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BRIAN FLORES'S EMPLOYMENT DISCRIMINATION LAWSUIT  
AGAINST THE NFL: A GAME CHANGER OR  
BUSINESS AS USUAL?

MICHAEL CONKLIN\*, JENNIFER BARGER-JOHNSON\*\*,  
AND MARTY LUDLUM\*\*\*

*"If you can change America's game, you can change America. And the most visible job in America in terms of hiring is the head coaches of the National Football League."*<sup>1</sup>

-Cyrus Mehri

I. INTRODUCTION

On February 1, 2022, Brian Flores filed an employment discrimination lawsuit against the Miami Dolphins ("Dolphins"), New York Giants ("Giants"), and National Football League ("NFL").<sup>2</sup> This potentially landmark case was initiated by a scathing fifty-eight-page Complaint containing bold claims, such as how NFL teams are the equivalent of slave owners,<sup>3</sup> that the Giants engaged in the "most insidious form of discrimination,"<sup>4</sup> and that the NFL is "rife with racism."<sup>5</sup> Such hyperbolic claims risk being counterproductive in that they overshadow the more reasonable claims of systemic racism which are supported by the evidence.

This Article examines the numerous legal issues implicated in the lawsuit. The Rooney Rule—which requires NFL teams to interview minority candidates for coaching positions—may do more harm than good. The Plaintiff's creative attempt to define the ap-

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\* Powell Endowed Professor of Business Law, Angelo State University. I would like to extend a special thanks to Tom Utecht for his invaluable assistance regarding statistical analysis of the NFL.

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1. The Daily, *The Rule at the Center of the N.F.L. Discrimination Lawsuit*, N.Y. TIMES, at 9:45 (Feb. 14, 2022), <https://www.nytimes.com/2022/02/14/podcasts/the-daily/brian-flores-nfl-rooney-rule.html> [<https://perma.cc/7TEP-66BL>]. Cyrus Mehri is the civil rights attorney who first performed the statistical analysis regarding Black coach performance and rate of hiring and firing that found disparities. *See id.*

2. *See* Complaint at 1, Flores v. Nat'l Football League, No. 1:22-cv-00871 (S.D.N.Y. Feb. 1, 2022).

3. *See id.* at 2.

4. *See id.* at 7.

5. *See id.* at 7, 11.

plicant pool as all former NFL players brings up issues as to what the correct applicant pool is for comparison purposes and problems inherent in inferring discrimination from small sample sizes. The accusation that Flores was discriminated against is difficult to prove given the infrequent hiring of head coaches and the subjective nature of the decision. Assuming that Flores did receive sham interviews with the Giants and Denver Broncos (“Broncos”), it is unclear that this constitutes actionable employment discrimination—or deserves any legal recourse at all.

Flores is represented by Douglas H. Wigdor, one of the nation’s top employment discrimination lawyers.<sup>6</sup> This Article examines strategic decisions, such as filing the lawsuit while Flores was still under consideration for head coaching positions; using Section 1981 instead of Title VII of the Civil Rights Act as the cause of action; seemingly irrelevant information in the Complaint, such as multiple references and quotes regarding civil rights leaders like Harriet Tubman; and the peculiar admission that the Dolphins—named Defendants in the suit—fired Flores not because he was Black but because he refused to throw games.

Part II chronicles the history of the NFL and issues of race. Part III examines how the Complaint appears to be targeted more at public opinion than a judge applying the relevant law in a neutral manner. Part IV critiques the Plaintiff’s claim regarding the correct applicant pool from which to compare head coach racial demographics. Part V considers the NFL’s likelihood of success in enforcing its mandatory arbitration clause under which Commissioner Roger Goodell would render an unappealable decision. Part VI weighs the strength of the Plaintiff’s evidence, including statistical imbalances, issues with small sample size, the subjective qualities in hiring head coaches, and the issue with claiming someone is merely “qualified” for a position. Part VII considers the likely role that systemic racism has played in current NFL racial imbalances. Part VIII provides evidence available to the Defendants to minimize the Plaintiff’s claims, such as the inconsistent nature of the allegations and non-discriminatory explanations that have more explanatory power. Part IX looks outside of the legal application and considers how such accusations may have unintended consequences in society at large. Part X looks at criticisms of the Rooney

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6. See LawPod, *OA566: Explosive Lawsuit Against the NFL Details Racial Bias*, OPENING ARGUMENTS, at 11:50 (Feb. 3, 2022), <https://openargs.com/oa566-explosive-lawsuit-against-the-nfl-details-racial-bias/> [<https://perma.cc/EX2C-3C2G>].

Rule and the NFL's response. Finally, Part XI concludes by opining on the likelihood of success of Flores's lawsuit.

## II. BRIEF HISTORY OF RACE AND THE NFL

The NFL's treatment of race in the twentieth century is mixed. The first Black NFL coach was hired over 100 years ago in 1921,<sup>7</sup> fifty-five years before the first Black Major League Baseball ("MLB") manager<sup>8</sup> and forty-five years before the first Black National Basketball Association ("NBA") coach.<sup>9</sup> While the NFL had Black players decades before MLB and the NBA, the NFL successfully colluded to ban Black players for a dozen years beginning in the 1930s.<sup>10</sup>

In 2016, Colin Kaepernick began kneeling on the sidelines during the national anthem to protest police mistreatment of Black people.<sup>11</sup> This sparked controversy and criticism from some, including sitting President Donald Trump, who suggested that Kaepernick should be fired and that he should leave the country.<sup>12</sup> After becoming a free agent, Kaepernick was not picked up by any team, despite other players with weaker statistical performances than Kaepernick being hired.<sup>13</sup> In 2017, Kaepernick filed a grievance

7. See Dana Hunsinger Benbow, *NFL's First Black Coach Fritz Pollard Hired in 1921: It's Ironic. Not Much Has Changed*, INDIANAPOLIS STAR (Feb. 10, 2022, 5:00 AM), <https://www.indystar.com/story/sports/nfl/2022/02/10/first-black-nfl-coach-fritz-pollard-akron-pros/6637386001/> [<https://perma.cc/95ZP-DQA8>].

8. See Editors, *Frank Robinson Becomes the First Black Manager in MLB*, HISTORY (Aug. 24, 2021), <https://www.history.com/this-day-in-history/frank-robinson-first-black-manager-indians> [<https://perma.cc/35YW-K8KZ>].

9. See Gilbert McGregor, *How Bill Russell's Coaching Career Opened Doors for NBA's Black Head Coaches*, SPORTING NEWS (Oct. 20, 2021), <https://www.sportingnews.com/us/nba/news/bill-russell-coaching-career-black-nba-coaches/12v1c635cp2m61up9mkkxib9tk> [<https://perma.cc/5KMG-WG4Q>].

