclopedia*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/min/index.htm> [https://perma.cc/7W7K-CVRM]; *Tampa Bay Buccaneers Franchise Encyclopedia*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/tam/index.htm> [https://perma.cc/9LAH-RQ9P].

Green and Dungy were two of just five Black head coaches who had been hired by NFL teams since the League's modern era began in 1932.⁸ Their terminations left the NFL with one Black head coach.⁹ This prompted civil rights attorneys Cyrus Mehri and Johnnie Cochran Jr. to threaten legal action and commission a report exposing the NFL's treatment of Black coaches.¹⁰

With contributions from University of Pennsylvania labor economist Janice Madden, Mehri and Cochran published their report titled "Black Coaches in the National Football League: Superior Performance, Inferior Opportunities," on September 30, 2002.¹¹ The report analyzed NFL teams' hiring and firing practices over the previous fifteen seasons. Its findings showed statistically significant evidence that Black head coaching candidates were less likely to be hired and more likely to be fired than their white peers, despite winning a higher percentage of games.¹² The NFL responded to Mehri and Cochran's report by appointing a "Committee on Workplace Diversity," headed by Pittsburgh Steelers' owner Dan Rooney. On December 20, 2002, the NFL's Committee on Workplace Diversity issued a recommendation that NFL teams make a commitment to interviewing minority candidates for every head coach opening, with limited exceptions for some promotions from within.¹³ The NFL owners

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8. JOHNNIE L. COCHRAN, JR. & CYRUS MEHRI, BLACK COACHES IN THE NATIONAL FOOTBALL LEAGUE: SUPERIOR PERFORMANCE, INFERIOR OPPORTUNITIES 1 (2002).
 9. Sheinin et al., *supra* note 5.
 10. Martenzie Johnson, *Rooney Rule at 20: A Look Back at the Policy that Changed the NFL's Hiring of Black Coaches*, ANDSCAPE (Aug. 24, 2022), <https://andscape.com/features/rooney-rule-at-20-a-look-back-at-the-policy-that-changed-the-nfls-hiring-of-black-coaches/> [https://perma.cc/5REA-K3U9]. See also N. JEREMI DURU, ADVANCING THE BALL: RACE, REFORMATION, AND THE QUEST FOR EQUAL COACHING OPPORTUNITY IN THE NFL (2011) (chronicling former Cleveland Browns offensive lineman John Wooten and attorneys Mehri and Cochran's advocacy which resulted in the Rooney Rule).
 11. See COCHRAN, JR. & MEHRI, *supra* note 8.
 12. *Id.* at i-ii.
 13. Douglas C. Proxmire, *Coaching Diversity: The Rooney Rule, Its Application and Ideas for Expansion*, AM. CONST. SOC'Y 3 (Dec. 2008), https://www.acslaw.org/wp-content/uploads/old-uploads/originals/documents/Proxmire_Issue_Brief.pdf [https://perma.cc/8G2U-D5GM]; Gus Garcia-Roberts, *The Failed NFL Diversity 'Rule' Corporate America Loves*, WASH. POST (Oct. 4, 2022, 6:00

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promptly approved the committee's recommendation, and the Rooney Rule was born.

The problems with the Rooney Rule should have been apparent at its inception to anyone who understood the operation of the NFL, and these problems foreshadowed its failure. First, it is not clear that there was a "plaintiff" who could or would have actually sued the NFL at the rule's inception. The NFL obviously knew this. Accordingly, there was no individual who could actually hold the NFL accountable—for example, by filing a federal claim—for failing to adhere to the rule's goals. Second, the absence of a potential litigant also meant that at the time the NFL agreed to the rule, it knew that there was no future court or governmental entity that could hold NFL owners accountable and that, despite their words, there was no real process or procedure that could lead to them being held accountable.¹⁴ Finally, the rule itself was crafted in a way that permitted the NFL alone to monitor its adherence and accountability. Many fail to understand that the Commissioner and the League office have no power other than that specifically ceded to them by the NFL owners themselves. The NFL owners exclusively hire, evaluate, and govern the power of the Commissioner.

Nonetheless, the Rooney Rule looked like a success in the initial years following its adoption.¹⁵ Owners and general managers committed to

AM), <https://www.washingtonpost.com/sports/interactive/2022/rooney-rule-nfl-black-coaches/> [<https://perma.cc/95D8-CLZ8>].

14. That circumstance stands in stark contrast with the decades of meaningful oversight by a federal judge of the settlement that emerged from the case that players brought in the legal battle for free agency; the *Reggie White, et al.* settlement enabled players to hold the NFL accountable for its on-going misconduct for decades. See, e.g., Ron Clements, *Federal Judge Questions Whether Roger Goodell 'Understands There Is a CBA'*, SPORTING NEWS (Aug. 27, 2015), <https://www.sportingnews.com/us/nfl/news/roger-goodell-deflate-gate-cba-judge-david-doty-nflpa/2fazymshks951r6bjh16db8kt> [<https://perma.cc/AZ8J-VMRZ>]; *Judge Refuses NFL Motion to Reverse Himself in Vick Case*, OKLAHOMAN (Apr. 23, 2008), <https://www.oklahoman.com/story/sports/nfl/2008/04/23/judge-refuses-nfl-motion-to-reverse-himself-in-vick-case/61602571007/> [<https://perma.cc/U9HE-45CD>]. See also *White v. NFL*, 822 F. Supp. 1389 (D. Minn. 1993) (holding that the NFL's Plan B free agency system was an unreasonable restraint of trade and a violation of antitrust laws).
15. See, e.g., Cynthia DuBois, *The Impact of 'Soft' Affirmative Action Policies on Minority Hiring in Executive Leadership: The Case of the NFL's Rooney Rule*, 18 AM. L. ECON. REV. 208 (2016).

interviewing Black candidates for head coaching positions, and by the start of the 2006 NFL season, seven teams employed full-time Black head coaches.¹⁶ Two of these coaches, Tony Dungy and Lovie Smith, went on to lead their teams to the Super Bowl that season, becoming the first Black head coaches to ever do so.¹⁷ The next offseason, Dan Rooney hired Mike Tomlin as the first Black head coach in the Steelers' then seventy-five-year history.¹⁸ Tomlin was an instant success, and in February 2009, he became the second Black head coach to lead his team to a Super Bowl victory. Tomlin is still the Steelers head coach today, and the Steelers have never finished a season with a losing record during his sixteen-year tenure.¹⁹

The uptick in Black head coaching hires during the mid-to-late 2000s provided hope that racial equity was within reach. In 2009, the NFL expanded the Rooney Rule by applying its requirements to the hiring process for vacant general manager positions.²⁰ In 2011, seven teams still employed full-time Black head coaches, and three more hired interim Black head coaches after the season began.²¹ The NFL started touting the Rooney Rule to corporate America as a model policy, and versions of the rule were enacted by over 100 public companies including Facebook, Pinterest, Intel, Xerox, Uber, and Amazon, as well as by the five biggest banks in the United States.²² Major law firms also created a version of the policy that they called the Mansfield Rule,²³ and United States Senator

16. Sheinin et al., *supra* note 5.

17. *Id.*

18. *Id.*

19. See *Pittsburgh Steelers Franchise Encyclopedia*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/pit/index.htm> [<https://perma.cc/A7M3-PM6E>].

20. *The Rooney Rule*, *supra* note 4.

21. Sheinin et al., *supra* note 5.

22. Garcia-Roberts, *supra* note 13; Edward Graham, *After Amazon Adopts Rooney Rule, Black Lawmakers Call for More Diversity in Tech*, MORNING CONSULT (June 4, 2018, 2:18 PM), <https://morningconsult.com/2018/06/04/after-amazon-adopts-rooney-rule-black-lawmakers-call-more-diversity-tech/> [<https://perma.cc/5SJL-WR42>].

23. *An Open Letter from the 2020-2021 Mansfield Law Firms' Chairs & Managing Partners*, DIVERSITY LAB, <https://www.diversitylab.com/mansfield-rule-4-0/> [<https://perma.cc/EGL3-RDSK>].

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Chuck Schumer urged incoming legislators to apply the Rooney Rule in order to diversify their staff.²⁴

The hope surrounding the Rooney Rule was short-lived, however. Once public scrutiny receded, the apparent success of the policy began to slow.²⁵ Following the conclusion of the 2012 NFL season, teams did not hire a single Black candidate to fill any of eight head coaching vacancies or seven general management vacancies.²⁶ The number of ethnic minority coaches and general managers across the League eventually plunged back to pre-Rooney Rule levels,²⁷ and academic literature began to question the Rooney Rule's efficacy.²⁸ During the mid-to-late 2010s, the NFL rejected calls for it to significantly modify or overhaul the Rooney Rule, but its owners eventually responded to public pressure by passing a series of band-aid amendments designed to make the policy appear more robust.

In early 2020, public backlash peaked after NFL owners declined to hire the ultra-qualified Eric Bieniemy as a head coach for a second straight season. The owners responded by increasing the requirements of the Rooney Rule to compel teams to interview at least two external ethnic

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24. Ed O'Keefe, *Under Pressure, Schumer Wants Democrats to Focus on Minority Hiring—by Using an NFL Tool*, WASH. POST (Jan. 6, 2017, 5:00 AM EST), <https://www.washingtonpost.com/news/powerpost/wp/2017/01/06/under-pressure-schumer-wants-senate-democrats-to-adopt-the-rooney-rule-for-staff-hires/> [https://perma.cc/B3K9-ATLU].
 25. See Garcia-Roberts, *supra* note 13.
 26. Samuel G. Freedman, *What Work Remains for the Rooney Rule*, NEW YORKER (Feb. 11, 2014), <https://www.newyorker.com/sports/sporting-scene/what-work-remains-for-the-rooney-rule> [https://perma.cc/6WLK-EJU4].
 27. Jason Reid, *Future of Black NFL Coaches a Concern After Round of Firings*, ANDSCAPE (Dec. 31, 2018), <https://andscape.com/features/future-of-black-nfl-coaches-a-concern-after-round-of-firings/> [https://perma.cc/8JMX-GP25].
 28. Garcia-Roberts, *supra* note 13. See also Stefanie K. Johnson, David R. Hekman & Elsa T. Chan, *If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired*, HARV. BUS. REV. (Apr. 28, 2016), <https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired> [https://perma.cc/H6JX-77EN]; K.L. Gallagher, R. Lofton, S.N. Brooks & L. Brenneman, *Field Studies: NFL Head Coach Hiring and Pathways in the Rooney Rule Era* (Glob. Sport Inst. at Ariz. State Univ., 1 GSI Working Paper Series, 2021) <https://globalsport.asu.edu/sites/default/files/resources/globalsportinstitute-fieldstudiesnflfeb2021.pdf> [https://perma.cc/24EA-N32D].

minority candidates for open head coaching positions.²⁹ Following reports that the number of Black coordinators in the League had actually decreased since the Rooney Rule was adopted in 2003, the owners also adjusted the policy to require teams to interview at least one ethnic minority candidate for every open coordinator position.³⁰ In addition, the owners amended the League's anti-tampering policy to grant assistant coaches the right to interview with other teams for head coaching or coordinator positions, regardless of their contract status.³¹ Finally, the owners added a requirement to the Rooney Rule that teams and the NFL League office interview at least one minority candidate for every senior-level executive position, including team president, and they modified the policy so that women could be interviewed to satisfy the new requirement.³²

A few months later, following the murder of George Floyd, a nationwide reckoning with systemic racism, and increased player advocacy and collective bargaining, the NFL passed 2020 Resolution JC-2A, which rewards multiple draft picks to teams that develop minority leaders who go on to become general managers, executives, or head coaches around the League.³³ 2020 Resolution JC-2A also includes a public acknowledgment from NFL owners that "promot[ing] equal employment opportunity and a diverse and inclusive workforce advance[s] significant League interests, including improved decision making, enhanced business performance, and representing the NFL as an employer of choice that hires and promotes based on merit."³⁴

In early 2022, NFL owners again announced changes to the Rooney Rule, this time in response to the employment discrimination lawsuit brought by Brian Flores against the League and its member teams. First,

29. *The Rooney Rule*, *supra* note 4.

30. Sheinin et al., *supra* note 5.

31. Ken Belson, *NFL Team Owners Enhance Rooney Rule, but Stop Short of Incentives*, N.Y. TIMES (May 19, 2020), <https://www.nytimes.com/2020/05/19/sports/football/nfl-rooney-rule-minority-coaches.html> [<https://perma.cc/CUJ5-WMU9>].

32. Kevin Patra, *NFL Instituting Changes to Rooney Rule*, NFL (May 18, 2020, 4:36 PM), <https://www.nfl.com/news/nfl-instituting-changes-to-rooney-rule> [<https://perma.cc/9ZTR-H9RA>].

33. NFL 2020 Resolution JC-2A.

34. *Id.*

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the owners expanded the reach of the Rooney Rule by applying its requirements to the hiring process for quarterback coaches.³⁵ Next, the owners established the NFL's first hiring quota, requiring that each team employ at least one ethnic minority or woman as a member of its offensive coaching staff, and they created a League-wide fund to pay coaches hired under the new provision.³⁶ The owners intended these amendments to increase the number of minorities in the pool of offensive coaches who might go on to receive consideration for future head coaching positions. Finally, the owners extended the definition of "minority" for the purposes of the Rooney Rule to include women, regardless of their racial background or the position they are seeking.³⁷

B. The Rooney Rule Has Enabled Owners to Avoid Adopting Other, Potentially More Successful Hiring Reforms

When NFL owners ratified the Rooney Rule and touted it as a "structure" to ensure that qualified diverse candidates would be fairly interviewed and considered for head coaching positions, it was clear that the Rule did not impose real, meaningful, or definitive obligations on themselves. NFL owners have a long history of avoiding their legal obligations and perpetuating exclusive control over both players and coaches. They have fought to restrict player movement and free agency at the negotiating table and in jury trials,³⁸ paid players to abandon their

35. *The Rooney Rule*, *supra* note 4.

36. Kevin Seifert, *NFL Says All Teams Must Add Minority Offensive Coach, Expands Rooney Rule to Include Women*, ESPN (Mar. 28, 2022), https://www.espn.com/nfl/story/_/id/33617341/nfl-says-all-teams-add-minority-offensive-coach-expands-rooney-rule-include-women [https://perma.cc/TF3U-AUGW].

37. *Id.* See also *The Rooney Rule*, *supra* note 4 (listing "Women's Careers in Football" as part of the NFL's diversity and inclusion efforts).

38. See, e.g., *White v. Nat'l Football League*, 836 F. Supp. 1458 (D. Minn. 1993); *Jackson v. Nat'l Football League*, 802 F. Supp. 226 (D. Minn. 1992); *McNeil v. Nat'l Football League*, No. CIV. 4-90-476, 1992 WL 315292 (D. Minn. Sept. 10, 1992); *Powell v. Nat'l Football League*, 711 F. Supp. 959 (D. Minn. 1989); George Mavris, *White v. National Football League: The Myth of Free Agency in the National Football League*, 14 LOY. L.A. ENT. L. REV. 381 (1994); see also *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *Kapp v. Nat'l Football League*, 586 F.2d 644 (9th Cir. 1978); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976).

union,³⁹ and neglected to integrate their teams until being threatened into doing so by the federal government.⁴⁰ Accordingly, one has to question whether the Rooney Rule was ever intended by owners to act as a restrictive covenant upon their own hiring discretion. Rather, the record suggests that the NFL owners adopted the Rooney Rule to appease outsiders, who they knew would see a policy being employed by the League office without realizing that the League office has little to no power over owners' respective teams.⁴¹

In this regard, the Rooney Rule has been highly successful for NFL owners. First, the Rooney Rule provided owners with an apparent concession they used to escape a threatened lawsuit. Second, the Rooney Rule became a mechanism that gave owners a perception of fairness without any obligation to ensure it. Two decades after the Rooney Rule's enactment and dozens of hiring cycles later, it is clear that those who applaud the rule do not understand how the NFL has operated with respect to rights, race, and employment discrimination throughout its history. The Rooney Rule placed a spotlight on the NFL's Commissioner and League office, shielded the real decision-makers from scrutiny, and left the goal of "fairness" in the hands of those who had a history of opposing it.

Evidence from the Rooney Rule's adoption makes a case that NFL owners never expected the policy to bind them. Through document review and interviews with insiders, the *Washington Post* found that team owners rejected proposals for a more comprehensive diversity policy before they voted to adopt the Rooney Rule.⁴² According to former Atlanta Falcons vice

39. See Matthew Futterman, *How NFL Quarterback Jersey Sales Nearly Destroyed the Union*, DEADSPIN (Apr. 27, 2016), <https://deadspin.com/how-nfl-quarterback-jersey-sales-nearly-destroyed-the-u-1773300860> [https://perma.cc/GF6K-RKEM].

40. See generally THOMAS G. SMITH, *SHOWDOWN: JFK AND THE INTEGRATION OF THE WASHINGTON REDSKINS* (2012).

41. See Julia O'Connell, *The True Origins of the Rooney Rule, Part 1*, GLOB. SPORT MATTERS (Feb. 5, 2021), <https://globalsportmatters.com/listen/2021/02/05/the-true-origins-of-the-rooney-rule-part-1/> [https://perma.cc/JM2C-HX8F].

42. Wash. Post Staff, *Key Findings from 'Black Out,' the Post's Series on Black NFL Coaches*, WASH. POST (Sept. 21, 2022, 6:00 AM), <https://www.washingtonpost.com/sports/interactive/2022/takeaways-black-out-nfl/> [https://perma.cc/64JT-HXJF].

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president Ray Anderson, the owners knew all along that the Rooney Rule could become a “check-the-box exercise.”⁴³ Anderson participated in a working group in 2002 that was designed to assist the League’s all-white “Committee on Workplace Diversity” as it built the framework for the Rooney Rule.⁴⁴ Anderson recalls telling NFL owners “we’ve got to make sure and really promise each other that it’s not going to be used as a tokenism tool.”⁴⁵ The owners ignored him. Less than two weeks after voting to ratify the Rooney Rule, Cowboys owner Jerry Jones hired a white head coach that he interviewed for five hours in a jet on a New Jersey tarmac, and he satisfied the Rooney Rule by interviewing a Black candidate over the phone.⁴⁶ Jones calls himself “a states’ rights guy in the NFL” because he believes teams need to maintain their power over the League office.⁴⁷ He received a pass for his actions from then-Commissioner Paul Tagliabue,⁴⁸ and he has since led the owners in rejecting a number of suggestions over the past two decades that would have given the Rooney Rule more teeth.⁴⁹

Today, the Rooney Rule can more aptly be called the “Rooney Suggestion,” because a policy can hardly be called a rule if it is not followed, does not include any consequences for non-compliance, and has not achieved its goals since its inception. The “Rooney Suggestion” did not result in any modifications to the NFL Constitution and Bylaws, and it does little to police the cartel behavior of owners. Instead, the “Rooney Suggestion” was created by billionaires to create a public relations feel-good moment that helped them dodge a race- and equity-related controversy.

43. Garcia-Roberts, *supra* note 13.

44. *See NFL Clubs to Implement Comprehensive Program to Promote Diversity in Hiring*, NFL (Dec. 20, 2002), <https://www.nfl.info/nflmedia/News/2002News/NFLDiversityProgram.htm> [<https://perma.cc/KU8A-QUUN>].

45. Garcia-Roberts, *supra* note 13.

46. *Id.*

47. David Maraniss & Sally Jenkins, *Jerry Jones Helped Transform the NFL, Except When It Comes to Race*, WASH. POST (Nov. 23, 2022, 8:01 AM), <https://www.washingtonpost.com/sports/interactive/2022/jerry-jones-black-coaches-nfl/> [<https://perma.cc/2MP3-PW5F>].

48. Garcia-Roberts, *supra* note 13.

49. *See* Maraniss & Jenkins, *supra* note 47.

C. *Statistical Evidence of the Rooney Rule's Failure*

Statistical evidence confirms that the Rooney Rule is not serving its intended purpose.⁵⁰ In the twenty years since the Rooney Rule was passed, only 11% of head coaching positions have been filled by Black candidates, and many of these candidates have been fired before receiving the same opportunity to prove their worth as their white peers.⁵¹ Similar disparities exist at the offensive coordinator, quarterback coach, and general manager positions, despite the Rooney Rule's expansion to apply to those roles as well. This suggests that systemic flaws and lack of oversight limit the Rooney Rule's ability to drive real change.

In March 2022, University of Miami sociologist Alexis Piquero conducted a statistical analysis examining the efficacy of the Rooney Rule over the last eight years. Piquero tracked NFL head coaching interviews and outcomes and found that white candidates who interview for NFL head coaching positions are three times more likely to be hired than their non-white peers, even after controlling for age, number of opportunities, and previous coaching experience.⁵² Piquero also found that Black interviewees are roughly four times less likely to be hired for head coaching positions than all other candidates, controlling for age, number of opportunities, playing experience, offensive or defensive coordinator experience, and prior experience serving as an NFL head coach.⁵³ Piquero's findings are statistically significant, and they suggest that the Rooney Rule is not working.

The raw data Piquero examined paints an even clearer picture of the Rooney Rule's failure. NFL teams interviewed 121 candidates for 56 open head coaching positions between the beginning of 2015 and the end of the

50. The statistical evidence presented in this paper is up to date through January 1, 2023. During the 2023 head coach hiring cycle, five NFL teams hired new head coaches, and only one identifies as a person of color.

51. First Amended Class Action Complaint at 30, *Flores v. Nat'l Football League*, No. 22-cv-00871 (S.D.N.Y. filed Apr. 7, 2022), <https://www.courthouse news.com/wp-content/uploads/2022/04/nfl-amended-complaint.pdf> [<https://perma.cc/R6G9-NXAF>].