10. See Patrick Hruby, *'We've Come So Far': How Black Quarterbacks Defied a Racist Past to Become the NFL's Future*, GUARDIAN (Sept. 20, 2019, 4:00 AM), <https://www.theguardian.com/sport/2019/sep/20/black-quarterbacks-history-stereotypes> [<https://perma.cc/9PBV-UT7P>].

11. See P.R. Lockhart, *Colin Kaepernick's Collusion Grievance Against the NFL, Explained*, VOX (Feb. 15, 2019, 5:23 PM), <https://www.vox.com/identities/2018/9/6/17820158/colin-kaepernick-eric-reid-collusion-grievance-protest-settlement> [<https://perma.cc/638E-D46D>].

12. See Dan Cancian, *Everything Trump Has Said About NFL Kneeling So Far*, NEWSWEEK (June 8, 2020, 6:59 AM), <https://www.newsweek.com/everything-donald-trump-said-nfl-anthem-protests-1509333> [<https://perma.cc/DW8B-ZFWA>]. However, in 2020 Donald Trump stated that Kaepernick should be given another chance based solely on his ability. See Paul LeBlanc, *Trump Says Colin Kaepernick Should Be Given Another Chance in the NFL If he has the Playing Ability*, CNN (June 18, 2020, 8:52 AM), <https://www.cnn.com/2020/06/17/politics/colin-kaepernick-donald-trump-nfl/index.html> [<https://perma.cc/URF8-AGZP>].

13. See Lockhart, *supra* note 11.

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ance alleging that team owners colluded not to hire him.<sup>14</sup> The grievance was settled in 2019 for an undisclosed sum.<sup>15</sup>

The NFL received criticism for its recent use of race-norming in determining payouts from a \$1 billion chronic traumatic encephalopathy (“CTE”) settlement agreement.<sup>16</sup> Race-norming is a controversial practice whereby reduced cognitive function is weighted by race to account for an allegedly lower cognitive ability starting point for some races.<sup>17</sup> As it pertains to the NFL CTE settlement agreement, the practice means that when comparing the potential brain damage from football to a former Black player and a former white player of the same age and cognitive ability, the white player could receive financial compensation but the Black player might not.<sup>18</sup> This is because race-norming assumes that the Black player started out at a lower baseline of mental cognition and, therefore, has suffered less of a diminution in cognitive ability from playing football than the similarly situated white player.<sup>19</sup> After public outrage over the practice, the NFL announced it would stop using race-norming in 2021.<sup>20</sup>

In 2021, Las Vegas Raiders head coach Jon Gruden resigned after insensitive emails he sent went public.<sup>21</sup> The emails were ripe with anti-gay and misogynistic comments aimed at members within the NFL community and people outside of it like politicians. Additionally, the emails also contained a reference to DeMaurice Smith—the Black executive director of the NFL Players Association—as having “lips the size of Michelin tires.”<sup>22</sup>

### III. TARGET AUDIENCE: THE COURT OF PUBLIC OPINION

The fifty-eight-page Complaint often reads more like a closing argument targeting the emotions of lay jurors rather than a legal

14. *See id.*

15. *See id.*

16. *See* Maryclaire Dale, *NFL, Players Agree to End ‘Race-Norming’ in \$1B Settlement*, ASSOCIATED PRESS (Oct. 21, 2021), <https://apnews.com/article/nfl-sports-football-health-philadelphia-f9c8c931467c815099dce0ed42652379>.

17. *See* Rabiola Cineas, “Race Norming” and the Long Legacy of Medical Racism, *Explained*, VOX (July 9, 2021, 9:00 AM), <https://www.vox.com/22528334/race-norming-medical-racism>.

18. *See id.*

19. *See* Cineas, *supra* note 17.

20. *See id.*

21. *See* Paul Gutierrez, *Jon Gruden Resigns as Las Vegas Raiders Head Coach After Report of Anti-Gay, Misogynistic Language Used in Emails*, ESPN (Oct. 11, 2021), [https://www.espn.com/nfl/story/\\_/id/32384058/jon-gruden-resigns-las-vegas-raiders-head-coach](https://www.espn.com/nfl/story/_/id/32384058/jon-gruden-resigns-las-vegas-raiders-head-coach) [<https://perma.cc/TG7M-82UY>].

22. *Id.*

Complaint targeting a judge.<sup>23</sup> Much of the content ranges in legal relevance from very little to absolutely none. Even legally irrelevant details, such as the date on which the Complaint was filed—the first day of Black History Month—are provided in the preliminary statement.<sup>24</sup>

Much of the legally irrelevant content appears to be an attempt at implementing guilt-by-association logic. The Complaint chronicles racist decisions made by the NFL in the 1920s and 1930s.<sup>25</sup> The Complaint references Las Vegas Raiders head coach Jon Gruden's emails referring to the drafting of the first openly gay player Michael Sam as “[queer]” and calling then Vice President Joe Biden a “nervous clueless p\*\*\*\*.”<sup>26</sup> The Complaint also references Gruden's emailing photos of topless cheerleaders,<sup>27</sup> mocking transgender celebrity Caitlyn Jenner,<sup>28</sup> and telling a part owner of the Tampa Bay Buccaneers to perform oral sex on him.<sup>29</sup> This is all irrelevant to whether Flores can establish the required elements of discrimination against the Dolphins and Giants and appears to only be included in a highly tenuous attempt to impute a negative image on the NFL.

In contrast to the vilifying of some in the NFL—but no less irrelevant to the case—is how the Complaint describes Flores's upbringing. It mentions how he was the son of immigrants who grew up in housing projects with “drugs, gangs and violence in one of the city's toughest neighborhoods . . . .”<sup>30</sup> The Complaint goes on to say that Flores was “like a rose growing out of the concrete.”<sup>31</sup>

The Complaint contains references to Black civil rights heroes such as Harriet Tubman, Rosa Parks, Frederick Douglas, Jackie Robinson, and Mamie Till.<sup>32</sup> And the entire Complaint opens with

23. See Complaint, *supra* note 2, at 1.

24. See *id.* Commentators have also noted how the fact that the Complaint was filed less than two weeks before the Superbowl will likely maximize publicity. See, e.g., Judy Battista, *2022 NFL Head Coach Hires: Exploring the Results of Another Cycle Marred by Diversity Issues*, NFL (Feb. 6, 2022, 8:57 AM), <https://www.nfl.com/news/nfl-coach-hires-exploring-results-of-another-cycle-marred-by-diversity-issues> [<https://perma.cc/KFC3-78AP>] (“With the NFL world gathering for Super Bowl LVI this upcoming week, Flores' lawsuit and the league's hiring practices will certainly be topics of conversation . . .”).

25. See Complaint, *supra* note 2, at 12.

26. *Id.* at 18.

27. See *id.* at 19.

28. See *id.*

29. See *id.*

30. See Complaint, *supra* note 2, at 34.

31. *Id.*

32. See *id.* at 1.

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a Dr. Martin Luther King, Jr., quote.<sup>33</sup> Of course, the strength of Flores's discrimination case is in no way contingent upon what Dr. King did or did not say or the existence of Black civil rights heroes. This is perhaps an attempt to portray Flores's position as "on the right side of history."