52. Sarah Blaskey & Rosmery Izaguirre, *White Interviewees Had 3x Better Odds of Being Hired as NFL Coaches, New Data Show*, MIAMI HERALD (Mar. 4, 2022, 11:33 AM), <https://www.miamiherald.com/sports/nfl/article258302943.html> [<https://perma.cc/E4C7-BGET>].

53. *Id.*

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2022 hiring cycle.⁵⁴ One out of every three interviews NFL teams conducted during this span was with a Black candidate, however, only eight Black candidates ended up being hired.⁵⁵ According to Piquero's model, if the Rooney Rule was working, a race-neutral hiring scheme based on the interviews teams conducted would predict the hiring of ten additional Black head coaching candidates since the beginning of 2015.⁵⁶ Notably, all eight candidates NFL teams did decide to hire during this window have already been fired.⁵⁷

A 2022 study conducted by *FiveThirtyEight* replicated Piquero's findings using different methodology. *FiveThirtyEight* examined the background and demographic characteristics of twenty-five reported finalists for each of nine open head coaching positions in the 2021-2022 NFL hiring cycle. It found that while finalists who went on to be hired as head coaches tended to be younger, have more experience working as NFL coordinators, and have more experience coaching for teams with winning records, the "most statistically significant difference between [those who were hired and those who were not hired] *by far* was race."⁵⁸ According to the study 83.3% of finalists who were hired as NFL head coaches during the 2021-2022 hiring cycle were white, while only 37.5% of the runners-up were.⁵⁹ Moreover, 53.8% of white finalists ultimately ended up being hired, while just 16.7% of nonwhite finalists did. *FiveThirtyEight* determined this difference to be statistically significant.⁶⁰

54. *Id.* Note: the Tampa Bay Buccaneers promoted Todd Bowles to be the team's head coach after the close of the 2022 hiring cycle and the publication of this article.

55. *Id.*

56. *Id.*

57. *Id.*

58. Neil Paine, *NFL Teams Are Making Brian Flores's Case for Him*, FIVETHIRTYEIGHT (Feb. 17, 2022, 10:00 AM), <https://fivethirtyeight.com/features/nfl-teams-are-making-brian-floress-case-for-him/> [<https://perma.cc/H4FE-JPTB>].

59. *Id.*

60. *Id.*

D. *Shattering Myths: The Statistical Case for Institutional, Structural, and Systemic Discrimination in NFL Coach and Executive Hiring*

The NFL and its supporters suggest that the hiring, retention, and firing of NFL coaches is based on factors such as merit and a desire to win games, not on candidates' race or gender. However, the statistical and factual record dispels these myths.

Myth #1: NFL Coaching and Executive Hiring and Retention is Based Solely on Merit, and Everyone Begins on a Level Playing Field

Statistical evidence strongly suggests that diverse candidates are blocked from or face more obstacles to assuming leadership positions around the League. Entering the 2022 NFL season, only three out of thirty-two teams employed head coaches who identify as Black.⁶¹ Including these three, fewer than 20% of NFL teams employed full-time head coaches of color, despite nearly 70% of NFL players identifying as racial minorities and more than 55% of NFL players identifying as Black.⁶² The NFL's lack of diversity and inclusion extends into its teams' front offices. Entering the 2022 season, NFL teams hired people of color to fill just 25% of their general manager positions and fewer than 20% of their president or CEO, vice president, and other chief executive positions.⁶³ The NFL has not fared much better when it comes to establishing gender diversity. While upwards of 45% of the NFL's fanbase identifies as female,⁶⁴ NFL teams entering the 2022 season only employed fifteen female coaches to fill over

61. Wash. Post Staff, *supra* note 42.

62. Richard E. Lapchick, *The 2022 Racial and Gender Report Card: National Football League*, THE INST. FOR DIVERSITY AND ETHICS IN SPORT 8-9 (2022), https://www.tidesport.org/_files/ugd/ac4087_164be15709b04857b95cfe4c5311d65d.pdf [<https://perma.cc/M8F5-5EQH>].

63. *Id.* at 16-19. For context, people of color make up more than 40 percent of the United States population. *Population Estimates, July 1, 2022 (V2022)*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045222> [<https://perma.cc/L2CB-4PJZ>].

64. Liz Hampton, *Women Comprise Nearly Half of NFL Audience, but More Wanted*, REUTERS (Feb. 4, 2017, 5:19 PM), <https://www.reuters.com/article/us-nfl-superbowl-women/women-comprise-nearly-half-of-nfl-audience-but-more-wanted-idUSKBN15J0UY> [<https://perma.cc/9REU-7LA3>].

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eight hundred positions.⁶⁵ Fewer than 25% of team executives identify as women, including fewer than 10% of team presidents or CEOs. No team has ever employed a female head coach or a female general manager.⁶⁶ Thus, while the NFL relies on an increasingly diverse pool of players and fans, it appears to reserve a disproportionate number of leadership positions for white men.

These numbers are discouraging but unsurprising considering the NFL's long history of discriminating against qualified coaching candidates based on their race and ethnicity. The NFL has never kicked off a season with more than 25% of its teams employing a head coach of color.⁶⁷ From 1990, the year after Art Shell broke the modern League's head coaching color barrier,⁶⁸ to 2022, NFL owners have hired 178 full-time head coaches. Only twenty of them have identified as Black and four as being of Hispanic or Latino descent.⁶⁹ Entering the 2022 season, the NFL had kicked off four straight seasons with fewer than 10% of its teams entrusted to Black head coaches, and 40% of NFL teams have never hired a full-time Black head coach.⁷⁰

When NFL owners do hire Black head coaches, they are more likely to hire them for interim positions as opposed to full-time jobs. Since 1990, Black head coaches have held just 13% of full-time head coaching positions, but 31% of interim stints.⁷¹ In addition, Black men hired as interim head coaches have historically been 31% less likely to be retained on a permanent basis than their white counterparts.⁷² This has sparked criticism that NFL teams in disarray are receiving credit for hiring Black leaders only when the stakes are low.⁷³

NFL owners have also fired Black head coaches sooner and despite better results than their white peers. In its 2022 series *Black Out*, the *Washington Post* analyzed three decades' worth of data on the hiring,

65. Lapchick, *supra* note 62, at 11.

66. *Id.* at 16–19.

67. *Id.* at 10.

68. Sheinin et al., *supra* note 5.

69. Wash. Post Staff, *supra* note 42.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

performance, retention, and professional networks of NFL head coaches and reported that Black head coaches who win at least nine regular-season games have been fired as often as white head coaches who win at least six.⁷⁴ Black head coaches with winning records are four times more likely to be fired than their white counterparts.⁷⁵ Since 2010, almost a quarter of Black head coaches have been fired after coaching their teams for less than twenty games, compared to just a tenth of white head coaches.⁷⁶ And after being fired, these Black head coaches are forced to overcome a troubling “reshuffling effect” if they hope to receive a second chance.⁷⁷ According to the NFL’s 2022 Diversity and Inclusion Report on occupational mobility patterns, NFL owners regularly rehire white head coaches who were dismissed by other teams, but they tend to be reluctant to rehire previously fired head coaches of color.⁷⁸

Myth #2: The Lack of Diverse Head Coaching Hires Results from a Smaller Pool of Qualified Candidates

There is no shortage of diverse candidates for head coaching positions around the League.⁷⁹ Nearly 43% of assistant coaches in the NFL identify as people of color.⁸⁰ However, according to research conducted by professors at the University of Michigan, George Washington University, Emory University, and Iowa State University, these coaches are significantly less likely to be promoted than their white peers. The

74. *Id.*

75. Wash. Post Staff, *supra* note 42.

76. Sheinin et al. *supra* note 5.

77. See Carlton Keith Harrison & Scott Bukstein, *Occupational Mobility Patterns: A Case Study of Leadership and Access in the National Football League*, 3 *SOCIOLOGY MIND* 264, 266 (2013).

78. C. Keith Harrison & Scott Bukstein, *2022 NFL Diversity & Inclusion Report: Occupational Mobility Patterns* 28 (Feb. 2022), <https://operations.nfl.com/media/ucri5co3/2022-nfl-diversity-inclusion-report.pdf> [<https://perma.cc/8HTC-LCXR>].

79. See Jason Reid, *Black NFL Coordinators Are Ready for Head Coaching Jobs. Do Owners Care?*, *ANDSCAPE* (Nov. 10, 2022), <https://andscape.com/features/black-nfl-coordinators-are-ready-for-head-coaching-jobs-do-owners-care/> [<https://perma.cc/Y5SC-RG22>].

80. Lapchick, *supra* note 62, at 11.

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professors' models estimate that white position coaches and assistants in the NFL are more than twice as likely to be promoted as their Black counterparts, regardless of their performance, experience, education, age, or coaching position.⁸¹ Without systemic change, many coaches of color have resigned themselves to the fact that they will never receive an equitable opportunity to earn a top leadership position based on their merit.⁸²

Coaches of color face narrower paths to top jobs in the NFL than their white counterparts. According to the *Washington Post*, on average, Black men hired as head coaches in the past decade spent more than nine years longer than their white counterparts in mid-level assistant positions.⁸³ Black coaches are also almost twice as likely as white coaches to have played in the NFL at some point before coaching, and they are much less likely to be hired based on experience coaching at the more accessible collegiate level.⁸⁴ Over the past five years, NFL owners have hired fifteen head coaches under the age of forty, and only one has identified as Black.⁸⁵ Some of these young white head coaches took control of their teams without any experience coaching at the NFL level, which is something no Black head coach in NFL history can say.⁸⁶ The average age of a newly

-
81. Mina Kimes, *New Study Exposes the NFL's Real Coaching Diversity Crisis*, ESPN (Jan. 12, 2016), https://www.espn.com/nfl/story/_/id/14549971/study-nfl-coaching-diversity-crisis [<https://perma.cc/CGX7-HKH6>]; see also Christopher I. Rider, James B. Wade, Anand Swaminathan & Andreas Schwab, *Racial Disparity in Leadership: Evidence of Valuable Bias in the Promotions of National Football League Coaches*, 129 AM. J. SOCIO. 227 (2023).
 82. See, e.g., Dave Sheinin, *A Lost Generation of Black Coaching Talent*, WASH. POST (Oct. 12, 2022, 7:18 AM), <https://www.washingtonpost.com/sports/interactive/2022/clarence-shelmon-nfl-black-coaches/> [<https://perma.cc/U75R-35P5>]; Robert Klemko, *Black Coaches Are Losing Patience with the NFL's Hiring Process: 'You Know You Have No Shot'*, WASH. POST (Jan. 10, 2020, 4:00 AM), <https://www.washingtonpost.com/sports/2020/01/10/black-coaches-are-losing-patience-with-nfls-hiring-process-you-know-you-have-no-shot/> [<https://perma.cc/6DPU-J2PQ>].
 83. Wash. Post Staff, *supra* note 42.
 84. *Id.*
 85. Sheinin et al., 5.
 86. Michael Harriot, *Black Coaches Are Better: A Statistical Breakdown of the NFL's Racism*, THEGRIO (Feb. 11, 2022), <https://thegrio.com/2022/02/11/black-coaches-statistical-breakdown-nfl-racism/> [<https://perma.cc/54LJ-FVS2>].

hired Black head coach is 53.6, more than 4.7 years older than the average age of a newly hired white head coach.⁸⁷ Synthesizing these trends suggests that the NFL and its owners hold Black head coaching candidates to a different standard than white head coaching candidates.⁸⁸ Marvin Lewis, the longest-tenured Black head coach in NFL history, captured this sentiment when he told the *Washington Post*: “I was 22 years in coaching before I got to be the head coach The frustrating part for African American coaches right now is there are a lot of people who are getting the chance to skip some steps along the way. And we didn’t get that opportunity.”⁸⁹

The stark employment statistics, evidence of double standards, and anecdotal evidence only begin to tell the story of the NFL and its owners’ failure to diversify. Head coaching candidates of color need to overcome the League’s deep-rooted bias about what leaders should look like,⁹⁰ and they are plagued by traditions of nepotism, professional cliques, positional prejudices, and regional biases that block their paths to top jobs.⁹¹ The *process* through which NFL teams hire and fire coaches is inherently discriminatory.

Myth #3: When Hiring Head Coaches, NFL Teams Only Care About Winning

The NFL defends its hiring practices and refutes assertions of collusion and institutional racism by offering arguments that proceed roughly along the following lines: *teams would never engage in improper, conspiratorial,*

87. *Id.*

88. Wash. Post Staff, *supra* note 42.

89. Michael Lee & Jayne Orenstein, *The Ones Who Made It*, “*The Value*” Marvin Lewis Interview, WASH. POST (Sept. 21, 2022), <https://www.washingtonpost.com/sports/interactive/2022/black-nfl-coaches-voices/> [https://perma.cc/42J9-XF5S].

90. *See e.g.*, Jerry Brewer, *A Legacy of Exclusion*, WASH. POST (Sept. 21, 2022, 5:27 PM), <https://www.washingtonpost.com/sports/interactive/2022/inequity-nfl-coaches/> [https://perma.cc/Y9GR-BKSF].

91. Sally Jenkins, *NFL’s Bleak Record on Diversity Hiring Ends with Owners but Starts with Coaches*, WASH. POST (Jan. 14, 2020), https://www.washingtonpost.com/sports/nfl/nfls-bleak-record-on-diversity-hiring-ends-with-owners-but-starts-with-coaches/2020/01/14/8aa2bc8e-36e7-11ea-bf30-ad313e4ec754_story.html [https://perma.cc/RKN4-BXUP].

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or collusive behavior because they are locked in tight competition with one another for talent and they all want to win.⁹² This argument lacks any statistical or logical support, and it does not bear out in practice. NFL teams have colluded and deliberately engaged in concerted action to obtain business objectives at the expense of their win-loss records and the players.⁹³ The greatest example of this collusion may have been the historical agreement among NFL owners to exclude players of color from the 1920s to the 1940s.⁹⁴ The oft-cited “excuse” of competitive interests had little basis in fact then, and it has little basis in fact now.

Multiple studies have found that teams led by Black head coaches perform better even after controlling for measures of team quality.⁹⁵ Since 1990, Black head coaches have led their teams to a higher winning percentage than white head coaches.⁹⁶ During the same span, Black head coaches have been almost five percentage points more likely to lead their teams to the playoffs than white head coaches.⁹⁷ Nonetheless, the average tenure served by Black head coaches since 1990 is just 4.5 years, more

92. It should surprise no one that NFL officials cited this competitive balance rationale when arguing to the NFLPA that no team would blackball Colin Kaepernick because all of them wanted to win games and would select the best talent.

93. *See, e.g.*, *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011); *Radovich v. Nat'l Football League*, 352 U.S. 445 (1957).

94. *See The Four Men Who Broke the NFL's Color Line*, NFLPA HISTORY, <https://nflpa.com/posts/meet-the-four-men-who-broke-the-nfl-s-color-line> [<https://perma.cc/NV25-45NQ>]. (“In 1920, Fritz Pollard became the first African American to play in the NFL during its formative years. However, in the years after Pollard’s departure, the NFL owners imposed a ‘gentleman’s agreement’ preventing the signing of more Black players. The four men below are credited with re-integrating the NFL in 1946. The Los Angeles Coliseum threatened to evict the Los Angeles Rams unless the team signed an African-American player, which set the stage for UCLA stars Kenny Washington and Woody Strode to join the roster. A few months later, Bill Willis and Marion Motley started their journeys in professional football with the Cleveland Browns.”).

95. *See e.g.*, Janice Madden, *Differences in the Success of NFL Coaches by Race, 1990-2002: Evidence of Last Hire, First Fire*, 5 J. SPORTS ECON. 6 (2004).

96. Harriot, *supra* note 86.

97. *Id.*

than a full season less than the 5.7 year tenure white head coaches have historically averaged.⁹⁸

This contradicts the myth that winning is NFL owners' only goal when it comes to hiring, and it suggests that NFL owners' current method for selecting and removing head coaches sometimes prioritizes maintaining racial power structures over achieving better results. In 2018, the Detroit Lions set a particularly egregious example when they fired Jim Caldwell, a Black head coach who led the team to a higher winning percentage during his four-year tenure than any other head coach employed by the team over the past sixty years.⁹⁹ The Lions have never won more games during a four-year stretch than they did under Caldwell's leadership, and they have not finished a single season with a winning record since they terminated his employment.¹⁰⁰ Meanwhile, Caldwell has never received another chance to serve as an NFL head coach.¹⁰¹

Myth #4: NFL Head Coaches and Other Hiring Parties Conduct Broad Searches for Talent When Hiring Assistant Coaches

Nepotism is pervasive in NFL hiring. Longtime white coaches have acknowledged taking part in "unspoken gentlemen's agreement[s]" that "award apprenticeships to sons of old colleagues" to maintain a cycle that will yield future opportunities for their own kids.¹⁰² According to a recent study, in a given year, more than one-third of NFL head coaches and almost one-quarter of NFL coordinators may be related to a current or former NFL coach.¹⁰³ Entering the 2022 NFL season, twenty-four head coaches and coordinators had relatives who also coached in the NFL. All twenty-four identify as white. The prevalence of positions awarded to relatives in the NFL not only illustrates the difficulty coaches of color face

98. *Id.*

99. See *Detroit Lions Franchise Encyclopedia*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/det/index.htm> [<https://perma.cc/7FZK-7NE8>].

100. *Id.*

101. Sheinin et al., *supra* note 5.

102. Jenkins, *supra* note 91.

103. Kalyn Kahler, *Just How Big a Problem Is Nepotism in NFL Coaching?*, DEFECTOR (Jan. 3, 2022, 10:26 AM) <https://defector.com/just-how-big-a-problem-is-nepotism-in-nfl-coaching/> [[https://perma.cc/928\]-HKKR](https://perma.cc/928]-HKKR)].

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in getting lucrative coaching positions, but it underscores the lack of institutionalized fair hiring practices when it comes to the recruiting and retention of senior employees. It is difficult to adequately emphasize either the magnitude of the problem or the perception of institutionalized unfairness that occurs when coaches of color see a system that preaches ideals like “meritocracy” and “competitive balance” and nonetheless know that someone is more likely to get a job because of their familial relationship rather than their merit.

There are other relationship issues that also contribute to and exacerbate an unfair hiring system. Many coaching candidates are often hired in part based on the relationships they have formed with more established head coaches. These so-called “coaching trees” are responsible for producing a disproportionate number of head coaching opportunities.¹⁰⁴ In fact, many coaches can trace their lineage back to a certain head coach for whom they previously worked as an assistant. The reliance on this system operates to the detriment of coaches of color because most coaching trees are headed by white head coaches themselves who then go on to select the remainder of their coaching staff. The Tony Dungy coaching tree is both proof of the negative and positive impact that coaching trees can have. Over the past twenty-five years, more than half of the Black candidates who have been hired as full-time head coaches followed an alternative path to a top job through the “coaching tree” of Tony Dungy, the first Black head coach to win the Super Bowl.¹⁰⁵ While we can applaud the success of the Dungy coaching tree, it also reaffirms the problem that a potential coach’s future hiring can be very dependent on whom he has worked with in the past. That would not be as much of a problem if there was not such a wide disparity in outcomes between white coaches and coaches of color in the NFL hiring system. But the statistics demonstrate that the prevalence of existing white head coaches and their coaching trees creates a positive feedback loop that clearly favors white candidates seeking head coaching positions in the future.

104. See Adam Kilgore, *Branching Out*, WASH. POST (Oct. 12, 2018), <https://www.washingtonpost.com/graphics/2018/sports/nfl-coaching-trees-connecting-every-active-coach/> [https://perma.cc/TW3V-KT6T].

105. Sheinin et al., *supra* note 5.

Myth #5: All Position Coaches and Coordinators Are Equal
Candidates for Promotions

The contemporary NFL head coaching market favors young, offensive-minded coaches with experience overseeing quarterbacks.¹⁰⁶ This adversely affects candidates of color who have traditionally been funneled away from offensive coaching opportunities.¹⁰⁷ Much as the NFL once followed the bigoted view that Black men could not be good quarterbacks, the League today provides minority coaches with few opportunities to serve as offensive coordinators. Most NFL head coaches hired in the past ten years previously served as an offensive coordinator in the NFL for at least one full season.¹⁰⁸ However, just fourteen of the 133 offensive coordinators hired during that same span identify as people of color—fewer than 11%.¹⁰⁹ Meanwhile, more than 41% of the defensive coordinators hired over the past ten years identify as people of color.¹¹⁰ In other words, Black coaches are significantly more likely to be siphoned to defensive roles, while white coaches are over-represented in offensive coordinator positions both among coaching positions and players in those same positions. During the last coordinator hiring cycle, NFL teams hired twelve white offensive coordinators and one non-white offensive coordinator, but they hired five white defensive coordinators and seven non-white defensive coordinators.¹¹¹ The NFL's troubling "reshuffling effect" also resurfaces in offensive coordinator hiring. Over the past twenty years, more than a quarter of new offensive coordinator hires had previous experience serving as an NFL head coach or offensive coordinator for a different team. Nearly 92% of those reshuffled coaches identify as white.¹¹² These League-wide trends function as a barrier for minority coaches hoping to climb the coaching ladder through the well-established offensive track.

106. *Id.*

107. *See* Wash. Post Staff, *supra* note 42; *see also* Harrison & Bukstein, *supra* note 78, at 16.

108. Harrison & Bukstein, *supra* note 78, at 16.

109. *Id.*

110. *Id.*

111. *Id.* at 8.

112. *Id.* at 26.