#### IV. CORRECT APPLICANT POOL

The Complaint insists that the pool of potential head coaches should be defined as all former NFL players.<sup>34</sup> This is highly peculiar because only 19.4% of NFL head coaches have played in the NFL.<sup>35</sup> This standard would be beneficial to the Plaintiff's case, as it makes the hiring disparity appear more disparate. The Complaint alleges that 70% of the players in the NFL are Black.<sup>36</sup> It then compares this number to the 3% of NFL head coaches who are Black at the time of the Complaint as evidence of discrimination.<sup>37</sup> Some legal commentators have even considered this to be the correct applicant pool.<sup>38</sup> But as evidenced by the only 19.4% of NFL head coaches who played in the NFL, this 70% statistic is of minimal relevance.

It is illustrative how applying this same logic to other areas of employment would result in absurd results. For example, Supreme Court law clerks are made up of former law students. Law students

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33. *See id.* (quoting Dr. Martin Luther King, Jr.) ("Morals cannot be legislated, but behavior can be regulated. The law cannot make an employer love me, but it can keep him from refusing to hire me because of the color of my skin.").

34. *See, e.g.*, Complaint, *supra* note 2, at 5, 25, 39 ("[Rooney Rule] is not working because the numbers of Black Head Coaches, Coordinators and Quarterback Coaches are not even close to being reflective of the number of Black athletes on the field.").

35. *See infra* Appendix A.

36. *See* Complaint, *supra* note 2, at 25. It is unclear how this 70% figure was arrived at because the most recently available NFL Racial and Gender Report Card documents that only 57.5% of the NFL is Black. *See* Richard E. Lapchick, *The 2020 Racial and Gender Report Card: National Football League*, INST. FOR DIVERSITY AND ETHICS IN SPORT (2020), [https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/326b62\\_b84c731ad8dc4e62ba330772b283c9e3.pdf](https://43530132-36e9-4f52-811a-182c7a91933b.filesusr.com/ugd/326b62_b84c731ad8dc4e62ba330772b283c9e3.pdf) [<https://perma.cc/9TYL-6WPV>]. Even if one were to include every player who identified as "not disclosed/not specified" and "other," it would still only total 63.4%. *See id.* However, for the sake of simplicity, the 70% figure from the Complaint is used throughout this Article. *See* Complaint, *supra* note 2, at 25.

37. *See* Complaint, *supra* note 2, at 2.

38. *See* LawPod, *supra* note 6 ("The national football league is 70% black in terms of the players on the field. Coaching positions are almost always filled by former players . . . So, naturally, coaching should be around 70% Black.").

are roughly 8% Black.<sup>39</sup> But less than 1% of Ruth Bader Ginsburg's law clerks were Black.<sup>40</sup> Just as this is not strong evidence that progressive icon Ruth Bader Ginsburg is a discriminatory racist, neither is it strong evidence that the NFL and all its teams are. It only demonstrates the importance of defining the correct applicant pool and the problem with how small sample sizes produce great variability.

Attempting to use all NFL players as the correct applicant pool by which to judge head coach hiring decisions is clearly incorrect, but it is unclear exactly what the comparative applicant pool should be. If the U.S. population at large was used, Black males would be frequently overrepresented among NFL head coaches.<sup>41</sup> But, of course, this would be even more misleading than the Plaintiff's statistics, as certain demographic groups, such as Asian women, have disproportionately fewer members qualified to coach an NFL team.<sup>42</sup> Defining the applicant pool as all individuals qualified to be a head coach is likely the most accurate option. But it is nevertheless problematic in how many subjective factors are involved in determining who is qualified.<sup>43</sup> Additionally, there may be a significant difference between a candidate who is minimally qualified and one who is highly qualified. Finally, even if the Plaintiff could provide an objectively agreed upon disparity between the racial demographics in the applicant pool and those with a head coach position, this would likely not be enough to win at trial. This is because the Complaint alleges a Section 1981 cause of action rather

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39. See *Law School Enrollment by Race & Ethnicity (2019)*, ENJURIS, <https://www.enjuris.com/students/law-school-race-2019.html> [<https://perma.cc/H2S5-HADE>] (last visited Feb. 20, 2022).

40. See Jason L. Riley, *Why There Aren't More Black Coaches in the NFL*, WALL ST. J. (Feb. 8, 2022, 6:36 PM), <https://www.wsj.com/articles/why-black-coaches-nfl-football-brian-flores-miami-dolphins-racial-bias-sports-fired-systemic-racism-11644352627> [<https://perma.cc/SV88-SZ2R>].

41. See *Facts About the U.S. Black Population*, PEW RES. CTR. (Mar. 25, 2021), <https://www.pewresearch.org/social-trends/fact-sheet/facts-about-the-us-black-population/> [<https://perma.cc/U8M4-ABQW>] (finding Black males make up roughly 7% of the U.S. population). In 2011, 25% of NFL head coaches were Black men. See Riley, *supra* note 40.

42. See Madison Williams, *Female Coaches in the NFL: Meet Two of the Record-Setting 12 Women Leading Teams in 2021*, SPORTING NEWS (Nov. 15, 2021), <https://www.sportingnews.com/us/nfl/news/female-nfl-coaches-women-record/1lygnjw97krf91thjft3iryrg5> [<https://perma.cc/FM6C-7GBQ>] (noting there are currently twelve female coaches in the NFL, none of which are head coaches, offensive coordinators, or defensive coordinators and none of which appear to be of Asian descent).

43. For a discussion of the subjectivity involved in determining head coach qualifications, see *infra* notes 87-97 and accompanying text.

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than one under Title VII.<sup>44</sup> And under Section 1981, a disparate impact claim is insufficient.<sup>45</sup>

#### V. MANDATORY ARBITRATION

The NFL has a great incentive to move this issue to mandatory arbitration. Not only would doing so help keep the matter private, but more importantly, NFL Commissioner Roger Goodell would be the adjudicator.<sup>46</sup> As it pertains to mandatory arbitration in player discipline cases, Goodell has been described as “the judge, jury and executioner. And even the appellate judge too.”<sup>47</sup> The standard NFL coaches’ contract—which Flores likely signed with the Dolphins—states that the agreement “shall be governed by and construed in accordance with the Constitution, Bylaws, rules, and regulations of the National Football League.”<sup>48</sup> And section 8.3(E) of the NFL Constitution and Bylaws states:

The Commissioner shall have the full, complete and final jurisdiction and authority to arbitrate . . . [a]ny dispute involving a member or members in the League or any players or employees of the members of the League or any combination thereof that in the opinion of the Commissioner constitutes conduct detrimental to the best interests of the League or professional football.<sup>49</sup>

Unfortunately for the NFL, case law is clear regarding the essential nature of arbitrator neutrality. In the 1968 case of *Commonwealth Corporation v. Casualty Company*<sup>50</sup>, the Supreme Court held that it is improper to force arbitration with an arbitrator “that might reasonably be thought to be biased against one litigant and favorable to another.”<sup>51</sup> Allowing Goodell—the president of the

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44. See Complaint, *supra* note 2, at 52.

45. See Zuckerman Law Whistleblower Practice Group, *5 Differences Between Title VII and Section 1981 That Can Help Your Employment Race Discrimination Case*, 7 NAT’L. L. REV. (2017), <https://www.natlawreview.com/article/5-differences-between-title-vii-and-section-1981-can-help-your-employment-race> [<https://perma.cc/5HDR-GSEH>].

46. See Daniel Wallach, *NFL Won’t Be Able to Push Flores, Gruden Cases into Goodell-Led Arbitration Since League Is a Party*, CONDUCT DETRIMENTAL (Feb. 7, 2022), <https://www.conductdetrimental.com/post/nfl-won-t-be-able-to-push-flores-gruden-cases-into-goodell-led-arbitration-since-league-is-a-party> [<https://perma.cc/PU3D-T5ED>].

47. *Id.*

48. *Id.*

49. NAT’L FOOTBALL LEAGUE, CONST. AND BYLAWS OF NAT’L FOOTBALL LEAGUE (2006), [https://www.onlabor.org/wp-content/uploads/2017/04/co\\_.pdf](https://www.onlabor.org/wp-content/uploads/2017/04/co_.pdf) [<https://perma.cc/X4F8-SLRH>].

50. 393 U.S. 145 (1968).

51. See *id.* at 150.

League that is a named defendant in the case—to render a final and virtually unappealable decision would clearly violate this standard.<sup>52</sup>

There is even a recent case involving MLB that supports this conclusion. The dispute arose from a contract between the New York Yankees and a former minor league affiliate, the Staten Island Yankees.<sup>53</sup> When the Staten Island Yankees sued, the New York Yankees demanded the commissioner of MLB serve as the arbitrator, as stipulated in the contract.<sup>54</sup> In December of 2021, the New York County Supreme Court rejected the motion for arbitration, explaining, “[b]ased on the appearance of impropriety, the Commissioner of Major League Baseball should not arbitrate a dispute of claims that are asserted against Major League Baseball.”<sup>55</sup>

## VI. SHAM INTERVIEW AS RACIAL DISCRIMINATION

The first item mentioned in the Complaint is a quote from a text message exchange between Flores and his former superior, Bill Belichick of the New England Patriots.<sup>56</sup> These text messages provide evidence that even before the Giants interviewed Flores for the head coach position, they had already decided to hire Brian Daboll, a white man.<sup>57</sup> The Complaint also alleges that Flores participated in a similar sham interview with the Broncos.<sup>58</sup> There, Flores alleges that the then General Manager of the Broncos, John Elway, and others showed up one hour late, hungover, and “it was clear from the substance of the interview that [Flores] was being interviewed only because of the Rooney Rule.”<sup>59</sup>

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52. See Jean Hellwege, *Coming to a Contract Near You: The Predispute Jury Waiver*, 40 TRIAL 14 (2004) (quoting attorney Stephen Fink describing arbitration decisions as “essentially unappealable”).

53. See Michael McCann, *Yankees, MLB Retain Powerhouse Attorneys in Battle Against Staten Island*, SPORTICO (Jan. 29, 2021, 4:12 PM), <https://www.sportico.com/law/analysis/2021/staten-island-yankees-lawsuit-1234621541/> [<https://perma.cc/26MU-TZCW>].

54. See Wallach, *supra* note 46.

55. Order on Mot., *Nostalgic Partners, LLC v. N.Y. Yankees P’ship*, No. 656724/2020 (N.Y. Sup. Ct. Dec. 17, 2021).

56. See Complaint, *supra* note 2, at 1.

57. See *id.* at 7–8. In these text messages, Bill Belichick mistakenly tells Brian Flores that he heard from the Giants that he is their pick for head coach. See *id.* Bill Belichick thought he was messaging Brian Daboll, who had already been chosen by the Giants. See *id.*

58. See *id.* at 40–41.

59. See *id.* at 8.

The Complaint alleges that these sham interviews are in violation of the protections in Section 1981.<sup>60</sup> Assuming that Flores's allegations of these sham interviews with the Giants and the Broncos are correct, it is unclear that this constitutes actionable racial discrimination. Under this assumption, it is true that Flores would not have been subjected to a sham interview had he not been Black, because the Rooney Rule does not require such interviews for white candidates.<sup>61</sup> But there is no evidence to suggest that the Giants or the Broncos would have given more consideration to a similarly situated white candidate that had to be interviewed to satisfy a league rule. Moreover, the Rooney Rule only requires that an underrepresented minority must be interviewed for the job.<sup>62</sup> Therefore, under the assumption that this was a sham interview, even if Flores were Hispanic, Asian, Native American, or female, he would have likely received the same treatment.

Flores may have a valid claim against the Giants and the Broncos for wasting his time, but even here it is unclear exactly what the cause of action would be. The facts do not rise to the level of false imprisonment.<sup>63</sup> The Complaint alleges that Flores was “humiliated” by being subjected to a sham interview.<sup>64</sup> But this is unlikely to rise to the level of “severe emotional distress”—and conducting a sham interview is likely not “extreme and outrageous conduct”—both requirements to satisfy an intentional infliction of emotional distress or negligent infliction of emotional distress cause of action.<sup>65</sup> The most viable cause of action may be based on a quasi-contract theory. Flores could allege that when two parties agree to a job interview, there is an implicit agreement that the candidate has a chance at the job.

But even under such a quasi-contract theory, Flores would have difficulties. As it pertains to the Giants interview, Flores was informed by the Belichick text messages that it was a sham days

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60. *See id.* at 52.

61. *See* Nat'l Football League Operations, *The Rooney Rule*, <https://operations.nfl.com/inside-football-ops/diversity-inclusion/the-rooney-rule/> [<https://perma.cc/JJQ3-PDFA>] (last visited Feb. 20, 2022).

62. *See id.*

63. *See* *Martinez v. City of Schenectady*, 97 N.Y.2d 78, 85 (2001) (“A plaintiff asserting a common-law claim for false imprisonment must establish that the defendant intended to confine the plaintiff, that the plaintiff was conscious of the confinement and did not consent to the confinement, and that the confinement was not otherwise privileged.”).

64. *See* Complaint, *supra* note 2, at 10.