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When coaches of color do receive opportunities to coach on the offensive side of the ball, they are disproportionately likely to oversee running backs or receivers, rather than quarterbacks. Last season, thirty men of color served as running back coaches and twenty men of color served as wide receiver coaches, while just three men of color coached quarterbacks.¹¹³ Coaching quarterbacks is a vital steppingstone to an offensive coordinator title. More than 65% of NFL offensive coordinators have prior experience working as a quarterback coach at the NFL level, but more than 90% of the quarterback coaches hired in the past two decades have identified as white.¹¹⁴ This additional barricade reinforces decades of racist stereotypes that Black men are not suited for quarterback-adjacent positions,¹¹⁵ and it prevents offensive coaches of color from entering the head coaching pipeline by working as offensive coordinators. Since 1990, only 30% of Black full-time NFL head coaches climbed the coaching ladder through the more common offensive track.¹¹⁶ Today, Black coaches make up just 16% of offensive coordinators, and only one head coach of color comes from an offensive background.¹¹⁷

Still, even membership to a prestigious coaching tree and offensive pedigree is no guarantee of success. In 2019, the NFL made headlines when its member teams chose not to hire Kansas Chiefs offensive coordinator Eric Bieniemy to fill any of eight vacant head coaching positions.¹¹⁸ Many saw Bieniemy as a candidate who could overcome the NFL's systemic discrimination—he had played in the NFL for nine seasons, apprenticed under Kansas City Chiefs head coach Andy Reid, who is well known for producing future head coaches, and coached on the offensive

113. *Id.* at 25.

114. Harrison & Bukstein, *supra* note 78, at 25-26.

115. See, e.g., Lloyd Vance, *The Complete History of the African American Quarterbacks in the National Football League (NFL)—Part 1*, 27 COFFIN CORNER 1 (2005); Eugenio Mercurio & Vincent F. Filak, *Roughing the Passer: The Framing of Black and White Quarterbacks Prior to the NFL Draft*, 21 HOW. J. COMM'C'N 56 (2010); Brian D. Volz, *Race and Quarterback Survival in the National Football League*, 18 J. SPORTS ECON. 850 (2017).

116. Sheinin et al., *supra* note 5.

117. *Id.*

118. Adam Kilgore, *The NFL Has Just Three Black Head Coaches. Some Call It a 'Denial of Opportunity'*, WASH. POST (Dec. 19, 2019), <https://www.washingtonpost.com/sports/2019/12/19/nfl-has-just-three-black-head-coaches-some-call-it-denial-opportunity/> [https://perma.cc/4DA6-VFX4].

side of the ball, coordinating the third-highest-scoring offense in the history of the NFL.¹¹⁹ Both of Bieniemy's predecessors in Kansas City were hired to head coaching positions after spending two to three years working as the team's offensive coordinator.¹²⁰ Five years, three Super Bowl appearances, and sixteen head coaching interviews later, Eric Bieniemy remains waiting for his opportunity to lead an NFL team.¹²¹

Myth #6: The NFL's Only Diversity Problem Is in Coaching Hiring

In early 2022, NFL Commissioner Roger Goodell faced withering questions during his Super Bowl press conference about the failure of the Rooney Rule in the latest cycle of NFL coaching hires. Then reporter Jim Trotter raised the issue of the lack of diversity beyond coaching hires. "When we look at the League office, of the top eleven executives, there are only two people of color," Trotter said. "When we look at NFL Media Group, where I work, there is not one Black person at the senior level in the newsroom who makes decisions about a League whose player population is 70% Black. Why does the NFL and its owners have such a difficult time at the highest levels hiring Black people into decision-making positions?"¹²²

The NFL and its member teams' failure to hire and retain diverse head coaches is most visible because of head coaches' role as the face of the teams that employ them. However, the NFL and its owners have similarly failed over time to facilitate diversity and inclusion among teams' executive hires. The NFL has only kicked off two seasons with more than

119. *Id.*

120. *Id.*

121. Jason Reid, *Eric Bieniemy Has Waited Long Enough to Become an NFL Head Coach*, ANDSCAPE (Sept. 15, 2022), <https://andscape.com/features/eric-bieniemy-has-waited-long-enough-to-become-an-nfl-head-coach/> [<https://perma.cc/WZ38-CFCE>]; Charean Williams, *Colts Announce Completed Interview with Eric Bieniemy*, PROFOOTBALLTALK (Jan. 12, 2023), <https://profootballtalk.nbcsports.com/2023/01/12/colts-announce-completed-interview-with-eric-bieniemy/> [<https://perma.cc/H89R-LGGL>].

122. Charean Williams, *Roger Goodell on Lack of Diversity Within League Office: We're Not Doing Good Enough*, PROFOOTBALLTALK (Feb. 9, 2022, 9:08 PM), <https://profootballtalk.nbcsports.com/2022/02/09/roger-goodell-on-lack-of-diversity-within-the-league-office-were-not-doing-good-enough/> [<https://perma.cc/P5QW-6ZS8>].

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10% of its member teams employing a president or CEO of color, and the NFL has never started a season with more than 20% of its member teams employing a president or CEO of color.¹²³ Moreover, the NFL has never kicked off a season during which more than 20% of its member teams' vice presidents or 25% of its member teams' general managers identify as people of color.¹²⁴ Over the past thirty years, NFL owners have hired people of color to fill fewer than 15% of their open general manager positions, and they have given general managers of color shorter tenures than their white peers.¹²⁵ Almost half of the NFL's teams have never hired a general manager of color,¹²⁶ and until 2020, no NFL team had ever hired a president or CEO who identifies as Black.¹²⁷ The NFL also has never kicked off a season during which more than 10% of its member teams' presidents or CEOs or 26% of its member teams' vice presidents identify as women.¹²⁸

The NFL's lack of diversity and inclusion looks even worse when compared with the diversity and inclusion fostered by the National Basketball Association (NBA). Like the NFL, the NBA is a major American sports league that mostly employs players of color.¹²⁹ Unlike the NFL, however, the NBA's member teams have filled 50% of their head coaching positions and 50% of their general manager positions with leaders of color.¹³⁰ Entering the 2022 NBA season, NBA teams employ people of color in more than 25% of their chief executive and vice president positions and 30% of their senior management positions.¹³¹ Furthermore, NBA teams employ women in more than 25% of their chief executive positions, 30%

123. Lapchick, *supra* note 62, at 16-22.

124. *Id.* at 17-20, 53.

125. Harrison & Bukstein, *supra* note 78, at 16.

126. *Id.* at 22.

127. Jason Reid, *The Historic Hiring of Jason Wright, the NFL's First Black Team President*, ANDSCAPE (Aug. 17, 2020), <https://andscape.com/features/historic-hiring-jason-wright-washington-football-team-nfl-first-black-team-president/> [<https://perma.cc/BL4L-WWP3>].

128. Lapchick, *supra* note 62, at 16-20.

129. *Id.* at 9.

130. *Id.* at 16-20.

131. *Id.* at 20-21.

of their vice president positions, and nearly 40% of their senior management positions.¹³²

E. A Firsthand Account: Analyzing the Brian Flores Lawsuit in the Context of the Structural and Institutional Barriers to Fair Hiring

On February 1, 2022, Brian Flores filed a class action lawsuit against the NFL and its thirty-two member teams for discriminating against qualified coaching candidates based on their race and ethnicity. Flores' complaint, which has since been joined by two additional coaches, provides a first-hand account of the ways in which the NFL and its owners have contributed to the systemic discrimination of minority leaders. Flores' complaint alleges sham interviews and deliberate manipulation of the Rooney Rule, and it includes text messages from an active NFL head coach as proof of the duplicity within NFL hiring.¹³³ It also shows the ways in which the statistical trends presented above bear out in practice, demonstrating how NFL owners hire Black coaches when their teams are in disarray, fire Black coaches after winning seasons, neglect to "reshuffle" Black coaches, and guide Black coaches into defensive roles.

Brian Flores began his NFL career in 2004, when he was hired as a scouting assistant by the New England Patriots after earning praise for his football aptitude as a player at Boston College.¹³⁴ Flores identifies as Black, and he overcame long odds to earn his chance as an NFL scout. He grew up amid high poverty, crime, and unemployment rates in the housing projects in Brownsville, Brooklyn, New York after his parents immigrated to the United States from Honduras.¹³⁵ He and his family heard gunfire outside their building almost every night.¹³⁶ Two of Flores' four brothers were mugged at knifepoint on separate trips to their local video game store, and

132. *Id.*

133. See First Amended Class Action Complaint, *Flores v. Nat'l Football League*, No. 22-cv-00871 (S.D.N.Y. filed Apr. 7, 2022), <https://www.courthouse-news.com/wp-content/uploads/2022/04/nfl-amended-complaint.pdf> [<https://perma.cc/R6G9-NXAF>].

134. Ian O'Connor, *The Patriots' Next Coaching Star? His Odds Were Incredibly Long*, ESPN (Mar. 7, 2018), https://www.espn.com/nfl/story/_/s/id/22262842/brian-flores-new-england-patriots-next-coaching-star-emerge-bill-belichick-tree [<https://perma.cc/GQ2U-BY9M>].

135. *Id.*

136. *Id.*

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many of Flores and his brothers' friends joined gangs after finishing middle school.¹³⁷ Despite his surroundings, Flores was a grade-A student, and he was recruited to play football at an affluent private high school through a scholarship program for athletes from low-income backgrounds.¹³⁸ It took Flores ninety minutes to commute to school, but he excelled on the football field and in the classroom, and his success followed him from high school to college to the NFL.

Flores spent four years working as a scout for the New England Patriots before transitioning to a coaching position with the team in 2008.¹³⁹ During his coaching tenure, Flores received multiple promotions, although he was steered from an offensive to a defensive track early in his career like many of his Black peers. Flores worked his way up from assistant positions on special teams, offense, and defense to become a defensive position coach in 2012, and he eventually became the team's de facto defensive coordinator in 2018.¹⁴⁰ Over the same time period, the Patriots appeared in five Super Bowls, winning three of them. Flores called the Patriots' defensive plays in the last of these Super Bowls, and the Patriots held the Los Angeles Rams to three points, tied for the fewest ever in a Super Bowl.¹⁴¹ In 2019, following his outstanding performance with the Patriots, Flores was offered a head coaching position by Stephen Ross, the owner of the Miami Dolphins. Flores was the only head coach of color hired that year, despite eight teams needing to fill openings.¹⁴²

The Dolphins owner fired Brian Flores after just three seasons. In his first season as the Dolphins head coach, Flores inherited a gutted roster. The team traded away its starting quarterback and several other key players before the season began, and one ESPN expert predicted the team

137. *Id.*

138. *Id.*

139. *Id.*

140. O'Connor, *supra* note 134.

141. See *Boston/New England Patriots Franchise Encyclopedia*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/nwe/index.htm> [<https://perma.cc/W8Q6-NYVM>].

142. Sean Wagner-McGough, *Grading the Eight NFL Head Coach Hires: Bruce Arians, Vic Fangio, Freddie Kitchens Receive Highest Marks*, CBS SPORTS (Feb. 7, 2019, 10:14 AM), <https://www.cbssports.com/nfl/news/grading-the-eight-nfl-head-coach-hires-bruce-arians-vic-fangio-freddie-kitchens-receive-highest-marks/> [<https://perma.cc/X5AS-8XQP>].

would lose every single one of its games.¹⁴³ Three games into the season, the *Washington Post* ran a story with the headline, “The Dolphins could be the worst team in NFL history.”¹⁴⁴ Under Flores’ leadership, however, the team rallied to win five of its last nine games, despite leading the League in snaps played by rookies.¹⁴⁵

After the season concluded, reports surfaced that Stephen Ross was unhappy with Flores’ performance because Flores actually led the team to win too many games. According to the reports, Ross allegedly wanted Flores to “tank” the Dolphins season to put the team in position to secure the first pick in the ensuing year’s draft, and he allegedly told Flores that he would pay him \$100,000 for each game the Dolphins lost that year.¹⁴⁶ Ross’ alleged request might constitute a violation of the Sports Bribery Act, and Flores would have similarly violated the law if he followed his employer’s instructions.¹⁴⁷ Instead, Flores made clear to Ross that he would not agree to lose games on purpose, and that he would try his best to win every game the Dolphins played. Flores memorialized Ross’ desire to lose in a memorandum that he circulated to the Dolphins’ General Manager, Chief Executive Officer, and Senior Vice President of Football and Business Administration on December 4, 2019, detailing the toxicity that existed within the Dolphins organization and explaining the unreasonable position he was being placed in by the team’s ownership and upper

143. Safid Deen, *ESPN Analyst Predicts Miami Dolphins Will Lose Every Game in 2019*, SUN SENTINEL (May 20, 2019), <https://www.sun-sentinel.com/sports/miami-dolphins/fl-sp-dolphins-season-projections-20190520-4vaiimrvrgz3iyamatove73exe-story.html> [<https://perma.cc/24PY-3QC7>]

144. Neil Greenberg, *The Dolphins Could Be the Worst Team in NFL History*, WASH. POST (Sept. 24, 2019), <https://www.washingtonpost.com/sports/2019/09/24/miami-dolphins-could-be-worst-team-nfl-history/> [<https://perma.cc/HLZ7-29GL>].

145. Kyle Crabs, *The 2019 Miami Dolphins Led the NFL in Snaps Taken by Rookies*, DOLPHINSWIRE (Jan. 2, 2020), <https://dolphinswire.usatoday.com/2020/01/02/the-2019-miami-dolphins-led-the-nfl-in-snaps-taken-by-rookies/> [<https://perma.cc/8RN2-CEE8>].

146. First Amended Class Action Complaint at 46, *Flores v. Nat’l Football League*, No. 22-cv-00871 (S.D.N.Y. filed Apr. 7, 2022), <https://www.courthousenews.com/wp-content/uploads/2022/04/nfl-amended-complaint.pdf> [<https://perma.cc/R6G9-NXAF>].

147. See Sports Bribery Act, 18 U.S.C. § 224.

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management.¹⁴⁸ Flores' decision not to break the law was the beginning of the end of his tenure coaching the Dolphins.

According to the reports, after the end of the 2019 season, Ross again began to pressure Flores to break League rules. This time, Ross pressured Flores to violate the NFL's tampering policy by recruiting a prominent quarterback before the start of free agency and the League's "legal tampering period."¹⁴⁹ When Flores declined, Ross invited Flores to lunch on a yacht in an attempt to stage an impromptu meeting between the coach and quarterback. Shortly after Flores arrived for lunch, Ross told Flores that the quarterback was "conveniently" arriving at the marina. Flores refused the meeting and left the yacht immediately. However, he was punished for obeying League rules when he returned to the workplace. After these incidents took place, Flores was treated with disdain, made to feel uncomfortable, and held out as someone who was noncompliant and difficult to work with—typical discriminatory stereotypes that are regularly applied to Black people and not white people.¹⁵⁰

During his next two seasons as the Dolphins head coach, Flores led the team to consecutive winning records for the first time in seventeen years. He finished the seasons with an overall record of nineteen wins and fourteen losses despite receiving below-average play from his starting quarterback,¹⁵¹ and he received buzz as a coach of the year candidate from ESPN.¹⁵² Nonetheless, Flores was terminated by the Dolphins and subsequently labeled as abrasive and difficult to work with because he refused to tank or tamper in violation of League rules.¹⁵³ As Flores points

148. Mike Florio, *Brian Flores Says He Sent Memo to Dolphins Executives Regarding Stephen Ross's Desire to Lose Games*, PROFOOTBALLTALK (Apr. 7, 2022, 11:57 AM), <https://profootballtalk.nbcsports.com/2022/04/07/brian-flores-says-he-sent-memo-to-dolphins-executives-regarding-stephen-rosss-desire-to-lose-games/> [<https://perma.cc/2NDX-XEHH>].

149. First Amended Class Action Complaint at 47, *Flores*, No. 22-cv-00871.

150. *Id.*

151. Paine, *supra* note 58.

152. See Cameron Wolfe, *Why Dolphins' Brian Flores Should Be NFL Coach of the Year*, ESPN (Jan. 2, 2021), https://www.espn.com/blog/miami-dolphins/post/_/id/32046/why-dolphins-brian-flores-should-be-nfl-coach-of-the-year [<https://perma.cc/EN5G-2DJX>].

153. See, e.g., Ben Solak, *The Dolphins Didn't Fire Brian Flores Because of His Coaching*, THE RINGER (Jan. 10, 2022), <https://www.theringer.com/nfl/2022>

out in his complaint, these labels elicited an “angry Black man” stigma “that is commonly cast upon Black men who are strong in their morals and convictions while white men are coined as passionate.”¹⁵⁴ Dolphins players and others around the League expressed public shock and disappointment when they heard the news that Flores was fired.¹⁵⁵

The facts make clear that Flores is extremely qualified—he worked his way up through successive coaching positions in a tremendously successful franchise, had a proven track record of success, and turned a losing franchise around into a winning one. Accordingly, Flores re-entered the NFL head coaching market after his termination as one of the top candidates available. His ensuing experience in the process of head coach hiring was entirely inconsistent with his record and qualifications.

On January 11, 2022, just one day after being fired, Flores received a text message from an executive in the New York Giants’ front office. In an ensuing phone call, the executive allegedly told Flores that the Giants’ owner John Mara was extremely interested in hiring him for the team’s vacant head coaching position. After the call, Flores exchanged text messages with Giants executives about who he might want to bring in as his assistant coaches and coordinators, and he called the Giants head coaching position his “dream job.”¹⁵⁶ Flores also discussed his candidacy with Mara over Zoom, and a team executive texted Flores saying he hoped Flores would come in and win the job.¹⁵⁷

On January 24, 2022, the Giants finalized Flores’ interview date for January 27, 2022. Later that day, however, Flores heard from Bill Belichick, his former head coach on the Patriots, that the Giants were already set on hiring somebody else. Belichick was obviously privy to inside information, and he accidentally sent Brian Flores a congratulatory text after confusing him for Brian Daboll, the white coach that the Giants actually planned to hire.¹⁵⁸ Flores thus learned three days before his interview that “the

/1/10/22876955/brian-flores-fired-miami-dolphins-stephen-ross
[<https://perma.cc/37D2-UBP7>].

154. First Amended Class Action Complaint at 47, *Flores*, No. 22-cv-00871.

155. See, e.g., Chris Cwik, *Dolphins Players, Rest of NFL React to Brian Flores Getting Fired: ‘I’m Sick,’* YAHOO! SPORTS (Jan. 10, 2022), <https://sports.yahoo.com/dolphins-players-rest-of-nfl-react-to-brian-flores-getting-fired-im-sick-170451689.html> [<https://perma.cc/R9U5-RGPE>].

156. First Amended Class Action Complaint at 48, *Flores*, No. 22-cv-00871.

157. *Id.* at 49.

158. *Id.* at 50.

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Giants' continued courtship was nothing more than a discriminatory facade designed to show false compliance with the Rooney Rule" requirement that the Giants interview at least two coaches of color.¹⁵⁹

The Giants had already decided to hire Daboll and communicated their decision to multiple third parties, including Belichick. Apparently, they had no plans to tell Flores he was out of the running.¹⁶⁰ The facts suggest that Flores' interview was *designed* to be a sham so that the Giants could *check the Rooney Rule box* requiring them to merely interview a candidate of color. Flores still spent the days before his interview preparing, but he knew as he spoke with Giants management during his interview that he was not receiving serious consideration. The Giants publicly announced Brian Daboll as their next head coach the day after Flores' interview. The Giants, who could not even get the sham interview right, nonetheless fulfilled the technical components of a rule that once again failed to provide a meaningful opportunity to a coach of color.

The role played by the Giants in the Flores case is illustrative of the systemic issues at play in the battle for fair and equitable hiring practices. As background, the New York Giants organization has existed under the ownership of the Mara family for nearly one hundred years. During that time, it has never hired a Black head coach.¹⁶¹ The head coaches of the Giants hired prior to interviewing Flores were also not successful. In the six years before choosing Daboll over Flores, the Giants cycled through three white head coaches and one white interim head coach who led the team to a combined thirty-three wins and sixty-four losses.¹⁶² None of these coaches arrived with a résumé that made them stand out when compared with Flores or their other Black peers, and none of these coaches lasted more than two seasons with the team.¹⁶³

159. *Id.* at 49.

160. *See, e.g.,* @JimmyRandazzo, TWITTER (Jan. 28, 2022), <https://twitter.com/JimmyRandazzo/status/1487168987725185025> [<https://perma.cc/MHY8-KYFY>].

161. Adam Kilgore & Nicole Dungca, *Thirteen NFL Teams Have Never Had a Black Head Coach. Here's One Franchise's Story*, WASH. POST (Nov. 21, 2022), <https://www.washingtonpost.com/sports/interactive/2022/ny-giants-head-coach-history/> [<https://perma.cc/FY2T-3XPK>].

162. *See New York Giants Franchise Encyclopedia*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/nyg/index.htm> [<https://perma.cc/GD89-7QHT>].

163. Kilgore & Dungca, *supra* note 161.

The Giants owner, John Mara (son of Wellington Mara, who was one of the pivotal founders of the NFL), is the Chairman of the NFL's Executive Committee. He also sits on the NFL's workplace diversity committee, which claims to seek diverse candidates for leadership positions. Former employees and industry experts have described the Giants as an insular organization that hires coaches and executives using "a process built on personal connections and referrals from overwhelmingly white networks, with largely white hiring panels and little accountability on diversity."¹⁶⁴ The Giants organization does not employ a staff member dedicated to diversity, equity and inclusion.¹⁶⁵ According to one former employee who worked in the Giants front office from 2007 to 2017, even if the team is not overtly racist or malicious, it does little to mitigate "inherent and unconscious biases" that disadvantage minority candidates.¹⁶⁶ The employee went on to tell the *Washington Post* that there is "no question" that the Giants owner imagines a white man when he pictures a leader of his team, despite the fact that most of the Giants' players are Black and most of the Giants' fans hail from New York and New Jersey, one of the most diverse communities in the country.¹⁶⁷ An anonymous NFL coaching agent added that associates within the League have cautioned him against sending Black clients to interview with the Giants because they might receive "a joke interview."¹⁶⁸ These associates warned that "[the Giants] are not going to hire a Black head coach. They're just not."¹⁶⁹ The Giants have hired twenty-two head coaches to date. All of them have been white. Moreover, according to Flores, the Giants have only interviewed more than the minimum number of Black candidates once since the passage of the Rooney Rule.¹⁷⁰ To some, this suggests the Giants' primary interest in interviewing diverse candidates is satisfying the NFL's mandate.