65. *See* *Howell v. N.Y. Post Co., Inc.*, 81 N.Y.2d 115, 121 (1993) (listing elements of intentional infliction of emotional distress).

before the interview was scheduled, yet he decided to participate anyway.<sup>66</sup> The Complaint alleges that Flores was “forced” to go through with the Giants’ interview, despite already knowing that the interview was for a job “he already knew he would not get . . . .”<sup>67</sup> Considering the benefits of going through with a sham interview may illuminate the real reason why Flores did so. For example, such an interview would still provide valuable insight into the hiring process and more importantly could serve as a valuable networking opportunity. As the Belichick text messages demonstrate, coaches and owners are a close-knit group.<sup>68</sup> Therefore, showing up to a sham interview and impressing the interviewers could result in job opportunities elsewhere or later at the same organization. Even setting aside these benefits, the damages Flores incurred by showing up to a sham interview would likely be minimal—only the value of his time spent interviewing.

So far, the analysis in this section has presumed that these interviews were a sham as Flores claims. However, there is also evidence to suggest that the interview with the Giants was not a sham. Including Flores, the Giants interviewed three underrepresented minorities for the head coach position when only two were required to satisfy the Rooney Rule.<sup>69</sup> Perhaps they were just being overly cautious in their deceptive effort to appear serious about conducting sham interviews. But perhaps they were legitimately interested in these candidates—at least initially.

Despite what the Belichick text messages strongly imply, the Giants claim that they did not make the decision to hire Daboll until after interviewing Flores.<sup>70</sup> The Giants further claim that they have “additional concrete and objective evidence to substantiate we did not make our decision” until after interviewing Flores.<sup>71</sup> Finally, the Giants stated that at the time of the text messages, Daboll’s interview had not yet occurred.<sup>72</sup>

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66. See Complaint, *supra* note 2, at 7.

67. See *id.*

68. See *id.* at 1.

69. See AJ Lise, *Brian Flores Lawsuit: A Defense of the New York Giants, Conduct Detrimental* (Feb. 5, 2022), <https://www.conductdetrimental.com/post/brian-flores-lawsuit-a-defense-of-the-new-york-giants> [<https://perma.cc/DUB2-9CP4>].

70. See Madeline Coleman, *Giants Call Flores's Allegations 'Disturbing and Simply False'*, SPORTS ILLUSTRATED (Feb. 3, 2022), <https://www.si.com/nfl/2022/02/03/new-york-giants-call-brian-flores-allegations-disturbing-and-simply-false> [<https://perma.cc/SHD9-7ZMH>].

71. *Id.*

72. See Coleman, *supra* note 70.

## VII. PLAINTIFF'S EVIDENCE

As documented in Part III, the Complaint contains much information that is largely irrelevant to proving the required elements of employment discrimination. This section looks at the evidence presented in the Complaint that is in some way relevant to the case. Likely counterarguments available to the Defendants to rebut these claims are also presented in this section.

## A. Statistical Imbalances

The strongest evidence presented in the Complaint is likely that of statistical imbalances. While these are not the “brutal statistics”<sup>73</sup> that some commentators have claimed, they do initially give rise to an inference of discrimination. The Plaintiff’s attempt to compare the 70% Black players in the NFL to the much lower percentage of Black coaches has already been addressed in Part IV. A more powerful statistic is that of how Black coaches are treated compared to their white counterparts with similar records.<sup>74</sup>

The average tenure for a Black head coach is more than one year less than that of the average white coach, despite Black head coaches having a slightly better win–loss record.<sup>75</sup> Black head coaches have more coaching experience.<sup>76</sup> Black head coaches are more likely to make it to the playoffs.<sup>77</sup> Black head coaches are less likely to receive second chances.<sup>78</sup> And Black head coaches are more likely to be fired after a winning season.<sup>79</sup> However, while these statistics are stronger than the player/coach ratio, they are not without counterarguments. For example, the small sample size, the numerous variables outside the control of a head coach, and the intangibles involved in selecting a head coach all call into question the explanatory power of these racially disparate statistics.

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73. See LawPod, *supra* note 6, at 9-13.

74. See Complaint, *supra* note 2, at 3, 4, 24.

75. See Michael Harriot, *Black Coaches Are Better: A Statistical Breakdown of the NFL's Racism*, GRIO (Feb. 11, 2022), <https://thegrio.com/2022/02/11/black-coaches-statistical-breakdown-nfl-racism/> [https://perma.cc/J2V2-B9GS].

76. See *id.*

77. See *id.*

78. See Martenzie Johnson, *New Study: Minority Coaches Still Fare Worse During NFL Hiring Process*, Andscape (Dec. 30, 2019), <https://andscape.com/features/new-study-minority-coaches-still-fare-worse-during-nfl-hiring-process/> [https://perma.cc/WMW3-V54X].

79. See Harriot, *supra* note 75 (“In the history of the NFL, only 17 coaches have been fired with a winning record, five of whom were Black.”).

### B. Sample Size

If there were an available sample size of thousands of coaches and tens of thousands of games, then the practice of looking at win–loss statistics would be more relevant.<sup>80</sup> The currently available sample size of just a few Black head coaches and only sixteen to seventeen regular season games per season does not provide enough data points for robust analysis.<sup>81</sup> The problem with such a small sample size is the high levels of volatility involved. For example, in 2011, there were eight Black head coaches.<sup>82</sup> Flores filed his lawsuit at a time when there was only one Black head coach.<sup>83</sup> But this level of fluctuation is to be expected given the small sample size.<sup>84</sup> It is not strong evidence that the NFL is eight times more racist and discriminatory than it was eleven years ago.

Another example of how the fluctuations inherent in small sample sizes are problematic is demonstrated by considering the year-by-year hiring statistics. For the 2009–10 season, 0% of new-hire NFL head coaches were people of color; the next year 43% were and two years later it was back down to 0%.<sup>85</sup> Again, this is not evidence for supporting the hypothesis that the NFL was racist one year, not the next, and then racist again two years later. It only demonstrates the high variability that is expected with such a small sample size.<sup>86</sup>

### C. Head Coach Hiring Intangibles

The explanatory power of the preceding win–loss statistics are further diminished by the many intangibles involved in hiring a head coach. For example, loyalty and coaching style compatibility are relevant factors. Just as a CEO's management style may lead to great success in one type of corporate culture, that same style may be disastrous in another. And as one former NFL coach explained,

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80. See Ronan Fitzpatrick, *Why is Sample Size Important?*, NQUERY (Nov. 1, 2015), <https://blog.statsols.com/why-is-sample-size-important/> [<https://perma.cc/2L76-DLRN>].

81. See *id.*

82. See Riley, *supra* note 40.

83. See Complaint, *supra* note 2, at 27.

84. See Fitzpatrick, *supra* note 80.

85. See S.N. Brooks et al., *Field Studies: A 10-Year Snapshot of NFL Coaching Hires*, 1 GLOBAL SPORTS INST. ARIZ. ST. UNIV. (Dec. 30, 2019) <https://globalsportmatters.com/wp-content/uploads/2020/12/Field-Studies-NFL-12.14.2020.4pm.pdf> [<https://perma.cc/A6NL-B6NR>] (referencing years 2009–10, 2010–11, and 2012–13).