164. *Id.*

165. *Id.*

166. *Id.*

167. *See New York Giants Roster*, N.Y. GIANTS, <https://www.giants.com/team/players-roster/> [<https://perma.cc/F25K-UQE>].

168. Kilgore & Dungca, *supra* note 161.

169. *Id.*

170. First Amended Class Action Complaint at 51-52, *Flores v. Nat'l Football League*, No. 22-cv-00871 (S.D.N.Y. filed Apr. 7, 2022), <https://www.courthouse.com/wp-content/uploads/2022/04/nfl-amended-complaint.pdf> [<https://perma.cc/R6G9-NXAF>].

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The Giants are not unique. Since 1990, thirteen teams have failed to hire a full-time Black head coach despite filling a combined ninety openings during the time period.¹⁷¹ One of the Black candidates that the Giants interviewed in a recent hiring cycle, Pittsburgh Steelers defensive coordinator Teryl Austin, has interviewed eleven times for head coaching positions without getting hired.¹⁷² “Maybe I’m not what the owners see when they look in the mirror and they see leadership positions,” Austin told the Associated Press.¹⁷³ Austin has served as a defensive coordinator for three NFL teams and coached in three Super Bowls. Multiple teams that turned him down for a head coaching position have never hired a Black head coach and have been accused of conducting sham interviews for minority candidates.¹⁷⁴

The facts as alleged in the Flores case provides both independent verification and contextual understanding of the pervasiveness of the ingrained systems within the NFL that thwart fair hiring despite the supposed allegiance to the Rooney Rule.

F. A View from Inside the NFL’s Coaching World: The NFLPA’s Survey of Current and Former NFL Coaches of Color

The NFLPA’s survey of current and former NFL coaches of color demonstrates that an overwhelming majority of coaches of color have experienced and believe that there is a systemic pattern of blocking diverse candidates from assuming leadership positions. Its results confirm that Brian Flores’ encounter with the NFL’s system of discrimination is not out of the ordinary.

In an effort to build a contemporary understanding of how NFL insiders view the NFL’s operations with respect to diversity, the NFLPA conducted a confidential survey of current and former coaches of color in

171. Kilgore & Dungca, *supra* note 161.

172. John Perrotto, *Teryl Austin Can Rebuild Résumé as Pittsburgh Steelers’ New Defensive Coordinator*, FORBES (Feb. 9, 2022), https://www.forbes.com/sites/johnperrotto/2022/02/09/teryl-austin-can-rebuild-resume-as-pittsburgh-steelers-new-defensive-coordinator/?sh=412b4ca6eba0&itid=lk_inline_enhanced-template [https://perma.cc/J5QH-B7HG].

173. Kilgore & Dungca, *supra* note 161.

174. First Amended Class Action Complaint at 71, *Flores*, No. 22-cv-00871. See also Kilgore & Dungca, *supra* note 161.

March 2022.¹⁷⁵ As part of the survey, the NFLPA asked current and former coaches eighteen questions via email aimed at issues of fairness and transparency in the NFL workplace. These questions appear in full in the appendix. The survey had a reply rate of 72.3%.

The data the NFLPA collected provides additional insight into the bleak reality of NFL coaching and executive hiring, and it provides the best evidence yet that the NFL acts as a safe harbor for systemic and institutional practices that result in depriving coaches of color and candidates of color from a fair and equal opportunity. Despite working in a modern climate that increasingly demands diversity, equity and inclusion, an overwhelming majority of survey respondents—almost 90%—reported that the NFL and its owners do not adhere to federal statutes against discrimination. Nearly 70% of survey respondents reported that the NFL League office is not responsive to equity, discrimination, and fair hiring issues. In addition, 50% of respondents reported that their teams do not have a diversity and inclusion policy, and 80% of respondents reported that they were never briefed on fair employment guidelines set forth by the United States Equal Employment Opportunity Commission or related laws and regulations governing fair employment.

Survey respondents also corroborated owners' responsibility for member teams' inequitable employment statistics. A whopping 90% of survey respondents said they believe that race plays a role in owners' decisions to hire their head coaches and coordinators, and more than 50% of respondents said they believe race influences the length of NFL coaches' contracts. Respondents went on to confirm that NFL owners oversee a hiring system built around a complete lack of transparency when it comes to coaches' salaries and benefits, and many respondents used the NFLPA's survey to call for more transparency in NFL hiring. Nearly every respondent surveyed said they believe that the NFL Coaches Association has done nothing to help coaches.

These results serve as an indictment of the NFL's commitment to promoting equitable and fair workplaces, and they paint a picture of the NFL as a league content to rely heavily on diverse players but not on diverse leaders. The League's widespread lack of candor, lawful employment practices, and transparency inhibits fair treatment for every coach and candidate and is likely to disproportionately penalize candidates of color. Right now, the NFL has offered no real transparency

175. The NFLPA is a labor union representing NFL players. See NFLPA, <https://nflpa.com> [<https://perma.cc/G67J-TP7X>].

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(other than the unintended revelations in the Flores lawsuit) regarding how coaches are recruited, hired, paid, promoted, or retained. Without a transparent employment process, all prospective employees are left with is data suggesting that the best way to obtain a successful career in an NFL leadership position is to be white and related to a former coach or executive.

The NFLPA survey results reveal a troubling pattern in the NFL that begins with the absence of industry-standard procedures and transparency or accountability measures. The results also serve as additional evidence that the NFL's current policies have done little to curb the systemic racial discrimination in hiring, retention and termination of NFL coaches and executives that persists around the League.

III. BARRIERS TO REFORM: HOW NFL OWNERS DODGE ACCOUNTABILITY

A. *NFL Owners Have Unchecked Discretion over Hiring Decisions*

NFL owners use the League's feudal structure to preserve a system in which they can maneuver with minimal opposition to day-to-day operations or employment decisions. In traditional businesses, chief executives or corporate boards establish operating mandates, including governance, compliance, and reporting requirements that must be implemented by various business units. In the NFL, the opposite is true. Individual business units, the member teams, dictate the defining operating rules of the League, and they assign these operating orders to the League's chief executives and Commissioner for implementation at the League level. This means that in the NFL, the Commissioner cannot resolve issues of employment discrimination through direct orders to owners of member teams. Executive Vice President Troy Vincent captured this sentiment in the NFL's 2022 Diversity and Inclusion Report on occupational mobility patterns, where he wrote that "[t]he NFL is committed to attaining a diverse and inclusive workforce of coaches and front office personnel. *But the one missing component to reaching this goal is the ability to change the hearts of those who are in charge of hiring.*"¹⁷⁶ This statement is obviously true, but Vincent did not explain why this is the case: owners have refused to subject themselves to a governance system that regulates their individual prejudices to create a fairer hiring system.

176. Harrison & Bukstein, *supra* note 78, at 4 (emphasis added).

The NFL League office, to its credit, employs a much more diverse front office than the average NFL member team.¹⁷⁷ But this has not had a trickle down-effect. In a recent interview, Vincent discussed promotion of coaches with the *Washington Post*: “[w]e’ve exhausted ourselves with programs, initiatives, [and] making sure that [owners] are aware of who’s out there [as candidates]. But we don’t make the hire[s].”¹⁷⁸

NFL teams make the hires, and, bolstered by a structure that facilitates complete control and insulates them from critique, do not feel pressure to conform to traditional corporate hiring procedures. There are no industry-wide standards, processes, or procedures governing the way NFL owners identify, interview, and select head coaches and team executives.¹⁷⁹ Owners do not make League-wide postings when they need to fill openings. There is no job bank or information system that informs applicants or job seekers of League-wide job descriptions, salaries, or benefits, and there are not any resources that allow applicants to compare jobs, governance, or opportunities across all teams. As an interested applicant, a coach must pursue employment without reliance on the League for standardized job descriptions, formal interview protocols, or transparent criteria through which candidates are evaluated and compared. The NFL has never articulated any mechanism to ensure that teams adhere to non-discrimination laws or equal employment policies. As a result, teams face no real checks that are designed to ensure diverse outcomes or hold owners accountable when they make hiring decisions. On the contrary, we know that general managers and other team personnel routinely ask players seeking employment at the NFL Scouting Combine questions that are likely impermissible—and at best improper or insensitive—and that these actions have persisted for years.¹⁸⁰

The NFL teams’ casual and non-uniform hiring culture contributes to the lack of diversity seen around the League in several ways. First, the

177. LAPCHICK, *supra* note 62, at 2.

178. Sheinin et al., *supra* note 5.

179. See, e.g., Sean Tomlinson, *The Terrifying Process of Hiring a New Head Coach in the NFL*, BLEACHER REPORT (Jan. 3, 2017), <https://bleacherreport.com/articles/2684789-the-terrifying-process-of-hiring-a-new-head-coach-in-the-nfl> [<https://perma.cc/KGX7-MEB8>].

180. See, e.g., Joe Rivera, *NFL Combine Controversial Interview Questions, from Prostitution to Virginitly & More*, SPORTING NEWS (Mar. 1, 2023), <https://www.sportingnews.com/us/nfl/news/nfl-combine-controversial-questions/dwblwnglywtunjqlphbutkx> [<https://perma.cc/NR5K-34LY>].

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teams' lack of uniform standards for posting, advertising, and interviewing for open positions reinforces a buddy and family system of hiring that allows owners to pass over qualified candidates without meaningful scrutiny.¹⁸¹ One might expect every NFL team to conduct itself like any other \$4-5 billion dollar entity when it engages in a search for a leader to guide its core product. However, unlike most multibillion-dollar entities, NFL teams rarely if ever employ search firms or engage professional recruiters. Instead, year after year, there is a recycling of coaching talent who already have strong ties to other senior coaches. Second, some teams require prospective candidates to receive their respective owners' permission to seek jobs with other teams, even if they are seeking lateral positions. Third, the complete lack of transparency and information about coaches' and executives' salaries and benefits gives owners a tremendous amount of power and leverage over the hiring process. NFL coaches have steadfastly refused to unionize, and this has resulted in both a lack of standard salaries and benefits, as well as a lack of knowledge within the marketplace that coaches could use to make decisions about whether to seek or accept new jobs or promotions. Fourth, the lack of transparency during the hiring process makes it nearly impossible for diverse candidates to know whether interviews they receive are being conducted in a fair and lawful method. These factors create a system that favors teams over prospective employees.

Most large corporations today employ full-time empowered human resources officers and diversity and inclusion officers to safeguard against blind spots that create conscious and unconscious bias in hiring. Most NFL teams do not.¹⁸² In 2020, the NFL appeased the public by hiring Jonathan Beane as its first chief diversity and inclusion officer following the murder of George Floyd.¹⁸³ Beane has not made any public comments about Brian

181. See, e.g., Tyler Conway, *Report: Jim Irsay 'Was Hellbent' on Jeff Saturday Despite Concerns from Colts Execs*, BLEACHER REPORT (Nov. 13, 2022), <https://bleacherreport.com/articles/10055542-report-jim-irsay-was-hellbent-on-jeff-saturday-despite-concerns-from-colts-execs> [https://perma.cc/Q3AQ-KCTN].

182. Anne L. DeMartini & Barbara Nalani Butler, *Perspective: National Football League Teams Need Chief Diversity Officers*, 4 FRONTIERS IN SPORTS & ACTIVE LIVING 1 (2022).

183. *NFL Appoints Diversity Veteran Jonathan Beane Chief Diversity and Inclusion Officer*, NFL: FOOTBALL OPERATIONS (Aug. 21, 2020), <https://operations.nfl.com/updates/football-ops/nfl-appoints-diversity-veteran-jonathan-beane-chief-diversity-and-inclusion-officer/> [https://perma.cc/79FH-7ZKS].

Flores's complaint or the allegations therein, any annual or semi-annual public statements with respect to the Rooney Rule, or any public remark with respect to other bias or diversity-related issues affecting the League. Only eleven NFL teams have hired full-time diversity and inclusion officers of their own,¹⁸⁴ and it is unclear what impact, if any, these officers have authority to make. While the NFL has done little to correct racial disparities among head coaching hires, it does employ a number of strategies to maintain the appearance that it is working to do so. For example, NFL owners tout the League's partnership with the Fritz Pollard Alliance as tool to increase diversity among coaching hires. In reality, the organization does little to hold NFL owners accountable to the goal of a more diverse workforce. The Fritz Pollard Alliance is a membership group comprised of scouts, coaches, and front office personnel that "exists to champion diversity in the NFL."¹⁸⁵ It was co-founded by Cyrus Mehri and Johnnie Cochran Jr., the same duo who once threatened to sue the NFL over its lack of diversity,¹⁸⁶ and at first glance, appears to be an external actor capable of ensuring that NFL owners adhere to equal employment policies. The Fritz Pollard Alliance opens public inquiries into owners' hiring decisions and evaluates whether these decisions appear to have been lawfully made.¹⁸⁷ However, closer inspection reveals that the Fritz Pollard Alliance is unwilling to directly confront owners about the need to overhaul their head coaching and executive hiring procedures or to enforce changes that have a realistic chance of achieving the goals of the Rooney Rule. When the Fritz Pollard Alliance received statistical evidence demonstrating the role of nepotism in owners' hiring practices, the organization opted not to consider it as a problem that needed to be addressed.¹⁸⁸ Furthermore, while the Fritz Pollard Alliance has called owners' hiring procedures "shameful" and advocated for owners to "develop specific diversity action plans to improve diversity in all aspects

184. Sheinin et al., *supra* note 5.

185. See FRITZ POLLARD ALLIANCE FOUND., <https://fritzpollard.org> [<https://perma.cc/HRC3-CBQM>].

186. *Our History*, FRITZ POLLARD ALLIANCE FOUND., <https://www.fritzpollard.org/history> [<https://perma.cc/9B7H-LFLB>].

187. See, e.g., Mike Florio, *Fritz Pollard Alliance Initiates Inquiry on Colts Interim Coaching Hire*, PROFOOTBALLTALK (Nov. 17, 2022), <https://profootballtalk.nbcsports.com/2022/11/17/fritz-pollard-alliance-initiates-inquiry-on-colts-interim-coaching-hire/> [<https://perma.cc/U52N-6UWH>].

188. Kahler, *supra* note 103.

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of management,”¹⁸⁹ it has never taken action beyond leading discussions or issuing public statements that fall short of placing the blame on the owners who perpetuate a system of unfairness, nor has it advocated for a system of governance and accountability to achieve an opposite result.

B. Anecdotal and Statistical Evidence of How NFL Owners Manipulate the Rooney Rule

The Rooney Rule fails because it was enacted and is overseen by the same NFL owners it is designed to restrict. In practice, the Rooney Rule gives NFL owners enough discretion that they can comply without meaningfully changing their behavior.¹⁹⁰ It provides no governance or regulation of the ultimate discretion of NFL owners and is thus ill-equipped to overcome any NFL owner’s internal racial biases or indifference to anti-discrimination rules. At bottom, the Rooney Rule was simply designed to change the composition of NFL owners’ candidate pools, not to dictate or enforce a set of criteria owners must use to make hiring decisions. As a result, NFL owners remain free to hire head coaches and team executives using discretionary and subjective processes that can easily spawn disparate and discriminatory outcomes. While owners may incorporate objective metrics such as years of experience or impact on team performance into their employment decisions, they often prefer to make hires based on gut feel and comfort with candidates.¹⁹¹ This necessarily leads owners to disproportionately select candidates who remind them of themselves. And the NFL has no Black owners.¹⁹²

NFL owners are overwhelmingly white—only one person of color currently serves as the principal owner of an NFL team.¹⁹³ Social psychology research demonstrates that white people tend to have

189. Mike Florio, *Fritz Pollard Alliance Slams NFL Hiring Practices*, PROFOOTBALLTALK (Jan. 13, 2020), <https://profootballtalk.nbcsports.com/2020/01/13/fritz-pollard-alliance-slams-nfl-hiring-practices/> [https://perma.cc/C9DE-EK96].

190. See Samuel G. Freedman, *What Work Remains for the Rooney Rule*, NEW YORKER (Feb. 11, 2014), <https://www.newyorker.com/sports/sporting-scene/what-work-remains-for-the-rooney-rule> [https://perma.cc/6WLK-EJU4].

191. Kilgore & Dungca, *supra* note 161.

192. Lapchick, *supra* note 62, at 15.

193. *Id.*

particularly homogeneous networks.¹⁹⁴ White people are thus more likely to receive referrals from their white peers, and their white peers are more likely to refer people who are also white. This helps explain why white employers tend to favor white candidates for significant positions, whether implicitly or explicitly.¹⁹⁵ Organizational studies have repeatedly shown that employers are more likely to hire employees of the same race,¹⁹⁶ unlikely to hire diverse candidates if they are the only diverse members of an applicant pool,¹⁹⁷ and capable of shaping the demographic make-up of entire organizations in their image.¹⁹⁸

This so-called “same race” bias clearly comes into play when NFL owners fill their teams’ leadership positions. NFL owners have long been accused of possessing racial prejudices and holding employees of color to a double standard, and it’s not hard to see why.¹⁹⁹ Many NFL owners grew up in the era of racial segregation, and they continue to operate in circles of extreme wealth that are just as racially segregated today.²⁰⁰ Twelve owners were born before 1950, and the average owners is seventy years old.²⁰¹ Four NFL owners, John Mara of the New York Giants, Art Rooney II of the Pittsburgh Steelers, Virginia Halas McCaskey of the Chicago Bears, and Michael Bidwill of the Arizona Cardinals, inherited their teams from families who colluded to build the League on the backs of Black players in

194. Kilgore & Dungca, *supra* note 161.

195. *Id.*

196. *See, e.g.,* Caren B. Goldberg, *Relational Demography and Similarity-Attraction in Interview Assessments and Subsequent Offer Decisions: Are We Missing Something?*, 30 GRP. & ORG. MGMT. 597 (2005).

197. *See* Stefanie K. Johnson, David R. Hekman & Elsa T. Chan, *If There’s Only One Woman in Your Candidate Pool, There’s Statistically No Chance She’ll Be Hired*, HARV. BUS. REV. (Apr. 28, 2016), <https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired> [<https://perma.cc/H6JX-77EN>].

198. *See, e.g.,* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

199. *See, e.g.,* Jemele Hill, *NFL Owners Have a Problem with Coaches of Color*, ATLANTIC (Jan. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/nfl-owners-have-problem-coaches-color/604771/> [<https://perma.cc/9Z8W-4FCL>].

200. Maraniss & Jenkins, *supra* note 47.

201. *Id.*

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the 1920s only to ban them after the League became financially viable in the 1930s and 1940s.²⁰²

The enforcement of the Rooney Rule also falls to NFL owners who have a history of misconduct and in some cases discriminatory behavior. Jerry Jones, the owner of the Dallas Cowboys, was present at a 1957 protest in North Little Rock, where he stood among a crowd of white students blocking Black students from entering a recently integrated public school.²⁰³ Now, Jones operates the League's most valuable franchise, which has never hired a Black head coach or general manager during his tenure. A second NFL owner, the late Bob McNair of the Houston Texans, compared Black players protesting systemic racism to prison inmates, saying "we can't have the inmates running the prison" after players knelt during the national anthem.²⁰⁴ Later, in an interview with the *Wall Street Journal*, McNair told reporters, "The main thing I regret is apologizing. I really didn't have anything to apologize for."²⁰⁵ A third NFL owner, Woody Johnson of the New York Jets, was investigated by the State Department for making racist and sexist comments to staff members in his role as United States Ambassador to the United Kingdom.²⁰⁶ A fourth NFL owner, the late Jerry Richardson of the Carolina Panthers, paid hush money to Black and female employees after targeting them with racial slurs and sexual harassment.²⁰⁷ A fifth NFL owner, Mark Davis of the Oakland and

202. See Ta-Nehisi Coates, *A History of Segregation in the NFL*, ATLANTIC (Nov. 17, 2011), <https://www.theatlantic.com/entertainment/archive/2011/11/a-history-of-segregation-in-the-nfl/248625/> [<https://perma.cc/H7KE-M83M>].

203. Maraniss & Jenkins, *supra* note 47.

204. See Seth Wickersham & Don Van Natta Jr., *Gaffes, TV Ratings Concerns Dominated as NFL, Players Forged Anthem Peace*, ESPN (Oct. 27, 2017), https://www.espn.com/espn/otl/story/_/id/21170410/gaffes-tv-ratings-concerns-dominated-nfl-players-forged-anthem-peace-league-meetings [<https://perma.cc/SV2Q-JNFY>].

205. Andrew Beaton, *Texans Owner Bob McNair Recalculates His Apology for 'Inmates' Remark*, WALL ST. J. (Apr. 5, 2018), <https://www.wsj.com/articles/texans-owner-bob-mcnair-recalculates-his-apology-for-inmates-remark-1522941584?mod=e2tws> [<https://perma.cc/2HS9-3ZW8>].

206. See Ken Belson, *As NFL Fights Racism and Sexism, Team Owners Undercut the Message*, N.Y. TIMES (July 25, 2020), <https://www.nytimes.com/2020/07/25/sports/football/woody-johnson-trump-jets.html> [<https://perma.cc/UHU7-HYFF>].

207. See L. Jon Wertheim & Viv Bernstein, *Source: Jerry Richardson, Panthers Have Made Multiple Confidential Payouts for Workplace Misconduct, Including*

Las Vegas Raiders, harbored a white head coach who he knew sent derogatory, racist emails to executives around the League for years.²⁰⁸ Many NFL owners have undervalued and resisted playing Black quarterbacks,²⁰⁹ none signed Colin Kaepernick after he knelt to protest racial injustice and police brutality,²¹⁰ and all benefit from a League that has done little to stop this slew of discriminatory controversies from occurring. It should come as no surprise that, according to NFL Executive Vice President of Football Operations Troy Vincent, prospective employees of color experience “backstage and frontstage racism, unconscious bias, [and] prejudice” at the hands of NFL owners.²¹¹

Without objective hiring criteria, many minority candidates who interview for leadership positions with these owners are unsure what their interviewers want to see. “It seems like the criteria moves,” Buffalo Bills defensive coordinator and twenty-four-year NFL coaching veteran Leslie Frazier told the *Washington Post*.²¹² “One week, or one year, it’s ‘We want an offensive-minded guy.’ Another year: ‘We want a guy with a Super Bowl-winning background.’ What’s the criteria? Sometimes it’s because he’s ‘a great leader.’ Sometimes it’s because he ‘came up the same way I came up.’ But the common theme . . . is [an owner is going] to hire someone that looks like that owner.”²¹³ In 2021, Giants owner John Mara

Sexual Harassment and Use of a Racial Slur, SPORTS ILLUSTRATED (Dec. 17, 2017), <https://www.si.com/nfl/2017/12/17/jerry-richardson-carolina-panthers-settlements-workplace-misconduct-sexual-harassment-racial-slur> [https://perma.cc/X4Y3-9ZCS].

208. See Ken Belson, *Raiders Coach Made Racist Comment About NFL Players’ Union Chief*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/10/08/sports/football/nfl-demaurence-smith-jon-gruden-racist-comment.html> [https://perma.cc/TMV3-JPAG].

209. See David Berri, *Running in Place: How the NFL Continues to Devalue Black Quarterbacks*, GLOB. SPORT MATTERS (Nov. 1, 2021), <https://globalsportmatters.com/business/2021/11/01/how-nfl-continues-devalue-black-quarterbacks-cam-newton/> [https://perma.cc/B9FB-GZE8].

210. See Martenzie Johnson, *All the Quarterbacks Who Signed Since Colin Kaepernick Became a Free Agent*, ANDSCAPE (Nov. 15, 2019), <https://andscape.com/features/33-quarterbacks-signed-before-colin-kaepernick-free-agent/> [https://perma.cc/4JM2-QC6Z].

211. Harrison & Bukstein, *supra* note 78, at 4 (emphasis added).

212. Sheinin et al., *supra* note 5.

213. *Id.*

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justified his decision to hire Joe Judge, a white coach with no prior experience as an offensive or defensive coordinator, by saying, “I could envision him standing in front of the team meeting room and grabbing the players’ attention and being a leader.”²¹⁴ Judge went on to lead the Giants to ten wins and twenty-three losses in two seasons as the team’s head coach.²¹⁵ In 2022, Cowboys owner Jerry Jones admitted that in NFL hiring, “it’s not the X’s and O’s . . . It’s who you know.”²¹⁶ Over the past twenty-five years of Jones’ tenure, the Cowboys have won the third fewest playoff games of any team in the NFL.²¹⁷ Jones, however, has doubled down on the importance of finding candidates who remind him of himself when he makes hiring decisions.²¹⁸

The Rooney Rule provides NFL owners with no built-in incentives to hire coaches of color, and owners can easily manipulate the rule to maintain gentlemen’s agreements, racism, and segregation. One way owners manipulate the Rooney Rule is by organizing sham interviews for minority candidates. Some owners have followed the letter of the Rooney Rule without following its spirit by allegedly interviewing young, inexperienced employees of color that already work for their team before announcing new white hires.²¹⁹ Others have been accused of conducting brief phone interviews with minority candidates.²²⁰ As Brian Flores alleges in his complaint, NFL owners often treat the Rooney Rule “as a formality that must be endured to formalize the pre-determined hiring of a white

214. Kilgore & Dungca, *supra* note 161.

215. *See New York Giants Franchise Encyclopedia, supra* note 162.

216. Maraniss & Jenkins, *supra* note 47.

217. *See generally Dallas Cowboys Franchise Encyclopedia*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/dal/index.htm> [<https://perma.cc/8MTC-S5VG>] (listing the Dallas Cowboys’ team records).

218. *See Maraniss & Jenkins, supra* note 47.

219. *See Jason Reid, Rethinking the NFL’s Rooney Rule for More Diversity at the Top*, FIVETHIRTYEIGHT (May 20, 2016), <https://fivethirtyeight.com/features/rethinking-the-nfls-rooney-rule-for-more-diversity-at-the-top/> [<https://perma.cc/C7LM-C8VJ>].

220. *See Garcia-Roberts, supra* note 13.

coach.”²²¹ When Flores experienced a sham interview firsthand during his disturbing encounter with the Giants, he was humiliated but unsurprised. It was not the first sham interview he sat through during his coaching career. Three years before interviewing with the Giants, Flores attended an interview with the Denver Broncos that the team’s president and general manager allegedly showed up to an hour late, looking disheveled and hungover.²²² According to Flores, it was clear from the substance of the interview that he was only brought in to satisfy the Rooney Rule, and that the Broncos never had any intention to consider him as a legitimate candidate for a head coaching position.²²³ The Broncos hired a white head coach shortly after interviewing Flores.

The extent to which NFL owners use sham interviews as part of their hiring process is hard to determine. This is because many minority candidates who have been subjected to sham interviews are hesitant to draw attention to the issue while they are still seeking jobs around the League. According to Tony Dungy, “there’s a culture of forced silence, because if you want another opportunity, you just can’t go out and say, ‘that interview that I got was a sham,’ or, ‘I didn’t get a fair deal.’ It’ll be held against you.”²²⁴ Dungy is now in the NFL Hall of Fame, and like many of his peers, he waited until his retirement to describe interviews in which he was tacitly told he had no chance.²²⁵ Since retiring, Dungy has publicly acknowledged that he and many of his Black peers kept racist comments to themselves during their careers because they were concerned about being labeled as difficult to work with.²²⁶ This decision is understandable, but it also insulated the NFL from the reality that many were not interested in a diverse workplace.

Some white NFL coaches have voluntarily admitted inside knowledge of sham interviews, however. In 2016, longtime Black NFL coach and defensive coordinator Ray Horton accepted an interview with the

221. First Amended Class Action Complaint at 32, *Flores v. Nat’l Football League*, No. 22-cv-00871 (S.D.N.Y. filed Apr. 7, 2022), <https://www.courthouse news.com/wp-content/uploads/2022/04/nfl-amended-complaint.pdf> [<https://perma.cc/R6G9-NXAF>].

222. *Id.* at 52-53.

223. *Id.* at 53.

224. Sheinin et al., *supra* note 5.

225. *Id.*

226. *Id.*

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Tennessee Titans that a white coach later revealed was designed to provide a false appearance of equal opportunity and willingness to consider a minority candidate.²²⁷ Horton, who joined Flores' complaint against the NFL as a named plaintiff, interviewed to be the Titans next head coach just a few hours before the team's all-white ownership and management announced that it was hiring a white candidate named Mike Mularkey to fill the position.²²⁸ Mularkey lasted two seasons as the Titans head coach.²²⁹ After leaving the team, Mularkey admitted in a podcast interview that the Titans owner told him he was going to be hired before complying with the Rooney Rule. "I sat there knowing I was the head coach in 2016 as [the Titans] went through this fake hiring process, knowing a lot of the coaches that they were interviewing, knowing how much they prepared to go through those interviews, knowing everything they could do and [that] they had no chance of getting that job," Mularkey said.²³⁰ On the day he was hired, Mularkey bumped into Horton leaving his interview at the Titans facility and remained quiet.²³¹ Today, Mularkey calls his complicity and silence the biggest regret of his NFL career.²³²

Mularkey's admission reveals that the Titans owner and executives affirmatively misrepresented to Horton that he had a legitimate chance at a head coaching position. It also reveals that the Titans disrespected and humiliated Horton by subjecting him to a sham interview based on his race after withholding material information that the organization had already decided to hire somebody else. To date, the Titans have still never hired a head coach of color,²³³ and Horton has never received another head coaching interview.

Another way owners manipulate the Rooney Rule is by hiring minority candidates when their teams are in disarray and then firing them as soon

227. First Amended Class Action Complaint at 7-8, *Flores*, No. 22-cv-00871.

228. *Id.* at 64-67.

229. See *Houston Oilers/Tennessee Oilers/Tennessee Titans Franchise Encyclopedia*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/teams/oti/> [<https://perma.cc/2WLG-BUG9>].

230. Steelers Realm Podcast, *Mike Mularkey Enters the Realm*, YOUTUBE, at 25:02 (Oct. 21, 2020), <https://www.youtube.com/watch?v=whsIgoNKxEE> [<https://perma.cc/E7QF-34Z2>].

231. First Amended Class Action Complaint at 66, *Flores*, No. 22-cv-00871.

232. Steelers Realm Podcast, *supra* note 230.

233. See Kilgore & Dungca, *supra* note 161.

as their teams are better positioned to succeed. In January 2021, the Texans hired twenty-seven-year NFL coaching veteran David Culley as the first full-time Black head coach in team history. Less than a year later, the Texans fired him without explanation, citing vague “philosophical differences” that raised the question of why he was ever hired in the first place.²³⁴ When Culley took over the Texans, the team was coming off a season in which it had only won four games, and its Pro Bowl quarterback was being sued for sexual assault and misconduct by twenty-three different women.²³⁵ Then, before the season began, the organization released the best player in team history.²³⁶ Culley was forced to start a rookie quarterback during most of the Texans’ games, and he managed to coach the team to the same number of wins it recorded in the previous season. The Texans knew their team would not be able to compete when they hired Culley, and they fired him after setting him up to fail during his only season as the team’s head coach. David Culley has not received another NFL coaching opportunity.

NFL teams rarely fire head coaches after just one season, preferring to give new coaches time and authority to develop their players and build their own team culture. When the Texans fired Culley, insiders around the League immediately compared the team’s actions to those of the Arizona Cardinals, who similarly fired a Black head coach after one unsuccessful season three years earlier.²³⁷ In January 2018, the Cardinals hired Steve Wilks as the team’s new head coach following the retirement of the team’s previous head coach and Pro Bowl quarterback.²³⁸ Then, in December

234. Sarah Barshop, *Houston Texans Fire Coach David Culley After Just One Season*, ESPN (Jan. 13, 2022), https://www.espn.com/nfl/story/_/id/33058754/source-houston-texans-fire-coach-david-culley-just-one-season [https://perma.cc/M94M-RLJK].

235. *Id.*

236. See Victor Mather, *Texans Release J.J. Watt After He Asks to Leave*, N.Y. TIMES (Feb. 12, 2021), <https://www.nytimes.com/2021/02/12/sports/football/texans-jj-watt.html> [https://perma.cc/PXX5-F24F].

237. See Jemele Hill, *The Continuing Humiliation of Black NFL Coaches*, ATLANTIC (Jan. 22, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/black-nfl-coaches-brian-flores-david-culley/621344/> [https://perma.cc/56JP-974A].

238. Kevin Patra, *Arizona Cardinals Hire Steve Wilks as Head Coach*, NFL (Jan. 22, 2018, 3:58 AM), <https://www.nfl.com/news/arizona-cardinals-hire-steve-wilks-as-head-coach-0ap3000000909373> [https://perma.cc/ZDD2-WJTJ].

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2018, the Cardinals fired Wilks without giving him a meaningful opportunity to succeed.²³⁹ During his single season as the Cardinals head coach, Wilks, who also joined Flores' complaint against the NFL as a named plaintiff, was forced to start an unprepared rookie quarterback that the organization allegedly drafted contrary to his suggestion.²⁴⁰ Then Wilks was forced to lead the Cardinals without a general manager for part of his tenure after the team's sitting general manager, Steve Keim, was convicted for driving under the influence of alcohol and suspended for five weeks.²⁴¹ Following an understandably unsuccessful season, the Cardinals awarded Keim an extended contract despite his fireable offense, drafted a new quarterback with the first overall pick, fired Wilks, and replaced him with Kliff Kingsbury, a white coach who had no prior experience working at the NFL level.²⁴² Kingsbury led the Cardinals to just one winning record in four seasons as the team's head coach.²⁴³ Meanwhile, Wilks returned to working as a position coach and coordinator until he was hired as an interim head coach by the Panthers in October 2022.²⁴⁴ The Panthers hired Wilks to replace Matt Rhule, another white head coach with no prior experience working at the NFL level,²⁴⁵ after Rhule led the team to eleven

239. See Josh Weinfuss, *When the Cardinals Fired Steve Wilks, They Fired the Wrong Guy*, ESPN (Dec. 31, 2018), https://www.espn.com/blog/arizona-cardinals/post/_/id/31247/when-the-cardinals-fired-steve-wilks-they-fired-the-wrong-guy [<https://perma.cc/QK3K-VT7N>].

240. See First Amended Class Action Complaint at 58-63, *Flores v. Nat'l Football League*, No. 22-cv-00871 (S.D.N.Y. filed Apr. 7, 2022), <https://www.courtshousenews.com/wp-content/uploads/2022/04/nfl-amended-complaint.pdf> [<https://perma.cc/R6G9-NXAF>].

241. See Darren Urban, *Steve Keim Suspended Five Weeks, Fined After DUI*, ARIZ. CARDINALS (Jul 17, 2018), <https://www.azcardinals.com/news/steve-keim-suspended-five-weeks-fined-after-dui> [<https://perma.cc/TZ8T-7GG6>].

242. Patra, *supra* note 238.

243. See *Chicago/St. Louis/Phoenix/Arizona Cardinals Franchise Encyclopedia*, PRO FOOTBALL REFERENCE. <https://www.pro-football-reference.com/teams/crd/index.htm> [<https://perma.cc/PB23-W972>].

244. Jason Reid, *Steve Wilks' Second Chance as a NFL Head Coach Comes with Caveats*, ANDSCAPE (Oct. 13, 2022), <https://andscape.com/features/steve-wilks-second-chance-as-a-nfl-head-coach-comes-with-caveats/> [<https://perma.cc/784D-AB4V>].

245. *Id.*

wins and twenty-seven losses in two and a half seasons.²⁴⁶ Wilks hoped his second stint inheriting a flailing franchise without an established quarterback would last longer than his first, but he was ultimately replaced at the end of the 2022 season.²⁴⁷ No NFL team has retained a Black interim head coach on a permanent basis in the past ten years.²⁴⁸

The evidence that Black head coaches are disproportionately hired to be “bridge coaches” is not just anecdotal. NFL owners acknowledged this disturbing trend when they considered a proposal that would reward teams for hiring minority candidates as long as they did not fire those candidates after a single season, but the owners ultimately rejected this proposal.²⁴⁹

NFL owners circumvent the Rooney Rule with ease because it is not effectively enforced. The NFL has only punished one team for attempting to engage in false compliance with the Rooney Rule, and it did so right after the policy was originally adopted. In 2003, the NFL fined the Lions just \$200,000 after the team’s president made clear that they intended to hire a white head coach named Steve Mariucci before considering any candidates of color.²⁵⁰ Five minority candidates declined subsequent head coaching interviews with the Lions that year because they did not think the team had any genuine intent to give them an equal opportunity.²⁵¹ Since then, however, the NFL has not punished a single team for alleged violations of the Rooney Rule, even after Mularkey publicly admitted that

246. See Matt Rhule, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/coaches/RhulMa0.htm> [https://perma.cc/BR7N-T6V4].

247. Kevin Patra, *Steve Wilks ‘Disappointed but Not Defeated’ After Not Getting Panthers’ Head Coaching Job*, NFL (Jan. 27, 2023), <https://www.nfl.com/news/steve-wilks-disappointed-but-not-defeated-panthers-head-coaching-job-reich> [https://perma.cc/3FS5-PPDB].

248. See David Newton, *Has Panthers Interim Coach Steve Wilks Earned the Full-Time Job?*, ESPN (Jan. 5, 2023), https://www.espn.com/blog/carolina-panthers/post/_/id/37309/has-panthers-interim-coach-steve-wilks-earned-the-full-time-job [https://perma.cc/3T5L-8KDG].

249. See Ken Belson, *NFL Owners Will Review Incentives to Boost Racial Diversity*, N.Y. TIMES, (May 15, 2020), <https://www.nytimes.com/2020/05/15/sports/football/minority-head-coaches-nfl.html> [https://perma.cc/9JKC-6E9T].

250. *Millen Fined for Not Interviewing Minority Candidates*, ESPN (July 25, 2003), <https://www.espn.com/nfl/news/2003/0725/1585560.html> [https://perma.cc/CN4G-49UX].

251. *Id.*

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the Titans manipulated the policy in 2016 and Flores presented text message evidence that the Giants manipulated the policy in 2022.²⁵² The NFL has authority to fine teams \$500,000 or more for failing to provide candidates of color with fair and legitimate employment opportunities,²⁵³ and it routinely awards larger fines for less controversial conduct.²⁵⁴ However, the NFL broadcasted its reluctance to enforce the Rooney Rule to owners in 2018, when it publicly declared that Raiders owner Mark Davis did not violate the policy after Davis himself suggested that he decided to hire a white head coach before interviewing any candidates of color.²⁵⁵

When Flores filed his complaint against the NFL and its member teams, the League responded within hours, without initiating any investigation whatsoever, by issuing a statement declaring that Flores' allegations of manipulations of the Rooney Rule were "without merit."²⁵⁶ This is the same League that has launched months-long investigations into other allegations, such as claims that the New England Patriots intentionally lowered the inflation of footballs before games.²⁵⁷ Cyrus Mehri, who played an integral part in creating the Rooney Rule, suggests that poor efforts to investigate and enforce Rooney Rule violations drive its lack of effectiveness. In 2021, Mehri reflected, "what I didn't know was how quickly [NFL owners] would blow off this rule."²⁵⁸ In 2022, Mehri

252. See Garcia-Roberts, *supra* note 13.

253. See Millen *Fined*, *supra* note 250; see also *NFL Personal Conduct Policy: League Policies for Players*, NFL (2022) <https://nflpaweb.blob.core.windows.net/website/Departments/Salary-Cap-Agent-Admin/2022-NFL-Personal-Conduct-Policy.pdf> [<https://perma.cc/H8AN-WQHV>].

254. See Millen *Fined*, *supra* note 250.

255. See Paul Gutierrez, *John Wooten Decries NFL's Ruling that Raiders Honored Rooney Rule*, ESPN (Jan. 19, 2018), https://www.espn.com/nfl/story/_/id/22154540/nfl-says-oakland-raiders-complied-rooney-rule-hiring-jon-gruden-head-coach [<https://perma.cc/TRS9-K3VN>].

256. See Bob Van Voris, *Ex-Dolphins Coach Claims NFL Racial Bias Behind Giants Snub (2)*, BLOOMBERG L. (Feb. 1, 2022), <https://news.bloomberglaw.com/daily-labor-report/ex-miami-coach-flores-sues-nfl-claiming-race-bias-in-giants-snub> [<https://perma.cc/83KY-WAM5>].

257. See Kevin Seifert, *What Really Happened During Deflategate? Five Years Later, the NFL's 'Scandal' Aged Poorly*, ESPN (Jan. 18, 2020), https://www.espn.com/nfl/story/_/id/28502507/what-really-happened-deflategate-five-years-later-nfl-scandal-aged-poorly [<https://perma.cc/L7BR-64NS>].

258. O'Connell, *supra* note 41.

added, “[the rule] requires enforcement, it requires good-faith implementation...the rule has to have teeth.”²⁵⁹ Without stricter oversight, the Rooney Rule stops short of ensuring that teams provide candidates of color and white candidates with the same opportunities for success. “This shows, yet again, that the NFL is either incapable or unwilling to address the issue of racial discrimination on its own,” Flores contends.²⁶⁰

Despite the NFL’s public declaration that Flores’ lawsuit is meritless, NFL executives begrudgingly admit that the League’s policies have not effectively fostered diversity and inclusion. In January 2022, Executive Vice President Tory Vincent publicly acknowledged that “there is a double standard” with regard to the way Black head coaches are treated, hired, and retained” in the NFL.²⁶¹ In February 2022, Commissioner Roger Goodell circulated an internal memorandum to all thirty-two teams in which he wrote “we have made significant efforts to promote diversity and adopted numerous policies and programs...however we must acknowledge that particularly with respect to head coaches the results have been unacceptable.”²⁶² Neither the admission by the NFL’s Executive Vice President nor the proclamation by its Commissioner has resulted in the creation of an accountability structure that penalizes teams for non-compliance. In October 2022, Steelers owner Art Rooney II, chair of the NFL’s workplace diversity committee and son of Dan Rooney, told the *Washington Post*, “I certainly would agree that the Rooney Rule by itself is not an effective diversity policy.”²⁶³ However, Rooney’s committee has

259. Jeff Green, *NFL Misses Out on Racial Awakening Taking Hold at U.S. Companies*, BLOOMBERG (Feb 3, 2022), <https://www.bloomberg.com/news/articles/2022-02-03/nfl-misses-out-on-racial-awakening-happening-at-corporates-with-brian-flores> [<https://perma.cc/M23R-N2KU>].

260. First Amended Class Action Complaint at 8, *Flores v. Nat’l Football League*, No. 22-cv-00871 (S.D.N.Y. filed Apr. 7, 2022), <https://www.courthouse.news.com/wp-content/uploads/2022/04/nfl-amended-complaint.pdf> [<https://perma.cc/R6G9-NXAF>].

261. Mark Maske, *Senior NFL Official: ‘Double Standard’ for Black Coaches When It Comes to Keeping Jobs*, WASH. POST (Jan. 11, 2022), <https://www.washingtonpost.com/sports/2022/01/11/black-nfl-coaches-firings-troy-vincent/> [<https://perma.cc/V86P-ZXCR>].

262. See @AdamSchefter, TWITTER (Feb. 5, 2022), <https://twitter.com/adamschefter/status/1489985648853405703?lang=en> [<https://perma.cc/T86H-K8JN>].

263. Garcia-Roberts, *supra* note 13.

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made no suggestions that would steer the NFL away from its system of self-regulation.