86. See Fitzpatrick, *supra* note 80.

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“loyalty is a big part of it.”<sup>87</sup> Also, NFL teams pursue different overall strategies for winning games which involves the acquisition of specific players in specific positions. Some coaches are more likely to be compatible with a given team’s makeup than other coaches.

The significance of intangibles in hiring a coach is illustrated in the methodology of a 2022 study that attempted to control for all relevant variables of coaching qualifications, thereby being left with only the role candidate race plays.<sup>88</sup> But this is an extremely oversimplified view of what teams are looking for in a coach, as the study controlled for only experience, position played in college, NFL playing experience, age, whether they were an offensive or defensive coordinator, and performance.<sup>89</sup> If this were all that teams considered when hiring coaches, the process would involve nothing more than hiring the candidate with the highest weighted qualitative score from these variables—interviews would not even be necessary.

Some of these intangibles are illustrated when considering the decision by the Giants to hire Daboll over Flores. Evidence suggests that at the time the Giants made their hiring decision, their main focus was to find a coach with a proven track record for developing an offense and a quarterback—two things that Daboll has had more success with than Flores.<sup>90</sup> Furthermore, the Giants had just hired Joe Schoen as General Manager.<sup>91</sup> Daboll had worked under Joe Schoen while at the Buffalo Bills and also while at the College of William & Mary, thus providing a proven track record of compatibility not present with Flores.<sup>92</sup>

The lack of objectivity involved in hiring decisions for head coaches increases the difficulty of proving discrimination. By defi-

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87. See Kalyn Kahler, *Just How Big a Problem Is Nepotism in NFL Coaching?*, DEFECTOR, at 4-5 (Jan. 3, 2022, 10:26 AM), <https://defector.com/just-how-big-a-problem-is-nepotism-in-nfl-coaching/> [<https://perma.cc/86FT-FJGR>].

88. See Joshua Pitts et. al., *Race and the Probability of Becoming a Head Coach for NFL Coordinators Since the Introduction of the Rooney Rule: Why Isn’t Eric Bieniemy a Head Coach Yet?*, REV. BLACK POL. ECON. (Feb. 1, 2022), <https://journals.sagepub.com/doi/10.1177/00346446221076866> [<https://perma.cc/3HUS-CH3F>].

89. See Pitts et al., *supra* note 88.

90. See Lise, *supra* note 69 (“Some of Flores’ claims certainly have merit. . . . There’s no question that Brian Flores has proven himself to be a successful head coach. . . . But, Flores was not the right person for the Giants this time around.”).

91. See *id.*

92. See Ryan Honey, *Brian Daboll vs. Brian Flores: Making the Case for Either Giants HC Candidate*, ELITE SPORTS NY (Jan. 23, 2022), <https://elitesportsny.com/2022/01/23/brian-daboll-brian-flores-making-case-either-giants-hc-candidate/> [<https://perma.cc/N8VL-YZG3>] (“[I]t was pretty obvious Daboll was going to be a serious option considering his familiarity with the new Giants GM [Schoen].”).

dition, the more objective a hiring decision is, the more universally agreed upon who the best candidate was. Conversely, the less objective a hiring decision, the less agreement there will be as to who the best candidate was. Perhaps this is why one of the points of injunctive relief sought is to “increase the objectivity of hiring and termination decisions for General Manager, Head Coach and Offensive and Defensive Coordinator positions.”<sup>93</sup> The Complaint provides the examples of “past performance” and “experience.”<sup>94</sup> While NFL players have numerous objective statistics to consider,<sup>95</sup> there is no equivalent for coaches. The best attempt at an objective measure for coaches would likely be their win–loss record, but there are simply too many variables outside the control of a coach that contribute to that ratio as to render it largely meaningless. Examples include player injuries, weather, bad calls by referees, player suspensions, strength of schedule, player retirements, and quality of players. Luck also plays a significant role in win–loss ratios. Almost half of all NFL games are won and lost by seven points or less.<sup>96</sup>

#### D. Plaintiff's Reliance on Flores Being “Qualified”

The Complaint attempts to draw an inference to racial discrimination by explaining that Flores was not hired by the Giants despite being “eminently qualified.”<sup>97</sup> If Flores were the only qualified person who was considered for the job and was overlooked in favor of hiring an unqualified candidate, that would be strong evidence of discrimination. But this was not the case. Flores was one of many qualified candidates for the job, and the person who was hired, Daboll, was also qualified—arguably even more qualified given the Giants' position.<sup>98</sup> Even Flores himself acknowledged that Daboll is a “great coach” who is “going to do a great job as head coach in this league.”<sup>99</sup>

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93. See Complaint, *supra* note 2, at 8.

94. See *id.* at 9.

95. Examples include passer rankings for quarterbacks, age, documented injuries, total yards, yards after catch, sacks, fumbles, height, weight, etc. And for new players, the combine provides numerous objective measures.

96. See *Frequency of NFL Regular-Season Scores, 2000-2021*, CLEANUP HITTER, [https://cleanuphitter.com/nfl/stats/nfl\\_common\\_scores.php](https://cleanuphitter.com/nfl/stats/nfl_common_scores.php) [<https://perma.cc/HE4E-46AN>] (last visited Mar. 5, 2022) (noting that 46.39% of regular-season games have a margin of victory of 7 points or less).

97. See Complaint, *supra* note 2, at 6.

98. For a discussion of Daboll's qualifications, see *supra* note 90 and accompanying text.

99. See Chauncey Alcorn, *Former Miami Dolphins Head Coach Brian Flores Says Lawsuit Against the League Is 'Bigger than Football,'* YAHOO! (Feb. 2, 2022), <https://>

## VIII. SYSTEMIC RACISM

It is unfortunate that the Complaint overplays its hand with accusations that Flores experienced the “most insidious form of discrimination” imaginable.<sup>100</sup> Such a hyperbolic and patently false accusation likely results in a refusal by some to seriously consider the more reasonable aspects illuminated by the lack of diversity in NFL coaching.<sup>101</sup> For example, this is likely an illustration of the effects of historical, systemic racism. Simply put, “systems and structures designed by racists for racist reasons are often maintained by nonracists for nonracist reasons.”<sup>102</sup> Even if NFL teams choose their head coaches based on a race-neutral assessment of their abilities, the longstanding systems in place may nevertheless perpetuate racial disparities.

The lack of Black head coaches could result in a corresponding lack of mentors for young Black men who want to pursue coaching. Former NFL Head Coach Jon Gruden’s lack of hiring any young Black coaches in his 15 years as the decision maker is an example of that lack of mentoring.<sup>103</sup> It could also reinforce the subconscious bias of what a head coach looks like. This stereotype of a white person being more contemplative and strategic may affect coaching disparities in multiple ways. For example, NFL coaches are disproportionately likely to have played as quarterbacks, compared to other positions.<sup>104</sup> And Black high school quarterbacks are significantly more likely to be moved to a different position when they play in college than white quarterbacks, perhaps due to stereotypical assumptions regarding intelligence and leadership.<sup>105</sup> This same phenomenon may ex-

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[www.yahoo.com/video/former-miami-dolphins-head-coach-200000267.html](http://www.yahoo.com/video/former-miami-dolphins-head-coach-200000267.html) [<https://perma.cc/G92X-CQ3B>].