C. The System and Structure of the NFL Inhibits Diverse and Inclusive Hiring Practices by Insulating Owners from Accountability

The nature of the NFL's business structure, special congressional legislation, and unique stadium deals supported by taxpayers have made it wildly successful as it reaches the \$20 billion mark in annual revenue. This nature and structure have also allowed it to operate in a manner that has resulted in a wild disparity between white coaches and coaches of color, lawsuits by cheerleaders for being paid less than minimum wage, and hiring practices that border or cross the line into illegality. It is difficult to understand the failures of the Rooney Rule without understanding and appreciating the ramifications of the NFL's structure and operation.

While the NFL and its teams may *appear* to the public to be structured like other incorporated entities in the United States, they do not operate like traditional corporations. The NFL is not structured like a corporate entity with a "head office" under which member "divisions" operate under strict oversight and governance with upward accountability to an empowered CEO. Simply, the owners do not "report" to the Commissioner as much as the Commissioner reports to the owners. Much like a confederation, decision-making power rests with the individual teams except for a set of issues expressly delegated to the Commissioner.

The NFL was founded and funded by its member teams, and its goal is to facilitate collaboration between teams so that they may play games against each other and generate revenue. The NFL does not sell any public shares, and it does not maintain a formal board of directors. In fact, there is almost no public discourse about the NFL's management committee, which is charged with governing the League. The chairman of that committee is not the Commissioner but rather a team owner.²⁶⁴ Not surprisingly, the team owners are rarely concerned that most of the anger and calls for reform are directed to the NFL Commissioner rather than to the Chairman of the Executive Committee, the overall members of the Management Committee, or the individual owners who are responsible for all major decisions.

264. *John Mara Named Chairman of NFL's Management Council Executive Committee*, N.Y. GIANTS (Oct 20, 2011), <https://www.giants.com/news/john-mara-named-chairman-of-nfl-s-management-council-executive-committee-6117599> [<https://perma.cc/P9VG-GCRV>].

The NFL owners elected Commissioner Goodell, and they pay him more than sixty million dollars a year (approximately two million dollars per team) to take the lead in exploring and developing League revenue as well as protecting and insulating their individual businesses pursuant to the operating rules they established in internal codes of operations such as the NFL Constitution and Bylaws.²⁶⁵ The Commissioner can mediate or resolve disputes between teams, and takes the lead in collective bargaining and disciplinary issues, but does not have independent authority to make any of the NFL's consequential "team-based" decisions like the processes by which head coaches are evaluated, hired, fired, or recruited.²⁶⁶

Despite having some reporting obligations because of its status as a not-for-profit entity, there has been little to no governmental oversight of NFL operations historically, either with respect to internal operations like non-discriminatory hiring, compliance with fair wage rules, or issues of workplace conduct or discrimination. Until 2015, the NFL possessed tax-exempt status as a not-for-profit entity due to a provision in Section 501(c)(6) of the Internal Revenue Code that specifically exempts "professional football leagues" from paying federal income taxes along with business leagues, chambers of commerce, real estate bonds, and boards of trade.²⁶⁷ The NFL successfully lobbied Congress for its statutory tax exempt status in 1966.²⁶⁸ Since then, the League has spent a considerable amount of money maintaining its relationship with

265. Ken Belson, *Roger Goodell's Pay for Two Years Reached Nearly \$128 Million*, N.Y. TIMES (Oct. 28, 2021), <https://www.nytimes.com/2021/10/28/sports/football/roger-goodell-salary-nfl.html?smid=tw-share> [https://perma.cc/CXP8-NTVR].

266. See generally Jimmy Golen & Warren K. Zola, *The Evolution of the Power of the Commissioner in Professional Sports*, in THE OXFORD HANDBOOK OF AM. SPORTS L. 19 (2017).

267. I.R.C. § 501(c)(6).

268. Joseph Stromberg, *Why the NFL Just Gave Up Its Nonprofit Status: To Escape Scrutiny*, VOX (Apr. 28, 2015), <https://www.vox.com/2015/4/28/8509767/nfl-tax-exempt-nonprofit> [https://perma.cc/79VU-ZZUX]. See also Drew Harwell & Will Hobson, *The NFL is Dropping Its Tax-Exempt Status. Why that Ends Up Helping Them Out*, WASH. POST (Apr. 28, 2015, 1:50 PM), <https://www.washingtonpost.com/news/business/wp/2015/04/28/the-nfl-is-dropping-its-tax-exempt-status-why-that-ends-up-helping-them-out/> [https://perma.cc/AUJ2-7CBX] (discussing amendment to the Marketplace Fairness Act that would end the NFL's exemption from taxation).

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legislators and forestalling governmental oversight.²⁶⁹ Over the past five years, the NFL has spent nearly \$6.5 million lobbying Congress, more than any other American sports league.²⁷⁰ While most of the revenue generated by the NFL has always been taxed after being distributed to its member teams, the NFL does retain a small portion of League profits. The NFL chose to relinquish its tax-exempt status in 2015 and as a result it is no longer required to publicly disclose many League salaries and expenditures.²⁷¹

NFL teams are structured as independent corporations or partnerships that shield their owners from the legal liability, public accountability, and governmental oversight found in traditional incorporated entities. They collect most of the money generated by the League, and since they are predominantly privately owned, they do not have to publish their operating expenses or income. In 2021, NFL teams generated a record-high national revenue of eleven billion dollars from television contracts and League sponsorships, and they also raked in money from ticket and concession sales, licensing and merchandising

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269. See Emma Baccellieri, *What Did Your Favorite League Spend on Federal Lobbying in 2019?*, SPORTS ILLUSTRATED (Feb. 14, 2020), <https://www.si.com/mlb/2020/02/14/nfl-nba-nhl-lobbying-us-government> [<https://perma.cc/RK3C-BB6P>]; see also Kristi Dosh, *Examining NFL's Tax-Exempt Status*, ESPN (June 4, 2013), https://www.espn.com/nfl/story/_/id/9342479/examining-nfl-tax-exempt-status-challenged-us-senator-tom-coburn [<https://perma.cc/7XXP-M3YD>]; Fred Barbash, *Why Congress Will Never Take Back the NFL's Tax Break*, WASH. POST (Sept. 15, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/09/15/why-congress-will-never-take-back-the-nfls-huge-tax-break/> [<https://perma.cc/9HWW-HU3Y>].
270. See *Client Profile: National Football League*, OPENSECRETS, <https://www.opensecrets.org/federal-lobbying/clients/summary?cycle=2021&id=D000027847> [<https://perma.cc/25WJ-TEX5>].
271. Duff Wilson, *NFL Executives Hope to Keep Salaries Secret*, N.Y. TIMES (Aug. 11, 2008), <https://www.nytimes.com/2008/08/12/sports/football/12nfltax.html> [<https://perma.cc/LT6L-DBU5>]. See also Drew Harwell & Will Hobson, *The NFL is Dropping Its Tax-Exempt Status. Why that Ends Up Helping Them Out*, WASH. POST (Apr. 28, 2015), <https://www.washingtonpost.com/news/business/wp/2015/04/28/the-nfl-is-dropping-its-tax-exempt-status-why-that-ends-up-helping-them-out/> [<https://perma.cc/AUJ2-7CBX>]; Joseph Stromberg, *Why the NFL Just Gave Up Its Nonprofit Status: To Escape Scrutiny*, VOX (Apr. 28, 2015), <https://www.vox.com/2015/4/28/8509767/nfl-tax-exempt-nonprofit> [<https://perma.cc/79VU-ZZUX>].

agreements, and local endorsement deals.²⁷² Nevertheless, many NFL owners operate their teams with substantially less structure, governance, and compliance than other billion-dollar entities, which ensures that their operations remain opaque.²⁷³

A significant amount of both the NFL's dominance and financial success is due to their unique treatment with respect to antitrust laws, including legislation that allows their teams to collectively negotiate television contracts and share revenue.²⁷⁴ While the NFL's legislative antitrust exemption for broadcast contracting purposes in the Sports Broadcasting Act of 1961 theoretically provides a basis for congressional or judicial oversight,²⁷⁵ legislators, regulators, and prosecutors have rarely attempted to govern teams by issuing subpoenas, initiating civil or criminal investigations, or enforcing lawful mandates. Furthermore, while many NFL teams have received significant state and local funding from taxpayers to build private stadiums, virtually no state or local government has ever attempted to exercise oversight over a team as a component of a monitoring scheme to oversee those public expenditures.²⁷⁶ In *Beckman v. Chicago Bear Football Club, Inc.*, a district court judge suggested that in certain cases, state and local governments may be enmeshed enough with the operations of NFL teams whose stadiums they finance to support finding a state action in a team's activity.²⁷⁷ *Beckman* comports with precedent that public stadium financing in baseball makes teams so entwined with state agencies that the agencies may be deemed responsible

272. Sheinin et al., *supra* note 5.

273. See Kilgore & Dungca, *supra* note 161.

274. See generally Stephen F. Ross, *The Single-Entity Doctrine of Antitrust as Applied to Sports Leagues*, in THE OXFORD HANDBOOK OF AM. SPORTS L. 225 (2017) (discussing how sports leagues avoid the requirement of the Rule of Reason to justify restraints on trade as procompetitive).

275. See Frederic J. Frommer, *Play Calling by Congress, NFL and NCAA Allowed Football to Flourish on Weekends*, SPORTS BUS. J. (Dec. 16, 2021), <https://www.sportsbusinessjournal.com/en/SB-Blogs/COVID19-OpEds/2021/12/16-Frommer> [<https://perma.cc/PS67-SDHK>].

276. See Gregg Easterbrook, *How the NFL Fleeces Taxpayers*, ATLANTIC (Oct. 2013), <https://www.theatlantic.com/magazine/archive/2013/10/how-the-nfl-fleeces-taxpayers/> [<https://perma.cc/B28H-MW2G>].

277. *Beckman v. Chi. Bear Football Club*, No. 17 C 4551, 2018 WL 1561719, at *9 (N.D. Ill. Mar. 30, 2018).

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for discriminatory acts conducted by those teams.²⁷⁸ Despite these legal hooks, state and local governments do little to hold NFL teams accountable unless teams leave or threaten to leave their jurisdictions.²⁷⁹

Governments seem content to let the NFL operate as an unbridled cartel. Empowered by its antitrust exemptions, the NFL has become the wealthiest and most economically powerful sports league in the country. In 2021, seventy-five of the 100 most-watched television programs in the United States were NFL games,²⁸⁰ and the average NFL team was valued by *Forbes* at \$3.5 billion.²⁸¹ According to the *Washington Post*, the NFL's market dominance gives it "unprecedented sway over American culture" that "ha[s] allowed it to survive controversies that could have smothered lesser enterprises."²⁸²

NFL owners use the League's popularity and lack of competition to build a network of financially reliant media partners and personalities who insulate them from any meaningful critiques. Major American news networks pay hundreds of billions of dollars to broadcast NFL games. While many of these networks have legitimate journalism divisions, they are consistently challenged and influenced by the NFL and some networks have made it clear that they will not attack the NFL.²⁸³ The NFL also runs

278. See *Ludtke v. Kuhn*, 461 F. Supp. 86, 93–96 (S.D.N.Y. 1978). See also *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961) (holding more generally that state action may be found where the direct perpetrator of allegedly discriminatory acts is, though a private entity, "so entwined" with an agency of the state that that agency must be deemed responsible for the private entity's acts).

279. See, e.g., Michael McCann, *St. Louis Sues the NFL: Where the Rams' Relocation Could Go Next in Court*, *SPORTS ILLUSTRATED* (Apr. 14, 2017), <https://www.si.com/nfl/2017/04/14/st-louis-nfl-lawsuit-rams-relocation> [https://perma.cc/CV58-9GPE].

280. Sheinin et al., *supra* note 5.

281. Mike Ozanian & Christina Settimi, *The NFL's Most Valuable Teams 2021: Average Team Value Soars to \$3.5 Billion as League Shrugs Off Pandemic Year*, *FORBES* (Aug. 5, 2021), <https://www.forbes.com/sites/mikeozanian/2021/08/05/the-nfls-most-valuable-teams-2021-average-team-value-soars-to-35-billion-as-league-shrugs-off-pandemic-year/> [https://perma.cc/4NTB-S2KD].

282. Sheinin et al., *supra* note 5.

283. See Kevin Draper, *ESPN's New Boss Changes Course, in Step with the N.F.L.*, *N.Y. TIMES* (Sept. 10, 2018), <https://www.nytimes.com/2018/09/10/sports/espn-nfl-jimmy-pitaro.html> [https://perma.cc/N92P-UQ7Z].

its own media network that is funded by member team owners. The presence of NFL Network not only provides the NFL owners with a built-in public relations operation, but also chills other networks from attacking the NFL because the NFL could respond by taking some media opportunities from these other networks and placing them on its own platform along with its exclusive access to historic NFL footage and expanded access to team facilities and players.

The NFL's corporate sponsors stay similarly tight-lipped when it comes to issues of discrimination, racism, and protests. While some corporate sponsors have acknowledged the League's problems with diversity and inclusion, they also have strong financial incentives to sustain their partnerships with the League. To date, few if any corporate sponsors have been willing to take strong stances against the NFL and its owners. This is well-illustrated by sponsors' public statements after NFL players knelt to protest racial injustice and police brutality. Ford Motor Corporation, for example, issued a statement saying, "we respect individuals' rights to express their views, even if they are not ones we share."²⁸⁴ Under Armour likewise added, "[we] stand for the flag and by our athletes for free speech, expression and a unified America."²⁸⁵ Some corporate executives rightly make the point that revenue partners only have theoretical influence over the NFL because their business relationships are severable. NFL owners spread hundreds of billions of dollars across independent deals with so many major banks, investors, businesses, and agencies that most individual sponsors would be unable to hold team owners accountable even if they tried. The only time corporate sponsors have taken a notable stand against the activity of an NFL owner was in the summer after George Floyd's murder, when a group of activist shareholders worth \$620 million pressured Nike, FedEx, and PepsiCo to threaten to sever their ties with the League unless Daniel Snyder, then owner of the Washington football team, changed his team's racist name.²⁸⁶ The activist shareholders' efforts came to fruition only after more than a

284. Maggie Astor, *How NFL Sponsors Have Reacted to 'Take a Knee' Protests*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/business/nfl-sponsors-anthem-protests.html> [https://perma.cc/7CFX-9F46].

285. *Id.*

286. Tisha Thompson, *Behind the Scenes of the Investor Push to Change Washington's Football Team Name*, ESPN (Sept. 2, 2020), https://www.espn.com/nfl/story/_/id/29788894/behind-scenes-investor-push-change-washington-football-team-name [https://perma.cc/NLA6-2YAJ].

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decade of fighting in shareholder meetings, and they have not proved to be replicable on a wider scale.²⁸⁷

Unsurprisingly, the NFL's combination of decentralization, lack of oversight, and perpetual growth in revenue makes its owners nearly impervious to outside calls for change. Owners are primarily held responsible to only themselves, and they protect themselves by employing both the willful and compromised support of others.

One way to understand the business of the NFL is through its corporate structure and history in the context of the ways in which similar, unregulated business systems have historically operated. As examples, the sharecropper systems that populated the South during the Reconstruction era, the coal mining towns that boomed in the late 1800s, the "Robber Baron" industrialist monopolies that operated in the early 1900s, and the migrant farm systems that still exist today all perpetuated schemes to deny workers power in order to maximize corporate control and generate corporate wealth. With respect to the hiring of its coaches, the NFL is no different. It is designed to prevent these employees from organizing, exerting control over their own destiny, and challenging the status quo, and its history has centered around the drive for more revenue and the grinding resistance to relinquishing power over its operations.

Therefore, when it comes to potential outside influences for change, it should come as no surprise that the NFL team owners do not fear a theoretical boycott by fans, influence by sponsors or other business partners, or lawsuits or collective action by aggrieved coaches or others within the NFL's ecosystem.

D. The NFL Uses Its Public Relations Machines to Perpetuate an Image that Is Inconsistent with Its Operations in Inclusive Hiring

NFL owners are no strangers to dodging race- and equity-related controversies. Over the past decade alone, owners have been criticized for silencing player protests about police brutality and racial injustice,²⁸⁸

287. *Id.*

288. See Kevin Seifert & Dan Graziano, *New Policy Requires On-Field Players, Personnel to Stand for Anthem*, ESPN (May 23, 2018), https://www.espn.com/nfl/story/_/id/23582533/nfl-owners-approve-new-national-anthem-policy [<https://perma.cc/5UT2-UK9V>].

harboring racist and misogynistic employees,²⁸⁹ operating workplaces rife with racism and sexual harassment,²⁹⁰ denying cheerleaders equal pay,²⁹¹ and minimizing payouts to former Black players involved in the League's billion-dollar concussion settlement by claiming they began with a lower cognitive function than their white peers.²⁹² NFL owners have largely avoided consequences for these and other transgressions by using a playbook built around deflection, retaliation, and forced arbitration. They squash employment discrimination claims the same way.

NFL owners regularly deflect blame for their actions onto the League office, which panders to the public without forcing owners to change. The lifecycle of a racial controversy in the NFL follows a well-trodden path. First, a player, coach, or member of the public criticizes the NFL and its owners for acting insensitively or inappropriately. Next, Commissioner Goodell issues a public statement on behalf of the League condemning racism but stopping short of condemning whatever specific behavior sparks the initial criticism. After that, the League donates money, pays a settlement fee, or announces a new policy or initiative that does not include any mechanisms for oversight or accountability. In recent years, the NFL has responded to racial controversies by donating money to social justice initiatives,²⁹³ implementing diversity training programs,²⁹⁴

289. See Ken Belson, *Raiders Coach Made Racist Comment About NFL Players' Union Chief*, N.Y. TIMES (Oct. 8, 2021), <https://www.nytimes.com/2021/10/08/sports/football/nfl-demaurence-smith-jon-gruden-racist-comment.html> [<https://perma.cc/TMV3-JPAG>].

290. See Will Hobson & Liz Clarke, *From Dream to Nightmare: More than a Dozen Women Allege Sexual Harassment and Verbal Abuse by Former Team Employees at Redskins Park*, WASH. POST (Jul. 16, 2020), <https://www.washingtonpost.com/sports/2020/07/16/redskins-sexual-harassment-larry-michael-alex-santos/?arc404=true> [<https://perma.cc/5UF2-GPYQ>].

291. See Michael Powell, *NFL Cheerleaders' Wage Fight Gains Momentum*, N.Y. TIMES (Sept. 8, 2015), <https://www.nytimes.com/2015/09/09/sports/a-wage-fight-gains-momentum.html> [<https://perma.cc/7Y82-A3WH>].

292. See Will Hobson, *How 'Race-Norming' Was Built into the NFL Concussion Settlement*, WASH. POST (Aug. 2, 2021), <https://www.washingtonpost.com/sports/2021/08/02/race-norming-nfl-concussion-settlement/> [<https://perma.cc/L45W-RLAS>].

293. See, e.g., Judy Battista, *NFL Commits \$250M over 10-Year Period to Combat Systemic Racism*, NFL (Jun. 11, 2020), <https://www.nfl.com/news/nfl->

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releasing a video of Goodell saying “Black Lives Matter,”²⁹⁵ painting “End Racism” on its fields,²⁹⁶ meeting with civil rights leaders including Al Sharpton,²⁹⁷ playing the Black National Anthem “Lift Every Voice and Sing” before select games,²⁹⁸ and tweaking and re-tweaking the Rooney Rule.²⁹⁹ While all of those acts demonstrate a racial awareness and may provide support for change, they will never replace the need for systemic internal change that holds individuals accountable to the platitudes and imposes consequences for misconduct.

NFL owners use the same strategy to deflect blame for discriminating against minority coaches and executives. After Flores brought suit against the League, Commissioner Goodell took the brunt of criticism on behalf of the owners. He held a press conference and told reporters “we believe in diversity,” “we won’t tolerate discrimination,” and “it’s . . . important for us to listen to [Flores] and understand what he and other coaches are going

commits-250m-over-10-year-period-to-combat-systemic-racism
[<https://perma.cc/ZV8A-GRLW>].

294. See, e.g., *NFL Makes Bold New Steps to Enhance Diversity*, NFL FOOTBALL OPERATIONS (May 19, 2020), <https://operations.nfl.com/updates/football-ops/nfl-makes-bold-new-steps-to-enhance-diversity/> [https://perma.cc/QGX4-UZVN].
295. See *Roger Goodell: NFL ‘Wrong’ for Not Listening to Protesting Players Earlier*, NFL (June 5, 2020), <https://www.nfl.com/news/roger-goodell-nfl-wrong-for-not-listening-to-protesting-players-earlier> [https://perma.cc/GGW5-S5QB].
296. See Cindy Boren, *NFL End Zones Will Bear ‘End Racism’ and ‘It Takes All of Us’ Messages in Home Openers*, WASH. POST (Jul. 28, 2020, 12:33 PM), <https://www.washingtonpost.com/sports/2020/07/28/nfl-end-zones-will-bear-end-racism-it-takes-all-us-messages-home-openers/> [https://perma.cc/49X2-TXXZ].
297. See Nicki Jhabvala, *Roger Goodell Meets with Rev. Al Sharpton, Civil Rights Leaders to Discuss NFL’s Hiring Practices*, WASH. POST (Feb. 8, 2022, 1:52 PM), <https://www.washingtonpost.com/sports/2022/02/08/goodell-sharpton-meeting/> [https://perma.cc/7D7N-Y5E4].
298. See Rachel Treisman, *The NFL Will Play ‘Lift Every Voice and Sing’ Before Each Season-Opener Game*, NPR (July 2, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/02/886936096/the-nfl-will-play-lift-every-voice-and-sing-before-each-season-opener-game> [https://perma.cc/SX6-JDB4].
299. See, e.g., *The Rooney Rule*, *supra* note 4.

through.”³⁰⁰ Behind the scenes, however, Goodell allegedly rejected Flores’ request to meet in the presence of a neutral third party mediator.³⁰¹ Instead, the NFL created a “diversity advisory committee” designed to make the NFL look like it was considering meaningful changes to its diversity, equity, and inclusion policies without actually making any. The committee was staffed with six so-called “outside experts,” including two lawyers who make a living defending employers against claims of discrimination.³⁰² According to Flores’ amended complaint, one of these lawyers even defended McDonalds against race discrimination claims as co-counsel to Loretta Lynch, the attorney that the NFL hired to defend itself against Flores.³⁰³ None of the members of the NFL Diversity Advisory Committee have spent their careers representing victims of discrimination. The committee has no power or authority beyond its ability to make private recommendations to the League.³⁰⁴ Diversity and inclusion cannot be achieved through platitudes, promises, or powerless committees.