100. See Complaint, *supra* note 2, at 7.

101. See Dr. Ken Broda-Bahm, *Avoid Hyperbole*, PERSUASIVE LITIGATOR (Dec. 5, 2016), <https://www.persuasivelitigator.com/2016/12/avoid-hyperbole.html> [<https://perma.cc/44BJ-N2JG>] (explaining how exaggeration reduces credibility).

102. David French & Sarah Isgur, *NFL Faces Racial Discrimination Lawsuit*, DISPATCH, at 16:00 (Feb. 4, 2022), <https://advisoryopinions.thedispatch.com/p/nfl-faces-racial-discrimination-lawsuit?s=R> [<https://perma.cc/6YU6-E6YP>].

103. See Andrew Lawrence, *Jon Gruden Was Hostile to Black People For Years Before His Emails Came Out*, GUARDIAN (Oct. 14, 2021), <https://www.theguardian.com/sport/2021/oct/14/jon-gruden-was-hostile-to-black-people-for-years-before-his-emails-came-out> [<https://perma.cc/L4GK-Q7P6>].

104. See Joshua Pitts, *New Evidence of Discrimination Against Black Coaches in the NFL Since 2018*, CONVERSATION (Feb. 9, 2022, 8:19 AM), <https://theconversation.com/new-evidence-of-discrimination-against-black-coaches-in-the-nfl-since-2018-176351> [<https://perma.cc/WR78-HPZS>].

105. See Pitts et al., *supra* note 88.

plain why Black athletes are more likely to be funneled into defensive rather than offensive positions, a practice that leads to more white offensive coordinators.<sup>106</sup> This is significant because offensive coordinators are more likely than defensive coordinators to be promoted to head coach.<sup>107</sup>

In any profession, referrals from friends and family are one of the most successful ways to obtain employment.<sup>108</sup> Because people are more likely to have friends and family that are of the same race, this creates an impediment to aspiring Black coaches.<sup>109</sup> The evidence suggests that this is the case in the NFL. Nine of the current thirty-two head coaches are either the son or father of a current or former NFL coach.<sup>110</sup> And 111 NFL coaches—including coordinators and position coaches—are related biologically or through marriage to current or former NFL coaches, out of a total of 792 coaches employed by NFL teams.<sup>111</sup> A few NFL teams, such as the Arizona Cardinals and the Atlanta Falcons, have an explicit policy against nepotism hiring among the coaching ranks.<sup>112</sup>

Claims of employment discrimination under Section 1981 require but-for causation.<sup>113</sup> Therefore, while discussions of the role of systemic racism may be necessary to improve racial diversity in coaching, it does little to strengthen the Plaintiff's case. For example, the Dolphins and Giants are not legally liable for how a disproportionate number of Black athletes are transitioned away from being quarterback in college.

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106. *See id.* (reasoning offensive coordinators are more likely to have been offensive players and defensive coordinators are more likely to have been defensive players).

107. *See* Johnson, *supra* note 78.

108. *See* Roy Maurer, *Employee Referrals Remain Top Source for Hires*, SHRM (June 23, 2017), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/employee-referrals-remains-top-source-hires.aspx> [<https://perma.cc/S8C3-7FFR>].

109. *See* Kim Parker et al., *Chapter 5: Race and Social Connections—Friends, Family and Neighborhoods*, PEW RES. CTR. (June 11, 2015), <https://www.pewresearch.org/social-trends/2015/06/11/chapter-5-race-and-social-connections-friends-family-and-neighborhoods/> [<https://perma.cc/7Y9R-55AQ>] (explaining how people generally feel strong social connections to others of the same race).

110. *See* Dr. C. Keith Harrison & Scott Bukstein, *Occupational Mobility Patterns in the National Football League*, NAT'L FOOTBALL LEAGUE (Feb. 2020), <https://operations.nfl.com/media/4229/2020-nfl-diversity-and-inclusion-report.pdf> [<https://perma.cc/J2WZ-CF9F>].

111. *See* Kahler, *supra* note 87.

112. *See id.*

113. For a discussion of Section 1981's but-for causation requirement, see *infra* note 169 and accompanying text.

## IX. EVIDENCE CONTRARY TO THE ALLEGATIONS

As demonstrated in Part VII, the Defendants would be able to minimize the explanatory power of the Plaintiff's evidence by explaining how much of it is either irrelevant to the allegations of discrimination or consistent with non-discriminatory behavior. This part presents evidence that the Defendants could present to support their position that there was no illegal discrimination. However, none of this evidence dispositively proves that illegal discrimination did not take place.

## A. Non-Discriminatory Explanation by the New York Giants

As previously mentioned, the Giants have non-discriminatory explanations for why they hired Daboll instead of Flores. Daboll was a better fit with their strategic goals and their general manager.<sup>114</sup> The Giants interviewed four minority candidates for general manager and three minority candidates for head coach.<sup>115</sup> This suggests that, at least initially, they were open to hiring minority candidates since the Rooney Rule only required them to interview two minority candidates.<sup>116</sup> This also means that it cannot be said that Flores was interviewed only to satisfy the Rooney Rule because it would have been satisfied had the Giants not interviewed him.

## B. Miami Dolphins Historical Record

The claim that the Dolphins are a racist organization that participates in racist employment practices is difficult to support given the Dolphins' track record. One sports commentator described how Dolphins' owner Stephen Ross ran the "blackest organization in the NFL. . . . At one time, his head coach, general manager, assistant general manager, defensive coordinator, and several members of his ownership group were all black."<sup>117</sup> And, of course, the Dolphins are the same organization that chose to hire Flores at a time when he had no head coaching experience.<sup>118</sup>

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114. For a discussion of Daboll's qualifications, see *supra* note 90 and accompanying text.

115. See Lise, *supra* note 69.

116. See *id.*

117. See Riley, *supra* note 40.

118. See Jarrett Bell, *Dolphins GM: We Hired Brian Flores as Coach Because 'This Generation is Different'*, USA TODAY (June 26, 2019, 12:09 AM), <https://www.usatoday.com/story/sports/nfl/columnist/bell/2019/06/25/dolphins-hired-brian-flores-leadership-nfl/1556453001/> [https://perma.cc/94D5-2YDM].