300. See Kevin Seifert, *Commissioner Roger Goodell Says NFL ‘Fell Short’ in Hiring of Minority Head Coaches*, ESPN (Feb. 9, 2022), https://www.espn.com/nfl/story/_/id/33253649/commissioner-roger-goodell-says-nfl-fell-short-hiring-minority-head-coaches [<https://perma.cc/4WB5-UD3C>]; Tyler Sullivan, *Super Bowl 2022: NFL Commissioner Roger Goodell Addresses Washington Investigation, Brian Flores Lawsuit, More*, CBS SPORTS (Feb. 11, 2022, 3:09 PM), <https://www.cbssports.com/nfl/news/super-bowl-2022-nfl-commissioner-roger-goodell-addresses-washington-investigation-brian-flores-lawsuit-more/> [<https://perma.cc/U9T5-N32A>].

301. See First Amended Class Action Complaint at 4-5, *Flores v. Nat’l Football League*, No. 22-cv-00871 (S.D.N.Y. filed Apr. 7, 2022), <https://www.courthousenews.com/wp-content/uploads/2022/04/nfl-amended-complaint.pdf> [<https://perma.cc/R6G9-NXAF>].

302. See *NFL Announces Diversity Advisory Committee Members*, NFL FOOTBALL OPERATIONS (Mar. 28, 2022), <https://operations.nfl.com/updates/football-ops/nfl-announces-diversity-advisory-committee-members/> [<https://perma.cc/J83D-3MJL>].

303. First Amended Class Action Complaint at 26, *Flores*, No. 22-cv-00871.

304. See *NFL Announces Diversity Advisory*, *supra* note 302.

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E. NFL Owners Silence Employees Using Forced Arbitration and Confidentiality Clauses

NFL owners complement their suite of institutional advantages by creating significant structural barriers to outside influence through the contracts they insist upon using with League and team personnel. Standard NFL contract provisions severely hamper the ability of coaches and other employees to effectuate change through litigation. Most NFL contracts include arbitration and confidentiality provisions which inhibit discovery in litigation. Moreover, the legal structure of the NFL requires litigants to sue the League office and all the member teams if litigants allege widespread misconduct or discrimination. Finally, the lack of transparency in hiring by clubs makes it difficult to build a case of deliberate discrimination, and the NFL and its teams have a significant amount of legal and funding resources to provide exhausting defenses to cases alleging discrimination.

NFL owners regularly force those with colorable claims against them into legal arbitration. NFL owners require their employees to sign employment agreements that include broad mandatory arbitration clauses. These clauses stipulate that employees waive their right to seek relief from their employers for “any dispute” before a neutral judge or jury in open court.³⁰⁵ In addition, Article VIII, Section 3(B) of the NFL Constitution and Bylaws states that the NFL Commissioner has “full, complete, and final jurisdiction and authority to arbitrate . . . [a]ny dispute between any player, coach, and/or other employee of any member of the League . . . and any member club or clubs.”³⁰⁶ The NFL interprets this clause to prevent employees of one team from bringing to court the owners of a different team with whom they do not have a contract.³⁰⁷ Together, these provisions help owners circumvent the state and federal

305. See Mike Florio, *Arbitration Clause Could Quickly Derail the Brian Flores Lawsuit*, PROFOOTBALLTALK (Feb. 4, 2022), <https://profootballtalk.nbcsports.com/2022/02/04/arbitration-clause-could-quickly-derail-the-brian-flores-lawsuit/> [https://perma.cc/4VU2-8Y7L].

306. NFL CONST. AND BYLAWS, art. VIII, § 3(B).

307. Memorandum of Law in Support of Defendant’s Motion to Compel Arbitration and Stay Further Proceedings at 1-4, *Flores v. Nat’l Football League*, No. 22-cv-00871 (S.D.N.Y. filed June 21, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.nysd.574213/gov.uscourts.nysd.574213.48.0.pdf> [https://perma.cc/CVS3-RLHT].

court system by forcing employees to bring claims against them in secretive, closed-door proceedings. These provisions also impede employees' ability to conduct discovery. NFL owners have used forced arbitration to quietly settle Colin Kaepernick's collusion lawsuit and several other player-driven legal actions that alleged improper discipline and wrongful terminations.³⁰⁸

Mandatory arbitration provisions are dangerous, especially when they do not arise from collective bargaining, are mandatory within a business eco-system with a history of racial or gender discrimination, and are prevalent in a corporation without diversity among senior leadership.³⁰⁹ These provisions prevent NFL employees from bringing claims before neutral juries, and they make it difficult for NFL employees to join together in class actions. NFL employees face long odds of success in the arbitration process because of the structural power that the NFL wields. It is nearly impossible for individual players or coaches to fairly take on a league with such vast resources, and players and coaches have limited ability to seek employment on better terms because the NFL's anti-competitive behavior restricts their mobility. League representatives contend that mandatory arbitration provisions should be permissible in the NFL because owners and their employees agree to them freely and with consideration. However, such agreements are not always fairly negotiated in practice, and any benefits received as consideration for strict arbitration provisions can end up being illusory because employees are unable to enforce them in court. NFL employees deserve an opportunity to have their cases heard by a jury of their peers, not by a private arbiter their employer is paying. In

308. See, e.g., Kevin Draper & Ken Belson, *Colin Kaepernick and the NFL Settle Collusion Case*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/sports/nfl-colin-kaepernick.html> [<https://perma.cc/K9CT-G6B8>]; Nicole A. Wheeler, *Fifth Cir. Sides with the NFL in the Hotly-Contested Ezekiel Elliott Suspension: A Comment on Nat'l Football League Players Ass'n v. Nat'l Football League*, 10 ARB. L. REV. 221 (2018); Christopher R. Deubert, *A Summary of the NFL's Investigation into the New Orleans Saints Alleged Bounty Program and Related Proceedings*, 9 DEPAUL J. OF SPORTS L. 123 (2013); *Report: Ray Rice Gets \$1.588 Million*, ESPN (Mar. 3, 2015), https://www.espn.com/nfl/story/_/id/12412931/ray-rice-baltimore-ravens-reach-settlement-1588-million [<https://perma.cc/5WD7-TQCJ>].

309. See e.g., Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST. (Dec. 7, 2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/XXY7-STV3>].

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March 2022, Congress acknowledged the ills of mandatory arbitration when it passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act,³¹⁰ which prohibits the use of mandatory arbitration in sexual harassment and sexual assault cases due to the power imbalance that it creates. Pairing the NFL's structural power with mandatory arbitration provisions gives NFL owners undue influence in disputes with their employees, effectively permitting the owners to act as foxes in charge of guarding the fair employment henhouse.

NFL owners use mandatory arbitration provisions to defend against lawsuits for discriminating and retaliating against minority coaches and executives. Roughly four months after Flores brought suit, the NFL and member teams filed a motion to compel arbitration and stay further proceedings. The NFL and its owners argued that Flores could not proceed in open court because the Federal Arbitration Act binds him by the mandatory arbitration clauses in his employment agreements and the NFL Constitution and Bylaws.³¹¹ The Federal Arbitration Act states that written arbitration agreements involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"³¹² and circuit courts have applied it in cases involving statutory claims of employment discrimination and alleged violations of plaintiffs' civil rights.³¹³ The NFL also argues that Flores' claims against the League itself are so entwined with and derivative of his claims against individual teams that they too must be subject to arbitration.³¹⁴ The NFL and its teams selected Commissioner Goodell as the person to arbitrate Flores' claims, despite the fact that Goodell has been paid hundreds of millions of dollars by the

310. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (codified as amended in scattered sections of 9 U.S.C.).

311. Memorandum of Law in Support of Defendant's Motion to Compel Arbitration and Stay Further Proceedings at 1-4, *Flores v. Nat'l Football League*, No. 22-cv-00871 (S.D.N.Y. filed June 21, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.nysd.574213/gov.uscourts.nysd.574213.48.0.pdf> [<https://perma.cc/CVS3-RLHT>].

312. Federal Arbitration Act, 9 U.S.C. § 2.

313. *See, e.g.*, *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144, 147 (2d Cir. 2004); *Parisi v. Goldman, Sachs & Co.*, 710 F.3d 483 (2d Cir. 2013).

314. Memorandum of Law in Support of Defendant's Motion to Compel Arbitration and Stay Further Proceedings at 3-4, *Flores*, No. 22-cv-00871.

teams' owners and issued a public statement asserting that Flores' claims are "without merit."³¹⁵

Legal scholars suggest that being forced into arbitration would doom Flores' case from the start and prevent Flores from exposing NFL owners' system of discriminatory practices in public.³¹⁶ Flores concurs that the use of arbitration in his case should be unconscionable, arguing that "while the Supreme Court has approved arbitration for resolution of statutory disputes, it has not licensed employers to create unconscionably biased one-sided 'kangaroo courts' that bear no resemblance to a neutral judicial forum and fail to comport with basic principles of fairness."³¹⁷ In spite of Flores' assertions, however, in March 2023, a federal judge ruled that Flores' claims against the NFL, along with some of his claims against individual teams, must be sent to arbitration. The judge wrote that while "the Court acknowledges that this structure creates a risk of biased adjudication and that the NFL statement [that Flores' claims are "without merit"] . . . is worrisome," federal law precludes her from intervening in Commission Goodell's role as an arbiter.³¹⁸ This stacks the odds in the NFL's favor.

315. See Van Voris, *supra* note 256.

316. See Rachel Reed & HLS News Staff, *Brian Flores vs. the NFL*, HARV. L. TODAY (Feb. 9, 2022), <https://hls.harvard.edu/today/brian-flores-vs-the-nfl/> [<https://perma.cc/U58W-UEYY>]; Jason Reid, *Where Things Stand in the Racial Discrimination Lawsuit Filed By Brian Flores Against the NFL*, ANDSCAPE (Aug. 3, 2022), [<https://perma.cc/LA8T-3L5J>].<https://andscape.com/features/where-things-stand-in-the-racial-discrimination-lawsuit-filed-by-brian-flores-against-the-nfl/> [<https://perma.cc/LA8T-3L5J>].

317. Memorandum of Law in Opposition to Defendant's Motion to Compel Arbitration and Stay Further Proceedings at 1, *Flores v. Nat'l Football League*, No. 22-cv-00871 (S.D.N.Y. filed August 31, 2022), <https://storage.courtlistener.com/recap/gov.uscourts.nysd.574213/gov.uscourts.nysd.574213.62.0.pdf> [<https://perma.cc/L3VH-M7ZJ>].

318. Daniel Kaplan, *Judge Rules Brian Flores Can Pursue Some Discrimination Claims in Court, Others Sent to Arbitration*, ATHLETIC (Mar. 1, 2023), <https://theathletic.com/4265892/2023/03/01/brian-flores-discrimination-case-nfl/> [<https://perma.cc/6D99-PPRW>].

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F. NFL Coaches and Executives Cannot Protect Themselves Through Collective Bargaining

NFL players protect themselves from the abuses of NFL team owners through collective bargaining.³¹⁹ Most, if not all, of the major concessions that NFL owners have made over the course of the League's history have arrived as the result of organized player action, litigation (or the threat of it), or collectively bargained agreements or settlements. NFL players are represented by the NFL Players Association (NFLPA), which negotiates the terms of collective bargaining agreements with the NFL owners and the League office on the players' behalf. Just over the last fifteen years alone, players have used the NFLPA to improve their wages, hours, health benefits, and working conditions, achieve more suitable neutral arbitration for player punishments, lobby for 2020 Resolution JC-2A, increase the amount of money the NFL donates to social justice causes, as well as drastically change safety and health protocols and benefits such as severance and pensions.³²⁰ The NFLPA has also brought multiple antitrust and collusion actions against NFL owners, and it fights to ensure that players receive anti-discrimination clauses in their contracts and equal treatment under the law in their workplaces.³²¹

Unlike NFL players, however, NFL coaches and executives are a non-unionized workforce. The NFL Players Association supported efforts to unionize coaches in the early 2000s but many coaches, including coaches of color, expressed resistance to unionizing. As a result, the NFL's current iteration of the coaches association does not have any leverage to protect its members from employment discrimination, sham interviews,

319. See generally Nicholas M. Ohanesian, *Collective Bargaining and Workforce Protections in Sports*, in THE OXFORD HANDBOOK OF AM. SPORTS L. 195 (2017); Gabe Feldman, *Collective Bargaining in Professional Sports: The Duel Between Players and Owners and Labor Law and Antitrust Law*, in THE OXFORD HANDBOOK OF AM. SPORTS L. 209 (2017).

320. See 2020 NFL-NFLPA Collective Bargaining Agreement.

321. See, e.g., *Brady v. Nat'l Football League*, 779 F. Supp. 2d 992 (D. Minn. 2011); Kalyn Kahler, *NFL Memo Says NFLPA Is Alleging Collusion in Absence of Fully Guaranteed QB Contracts*, ATHLETIC (Nov. 22, 2022), <https://theathletic.com/3921096/2022/11/22/nfl-owner-collusion-memo-nflpa/> [<https://perma.cc/9R5Q-9AQA>]; Michael McCann, *Amid Labor Unrest, NFL Players File Collusion Charges Against Owners*, SPORTS ILLUSTRATED (Jan. 18, 2011), <https://www.si.com/more-sports/2011/01/18/collusion> [<https://perma.cc/TK5N-ED2H>].

workplace misconduct, unfair mandatory arbitration clauses, or other harms that may arise at the whims of team owners. The current coaches association, led by Mr. David Cornwell, a person with longtime ties to the League, has made no comment regarding the current state of minority hiring or the allegations of recent years, and it has not attempted any coordinated action to assist the number of NFL coaches who find themselves at the mercy of an unfair and unchecked system. It remains unclear why NFL coaches have not been able to organize in an effective manner. NBA coaches unionized in 1976, and the NBA Coaches Association has played a robust role in obtaining more equitable employment practices from NBA owners.³²²

Notably, other non-unionized NFL workers, such as team physicians and cheerleaders, have been similarly unable to curb NFL owners' discriminatory practices through unionization.³²³ Entering the 2022 NFL season, only 3.3% of the 200 members of the NFL Physicians Society identified as Black, including just one head team physician. The NFL has never articulated a policy to ensure teams hire diverse medical staff, and it has only agreed to credential, certify, and provide oversight of NFL physicians as a result of NFL player bargaining.³²⁴ Meanwhile, NFL cheerleaders continue to sue their teams for wage theft, unsafe working conditions, sexual harassment, and discrimination, only to be classified as nonemployees and forced into closed-door arbitration by clauses in their contracts that they have no power to abrogate.³²⁵

322. See generally NAT'L BASKETBALL COACHES ASS'N, <https://nbacoaches.com/> [<https://perma.cc/J27W-YKTD>].

323. The only other unionized workforce in the NFL ecosystem is the NFL Referees Association, which has existed since 1972 despite most of the employees being part time. See *The Official PFRA-NFLRA History*, NFLRA, <https://www.nflra.com/nflra-history> [<https://perma.cc/2W3L-42SM>].

324. See 2020 NFL-NFLPA Collective Bargaining Agreement, art. 39 §§ 1(a)-(c).

325. See Powell, *supra* note 291. See also Associated Press, *Five More Former NFL Cheerleaders File Suit, Claiming Mistreatment*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/sports/nfl-cheerleaders-lawsuit-.html> [<https://perma.cc/R34U-GWH3>]; Scooby Axson, *Lawyer: Cheerleaders Will Move Forward with Lawsuits if Better Conditions Aren't Approved*, SPORTS ILLUSTRATED (May 7, 2018), <https://www.si.com/nfl/2018/05/07/nfl-cheerleaders-sexual-harassment-discrimination-complaints> [<https://perma.cc/B93J-9RR3>].

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IV. POTENTIAL SOLUTIONS: RECOMMENDATIONS FOR REFORM AND LEGAL CHALLENGES

A. *The Smith/Lasker Recommendations for Creating a Fair and Equal NFL Hiring System*

We believe that the NFL and its member teams should adopt comprehensive processes that are fair, non-discriminatory, and better designed for hiring, retaining, and promoting the most qualified individuals. The systemic nature of employment discrimination in the NFL proves that there are no simple solutions. Introducing a new owner of color will not make the NFL's problems go away. Nor will other soft fixes like adopting additional modifications to the Rooney Rule, setting new goals, or creating a myriad of diversity and inclusion "alliances," "fellowships," "forums," "initiatives," "mentorships," "partnerships," "plans," "programs," "seminars," or "trainings."³²⁶ Unless NFL owners are forced to replace the operational structure they have hidden behind for decades with one that is fully transparent and accountable, the issues that plague the NFL are unlikely to diminish.

Hiring talented and diverse leadership requires deliberate and centralized action. In February 2022, Representative Bobby L. Rush attributed the NFL's lack of diverse leaders to "bold-faced racism,"³²⁷ and he told reporters that "[t]he NFL has to be held more accountable as a business that has enormous impact on the economy and the culture of our nation."³²⁸ Rush petitioned the House Subcommittee on Consumer Protection and Commerce "to swiftly hold a hearing on the issue of systemic racism in the NFL," but his request did not gain any traction.³²⁹ NFL owners will likely continue this course of action until Congress or

326. See, e.g., Lapchick, *supra* note 62, at 29-45.

327. See Mark Maske, *Brian Flores's Allegations Against NFL Lead to Call for Congressional Hearing*, WASH. POST (Feb. 2, 2022), <https://www.washingtonpost.com/sports/2022/02/02/brian-flores-interview/> [https://perma.cc/F6JT-6745].

328. See Abby Vesoulis, *The NFL Keeps Fumbling and Congress Keeps Punting*, TIME (Feb. 8, 2022, 4:02 PM), <https://time.com/6145931/congress-nfl-flores/> [https://perma.cc/G658-LT7T].

329. See Maske, *supra* note 327.

other governmental actors start listening and acting.³³⁰ Federal, state, and local governments need to initiate a comprehensive overhaul of the NFL's corporate structure to compel the necessary changes that NFL owners refuse to make on their own and ensure that NFL teams owners provide equal opportunities to all of their current and future employees, regardless of the color of their skin.

We also propose twelve recommendations for NFL owners to adopt on their own to correct the hiring discrepancies around the league. While many of these recommendations place more control and accountability within the League office, we believe that absent government intervention, this is the only hope of both employing uniform rules and holding the teams accountable. The persistent failures of the NFL to create a non-discriminatory hiring system, one that adheres to the goal of facilitating diversity and inclusion in its business, are the troubling result of the structure and intent of the organization itself. The facts reveal that NFL ownership oversees a system of bias, racism, and discrimination that results in a blatant lack of diversity among head coaches and executives. NFL owners' refusal to adopt lawful, fair, and transparent hiring processes has tarnished the integrity of the NFL and may ultimately impact its continued success.

As we have reiterated in this article, analysis of the history, law, and practice of the NFL leads us to conclude that structural reform is the only possible solution to achieve a process that is not inherently discriminatory. Accordingly, we propose the following recommendations to both the public and the NFL in the hopes that the NFL will adopt them:

1. The NFL should eliminate the current Rooney Rule altogether as a failed experiment that neither does service to its namesake nor serves the goals of creating a fair hiring system.

330. For example, the NFLPA was instrumental in organizing and promoting Congressional hearings on head trauma in 2009. In response to this act of congressional oversight, the 2011 CBA contained significant modifications that improved care and protections for brain injuries. See Henry Bushnell, *Under the Blue Tent: How the NFL's Concussion Protocol Went from a 'Joke' to the Gold Standard*, YAHOO! SPORTS (Oct. 14, 2021), <https://sports.yahoo.com/under-the-blue-tent-how-the-nf-ls-concussion-protocol-went-from-a-joke-to-the-gold-standard-162147691.html> [https://perma.cc/T9GP-4KCE]; Associated Press, *NFLPA's Smith: Player Safety an Ongoing Challenge*, ESPN (Jan. 19, 2013), <https://www.espn.com/nfl/story?id=8859157&src> [https://perma.cc/W2KV-6W6M].

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2. The NFL should adopt a consistent, fair, transparent, and lawful system by which all NFL teams must comply with respect to hiring and retention. The NFL should immediately abandon its current hiring system and replace it with one that fairly evaluates talent, constrains team ownership from engaging in unlawful and/or meaningless “check the box” protocols, and enforces a deliberate, professional, and accountable system.

For example, the NFL should mandate compliance with NY City Local Law 59, which requires transparency in job postings with respect to salary and compensation. This law mirrors laws in California and Colorado (both of which host teams) and would eliminate the complete uncertainty in the current coaching job market. Given that the NFL League office is headquartered in New York City, all of the teams arguably have a legal obligation, if not moral and ethical obligation, to comply with laws that increase transparency.

3. The NFL should eliminate any rule, custom, or practice requiring coaches to seek permission from team owners to apply for jobs with other teams.
4. The NFL should select an outside monitor to periodically audit team hiring processes and publish an annual report on the successes and failures of team hiring, retention, and promotion across all employees. This would include building “best practices” models at both the team and League office level with respect to human resources, compliance, diversity, and fairness in hiring practices.
5. The NFL should require its chief diversity officer to develop League-wide job descriptions, contracts with uniform standards, objective guidelines, and lawful interview questions for all senior and executive positions, including head coach, general manager, and team president or CEO.
6. The NFL should adopt strict and significant punishment systems for team and League officials that fail to abide by these recommendations and the established protocols for a fair workplace. This system should be jointly administered by the outside monitor and the NFL Commissioner and provide

for significant and mandatory fines payable to entities outside of the NFL system. These fines should start at \$5 million and escalate for individuals and clubs who violate the adopted system. The reality is that teams do not care about draft picks or minor fines as punishment for violating League guidelines. The proof is that we still have consistent and repeated violations of the Rooney Rule process and have not achieved the Rooney Rule's goal.

The NFL uses significant fines to police player conduct both on and off the field, claiming that these fines promote uniformity and protect the NFL "product." It is ironic that the League has not adopted a similar "zero tolerance" fine structure when it comes to achieving a fair and inclusive workplace.

7. The NFL should develop uniform and consistent evaluation guidelines for all coaching, senior and executive positions. All NFL coaches should be reviewed annually like NFL referees are, and the results should be shared with senior team and League membership.
8. The NFL should develop and implement policies specifically limiting nepotism.
9. The NFL should require that every NFL coaching, senior, and executive position be posted with a specific job description and held open for at least thirty days. With respect to head coach hiring and coordinator positions, the NFL should additionally require that no position be filled until a certain number of days following the Super Bowl. This will ensure that every candidate has time to apply for open positions, and it will prevent teams from ignoring qualified candidates who are unavailable because their teams are playing in the NFL playoffs. In contrast, potential NFL players cannot be hired until all the candidates are available to all teams either through the draft or free agency.
10. The NFL should engage in every effort to help prospective head coaches and coordinators gain experience. For example, the NFL should desist from preventing active team coaches from coaching in the NFLPA Collegiate All-Star Game, as such

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opportunities help candidates gain head coaching experience and provide skill sets for their coaching résumés.

11. The NFL and the outside monitor should annually interview every coach who believes that they may be interested in a position change in the upcoming year and evaluate their qualifications. NFL teams have habitually interviewed qualified candidates only to provide some baseless, hidden, and imprecise grounds for favoring other candidates. To counteract this practice, there should be an interview and evaluation process for all interested coaches that would result in the teams reviewing some candidates that have already been evaluated as superior and qualified (or theoretically unqualified) coaching candidates by the league and the outside monitor. This puts pressure on the teams to provide a more quantifiable and justifiable basis for their decisions. Annually, the NFL would then publish a deidentified report of whether these “qualified” candidates were interviewed by teams and the reasons underlying their hiring, promotion, or rejection.

12. The NFL should drop opposition to the unionization of NFL head or assistant coaches. Through collective bargaining, NFL players have a consistent, transparent, and effective method of handling violations and a system that allows the collective to engage in protective measures. A coaches’ union would allow coaches to decide if they want to rely on an arbitration system (with neutral judges like the NFL/NFLPA system) or a non-arbitration system to settle issues and grievances. The arbitration system has the benefit of speedier resolutions, but the current forced system where arbitrators are chosen by the NFL and operate in secrecy is a disservice to both the coaches and the entire NFL.

The current system places this burden of fighting for accountability on individual coaches, restricting them by the individual clauses of their contracts and shielding the dispute resolution process in forced secret arbitration. Coaches should be able to collectively decide and agree upon a system of their work rules much like NFL players. They should decide on their arbitration system, discrimination policies, and confidentiality provisions rather than having them dictated by the NFL.

The NFL's system is broken. To fix it, owners need to abandon the failed Rooney Rule and replace their unchecked discretion with comprehensive requirements to eliminate discrimination, ensure fairness, improve diversity, and build an equitable, transparent, and accountable system. Mandating transparent processes and protocols with clear goals and implementing an accountability-based system that punishes noncompliance should improve diversity in the NFL, and it will most certainly lead to a system that is fairer than the one that currently exists. Real change will require team owners and the NFL Commissioner to radically change their hiring system, which is rooted in their own control.

B. Potential Legal Challenges for the NFL's Discriminatory Hiring Practices

In the absence of concerted governmental oversight or adoption of the Smith/Lasker recommendations, private actors may be able to drive change through litigation, though they may have to overcome the NFL's forced arbitration provisions. The NFL's persistent failures to meaningfully advance diversity and inclusion have contributed to an entrenched racial hierarchy that could open the door for current, former, and prospective coaches, as well as former and current players and the NFLPA,³³¹ to pursue legal action against the League and its teams. These claims may be brought under Title VII and state and local law theories of disparate impact or disparate treatment, under 42 U.S. Code § 1981, and under common law claims such as quasi-contract and fraudulent misrepresentation. These claims could be brought for individual monetary relief but might also provide an avenue for broader forms of injunctive relief such as replacing the Rooney Rule and owners' unchecked discretion with comprehensive requirements to eliminate discrimination, ensure fairness, improve diversity, and build an equitable, transparent, and accountable system. The Rooney Rule is itself an acknowledgement of the teams' historical failure to embrace racial diversity on their own and replacing the rule with elements from the Smith/Lasker recommendations could be an appropriate remedy.

331. The 2020 CBA contains an anti-discrimination clause that applies to players; many current players enter the coaching ranks, and that CBA provision may provide a vehicle to exert pressure regarding robust protections of coaches and executives in the hiring process. 2020 NFL-NFLPA Collective Bargaining Agreement art. 49 § 1.

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To prevail on disparate-impact claims under Title VII, plaintiffs must demonstrate that their employer's policy or practice has a disproportionately harmful effect on a protected class.³³² The statistics presented above demonstrate that Black coaches are markedly underrepresented relative to the pool of current and former NFL players and suffer disproportionate harm from current hiring and firing practices. Employers would be hard pressed to demonstrate the existence of a legitimate justification for their hiring and firing practices given that these practices have caused the average tenure for a Black head coach to be more than one year shorter than that of the average white coach, despite Black head coaches winning slightly more games. Moreover, while the NFL and its teams will dispute the proffered statistics with individualized arguments that the teams had specific needs that could not be addressed by particular applicants, plaintiffs can argue that numerous alternative policies and practices exist that would meet any potential legitimate objective but with less of a discriminatory intent.³³³ For instance, plaintiffs can argue that the defendants should promote Black ownership, appoint independent monitors, increase transparency, create meaningful retention and hiring incentives, refine diversity pipelines, implement uniform contracts, and adopt the remainder of the Smith/Lasker recommendations.

To prevail on a pattern-or-practice disparate-treatment claim, a plaintiff must establish "a prima facie case of a policy, pattern, or practice of intentional discrimination against [a] protected group"³³⁴ and demonstrate that "intentional discrimination was the defendant's 'standard operating procedure.'"³³⁵ Statistics that reveal "a gross disparity in the treatment of workers based on race" as well as anecdotal evidence can make out a prima facie case.³³⁶ Here, statistical evidence demonstrates that Black coaches suffer disproportionate harm from current hiring and firing practices, leading to widespread racial disparities among the coaching ranks. While the NFL and its teams will contend that the statistical evidence is either insignificant or inaccurate, courts are hesitant to agree with those arguments at the motion to dismiss stage, and

332. *See Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (quotation omitted).

333. *Id.*

334. *Teamsters v. United States*, 431 U.S. 324, 336 (1977)

335. *See Reynolds v. Barrett*, 685 F.3d 193, 202 (2d Cir. 2012).

336. *Teamsters*, 431 U.S. at 339.

individual plaintiffs thus should at least have the opportunity to conduct discovery before potentially being forced into arbitration.

To prevail on a § 1981 claim, a plaintiff must show that the defendant discriminated against the plaintiff on account of race and that the discrimination concerned the making and enforcing of contracts.³³⁷ Here, plaintiffs could argue that the NFL, its teams, and particular individuals (such as those who conducted interviews, owners, and staff members) violated § 1981 by denying the plaintiffs coaching positions and subjecting them to sham and illegitimate interviews, discriminatory retention policies, and unequal compensation compared to white counterparts that they would not have been subjected to but for their race.

Plaintiffs should have even stronger arguments under New York state and New York City laws (applicable under the NFL-NFLPA Collective Bargaining Agreement's choice of law provision), as New York state and local laws interpret disparate-treatment and disparate-impact claims more liberally than their federal counterparts. For example, under the New York City Human Rights Law, a plaintiff must allege only that his employer "treated [him] 'less well' . . . because of a discriminatory intent."³³⁸ To make that showing, a plaintiff may rely on the "mixed motive framework," which requires evidence suggesting that discrimination was "one of the motivating factors" for the defendant's conduct.³³⁹

Plaintiffs could also proceed under New York common law theories, such as quasi-contract or fraudulent misrepresentation. To prevail on a quasi-contract theory claim, a plaintiff must show that the counterparty "was enriched, at plaintiff's expense, and that it is against equity and good conscience" not to restore the plaintiff's former status, including compensation for expenditures made in reliance upon defendant's representations.³⁴⁰ If the NFL and its teams employ "Rooney Rule interviews" as nothing more than sham interviews, then the NFL and the teams are benefiting from positive public perception while harming the minority candidates who in reality had no chance of ever being hired. To

337. *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020).

338. *Mihalik v. Credit Agricole Cheuvreux N. Am.*, 715 F.3d 102, 110 (2d Cir. 2013).

339. *Id.* at 110 n.8. (quoting *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 127 (2d Cir. 2013)).

340. *Georgia Malone & Co. v. Ralph Rieder*, 926 N.Y.S.2d 494, 497 (2011) (quotation omitted).

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prevail on a claim for fraudulent misrepresentation, a plaintiff must allege (1) a misrepresentation or a material omission of fact, (2) which was false and known to be false by defendant, (3) made for the purpose of inducing the other party to rely upon it, (4) justifiable reliance of the other party on the misrepresentation or material omission, and (5) injury.³⁴¹ Here, a prospective coach could argue that (1) the interviewing requirements under the Rooney Rule are nothing more than shams, (2) the NFL and its teams knew that the interviews were shams, (3) the interviews were set up to induce Black candidates to engage with the sham interviews, (4) the Black candidates relied on the sham interviews to their detriment, and (5) the Black candidates suffered harm as a result.

V. CONCLUSION

As the NFL enters a new season, qualified candidates of color must once again rely on the charity and goodwill of the NFL's predominantly white, billionaire owners to provide equal opportunity for success and advancement. Yet, the statistical and anecdotal evidence presented herein demonstrates that the NFL, its member teams, and its member team owners engage in a pattern and practice of employment discrimination. It also suggests that the current policy and practice enables NFL teams to keep minority candidates from filling head coaching and executive level positions around the League.

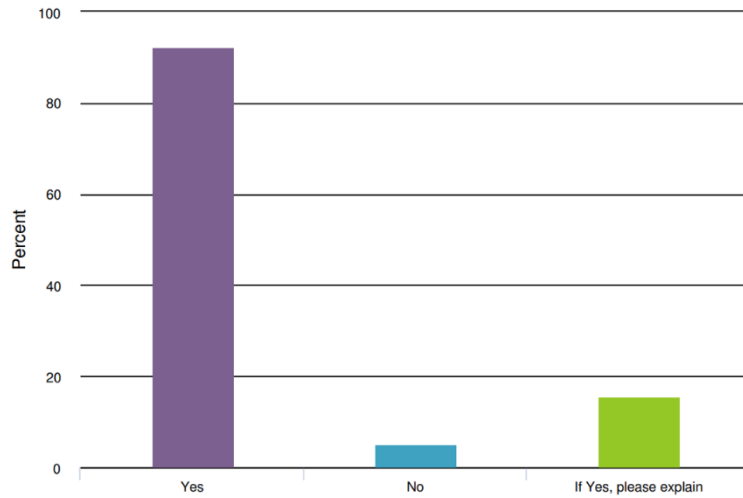
The institutional and structural realities of America's game are the same realities for millions of Americans. There is much to cheer about for both, but until we face those realities there will continue to be wins that benefit the few at the expense of the many, and we will continue to be distracted and deluded into believing that all of it is just a game. The fans deserve better, the players deserve better, and most certainly the people who work for the NFL as coaches and executives deserve better.

341. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 178 (2011) (quotation omitted).

VI. APPENDIX

Data from the 2022 NFLPA Survey of Active and Former NFL Coaches:

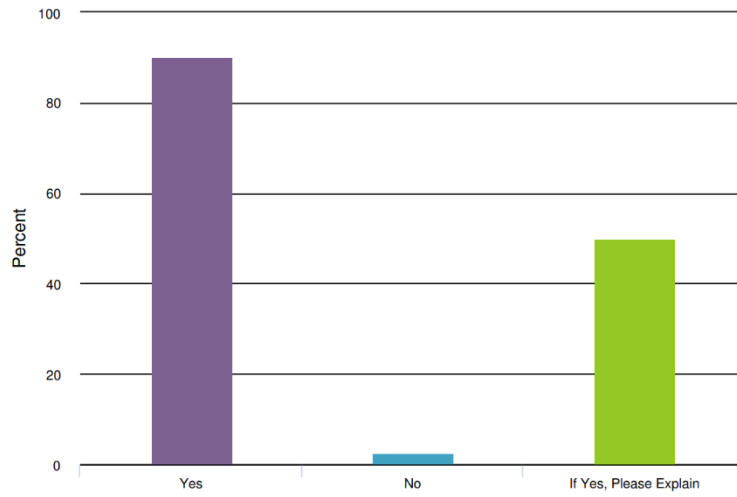
1. Do you believe that there needs to be more transparency in the hiring process, salaries and benefits for NFL coaches?



Value	Percent	Responses
Yes	92.3%	36
No	5.1%	2
If Yes, please explain	15.4%	6

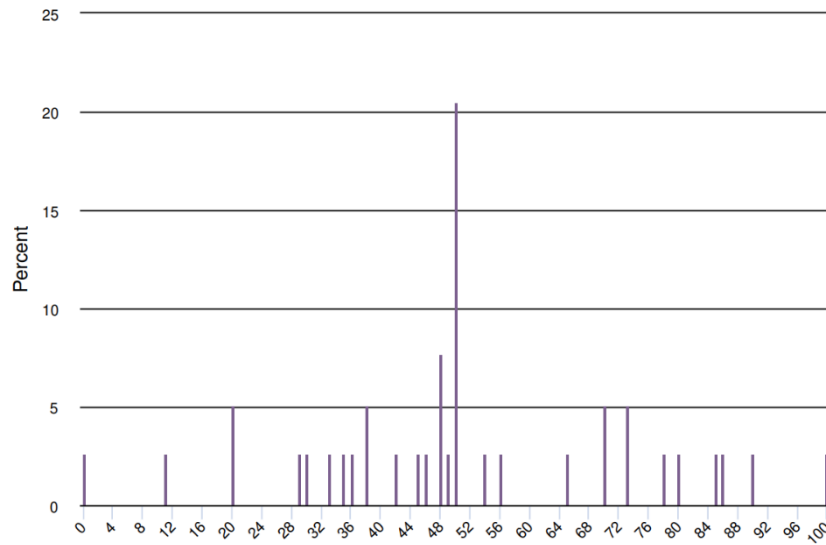
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2. Do you believe race plays a role in all coaching decisions including head coach and coordinators?



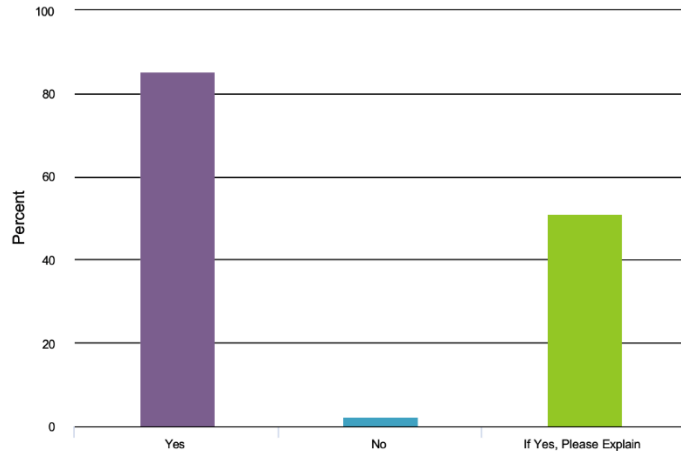
Value	Percent	Responses
Yes	90.0%	36
No	2.5%	1
If Yes, Please Explain	50.0%	20




3. How would you rate the overall fairness of personnel decisions made at the team level on a 1-10 scale with 10 being most fair and 1 being the least fair?



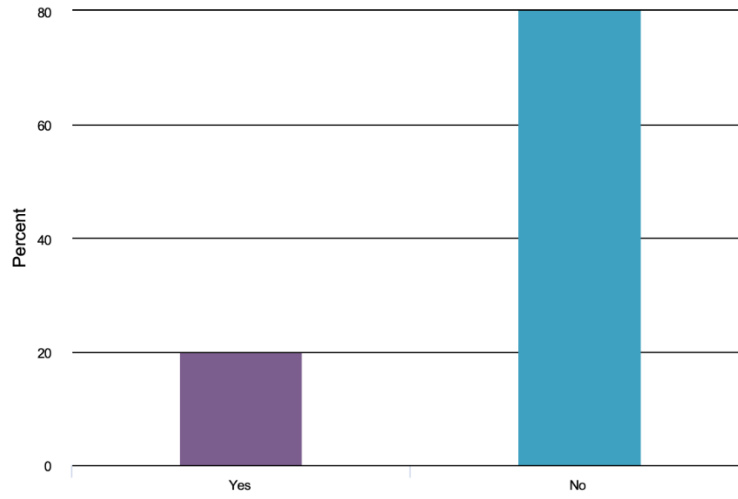
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4. Do you believe race plays a role in head coach hiring at the college level?



Value		Percent	Responses
Yes		85.4%	35
No		2.4%	1
If Yes, Please Explain		51.2%	21

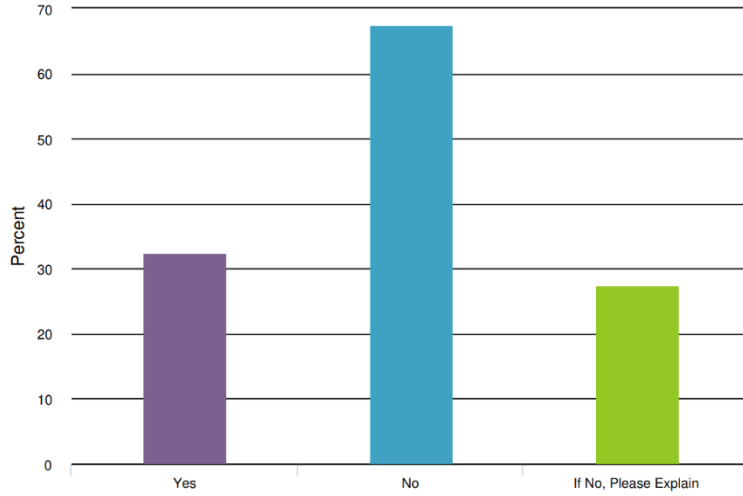
5. Have you been briefed about federal statutes (e.g. EEOC) being observed and obeyed when hiring and promoting NFL coaches?






Value	Percent	Responses
Yes	20.0%	8
No	80.0%	32

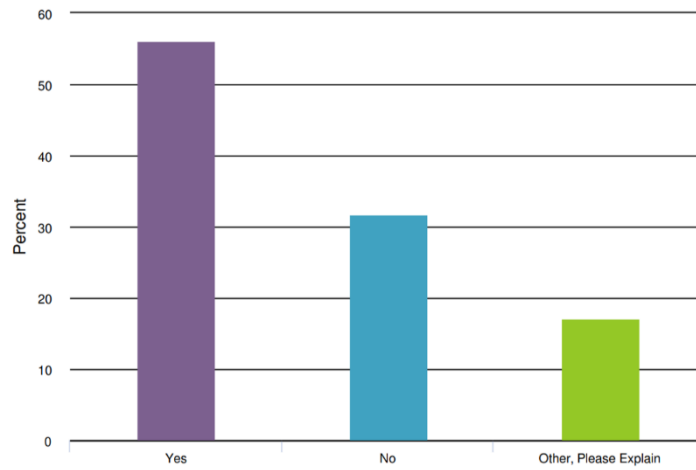
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6. Do you believe the NFL league office is responsive to issues of equity, discrimination, diversity and inclusion at the team level?



Value		Percent	Responses
Yes		32.5%	13
No		67.5%	27
If No, Please Explain		27.5%	11

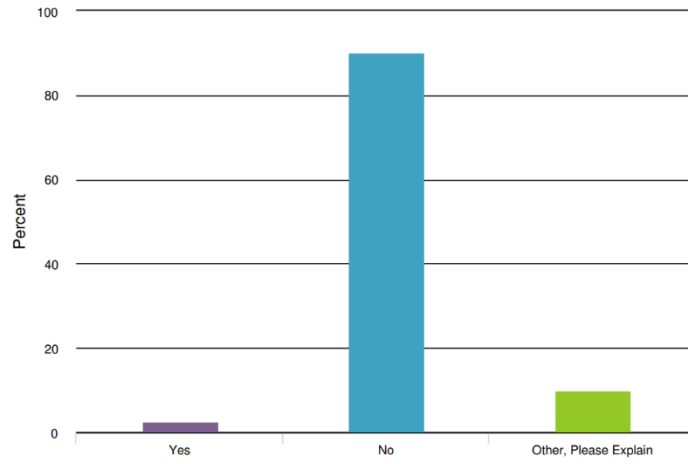
7. Do you think that race is a factor when negotiating the length of NFL coaches contract?



Value		Percent	Responses
Yes		56.1%	23
No		31.7%	13
Other, Please Explain		17.1%	7

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8. Do you think the federal statutes prohibiting discrimination (e.g. EEOC) are observed and obeyed when hiring and promoting NFL coaches?



Value	Percent	Responses
Yes	2.5%	1
No	90.0%	36
Other, Please Explain	10.0%	4