### C. Flores's Reputation

At this point in the litigation process, it is unknown whether the Giants took into consideration in their hiring decision Flores's reputation for being, as the Dolphins put it, "noncompliant and difficult to work with."<sup>119</sup> Even if this reputation is unfounded and the result of Flores's refusal to intentionally lose games as the Complaint alleges, the Giants would not be liable for believing it. Perhaps Flores would have a defamation action against the Dolphins, but that is irrelevant to claiming it was a discriminatory hiring practice for the Giants not to hire him based on the negative reputation of being difficult to work with.

### D. Inconsistent Incentives

NFL teams are highly motivated to win football games. They invest millions in recruiting efforts and are sometimes even willing to cheat just to slightly increase their odds of winning.<sup>120</sup> This win-at-all-costs mentality is inconsistent with the accusation that most NFL teams would discriminate against superior Black coaches who would increase their odds of winning. Likewise, Black men make up 7% of the U.S. population but make up 70% of NFL rosters.<sup>121</sup> This is inconsistent with the claim that NFL teams are willing to decrease their chances of winning just to not hire Black employees. Put another way, if teams are willing to reduce their odds of winning by refusing to hire the best available head coach because he is Black, then why would they not also apply the same logic and further decrease their odds of winning by preferring to hire inferior white players to superior Black players? It would make little sense for NFL teams to suspend their racism in the latter instance but not in the former. And now with free draft picks as an incentive for developing Black coaches,<sup>122</sup> even if a team viewed a white candidate for head coach as slightly better than the Black candidate, it may nevertheless be better for the team to choose the Black candidate if they reason that the extra draft picks will offset this difference. This does not definitively prove that the Giants did not discriminate against Flores; rather, it lends credibility to the claim. Perhaps in anticipation of this argument, the Complaint attempts

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119. See Complaint, *supra* note 2, at 6.

120. See *The NFL's Biggest: Cheaters*, YOUR TEAM CHEATS, <https://yourteamcheats.com/cheaters/> [<https://perma.cc/4BND-FKUW>] (last visited Mar. 3, 2022).

121. See Complaint, *supra* note 2, at 25.

122. See Battista, *supra* note 24

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to portray hiring an NFL football player as a punishment because the players are exploited to make money for the owners while risking their health.<sup>123</sup>

#### E. Accusation of Throwing Games for the Miami Dolphins

One piece of evidence available to the defense was oddly provided by the plaintiff in the Complaint with the admission that the reason Flores was fired was not racism, but rather, a refusal to violate league rules when asked.<sup>124</sup> It is alleged that Flores refused to intentionally lose games in 2019 to improve the team's draft position.<sup>125</sup> The Complaint acknowledges that it was only after this alleged occurrence that Flores was treated badly and then ultimately fired.<sup>126</sup> The Dolphins have disputed this allegation, claiming it is "false, malicious, and defamatory."<sup>127</sup> But the claim is largely irrelevant to the discrimination case because, while it may have been an unlawful reason for firing Flores, it still provides a non-discriminatory explanation.

Flores could still make the nuanced claim that this firing was discriminatory by alleging that a white head coach who refused to throw games would not have been fired. But this is a highly speculative argument with very little evidence to support it. The Dolphins were unlikely to have kept a record of this alleged offer. The Complaint attempts to link this cause of Flores's firing to racism by alleging that "[t]his is reflective of an all too familiar 'angry black man' stigma that is often cast upon Black men who are strong in their morals and convictions while white men are coined as passionate for those very same attributes."<sup>128</sup>

#### X. PRAGMATISM AND UNINTENDED CONSEQUENCES

Up to this point, the Article has focused on legal issues related to the Flores employment discrimination lawsuit. This section examines the larger societal implications of such a lawsuit and the

123. See Complaint, *supra* note 2, at 24 (alleging NFL owners were "willing to sign Black players [to] make them money while risking their health").

124. See Complaint, *supra* note 2, at 6.

125. See *id.* at 5–6, 34–35.

126. See *id.* at 6 ("After the incident, Mr. Flores was treated with disdain and held out as someone who was noncompliant and difficult to work with. . . . From that point forward, Mr. Flores was ostracized and ultimately he was fired.")

127. See Adam Barnes, *Miami Dolphins Hire Multi-Racial Head Coach Amid NFL's Coaching Diversity Controversy*, HILL (Feb. 7, 2022), <https://thehill.com/changing-america/respect/diversity-inclusion/593112-miami-dolphins-hire-multi-racial-head-coach-amid> [<https://perma.cc/AMU4FAUJ>].

128. See Complaint, *supra* note 2, at 6.

hyperbolic allegations in the Complaint. The costs and benefits of such actions result in a difficult calculus to perform, as different people may disagree as to whether a given outcome is a cost or a benefit. Furthermore, even when costs and benefits are agreed on, their subjective nature makes weighting them for comparison difficult.

The Complaint contains dangerously hyperbolic language that could be counterproductive to the change the plaintiff wants to affect. The most extreme example is likely that of claiming that the NFL is “managed like a plantation,” comparing the players to slaves and the team owners to slave owners.<sup>129</sup> The notion that paying millions of dollars to someone in return for his voluntary participation in a sport that hundreds of thousands of Americans play for free is in any way comparable to slavery in the antebellum South is astonishingly insensitive to the tragic experiences of millions of slaves. Consequently, this analogy creates a self-imposed straw-man argument that opponents can easily refute.<sup>130</sup> This is ill-advised because it effectively imposes an impossible-to-defend standard, which then allows the other side to claim victory without having to address the more reasonable arguments available.

Such hyperbolic language may result in a similar effect in third-party observers to the debate. By making extreme claims that are easily refuted, observers may assume the overall position of the anti-discrimination advocate is likewise flawed. And even worse, this may also result in NFL teams similarly dismissing all concerns of anti-discrimination advocates as illegitimate. This is because when team owners are accused of engaging in the “most insidious form of discrimination” and being the equivalent of a slave owner,<sup>131</sup> these accusations can be easily dismissed and serve as justification to not engage with the issue any further.<sup>132</sup> A far more tactful approach that is more likely to effectuate change is to instead discuss how the effects of systemic racism may still be affecting minority representation today.<sup>133</sup>

Claims that the Giants engaged in the “most insidious form of discrimination” likely has further unintended consequences by im-

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129. *See id.* at 2.

130. *See Straw Man*, BLACK'S L. DICTIONARY (11th ed. 2009) (explaining straw-man argument is “tenuous and exaggerated counterargument that an advocate makes for the sole purpose of disproving it.”).

131. *See* Complaint, *supra* note 2, at 7.

132. *See* Broda-Bahm, *supra* note 101.

133. For a discussion of the effects of systemic racism, see *supra* notes 100-113 and accompanying text.

plication.<sup>134</sup> For example, by claiming that Flores's alleged sham interview with the Giants is as insidious as discrimination can get, the experience of others who have experienced far worse discrimination is unjustifiably minimized. Furthermore, such a claim could be hijacked by advocates as evidence that discrimination is not a significant problem in America anymore. After all, they may reason, if the worst form of discrimination that occurs today is inviting someone to a sham interview, then society should probably focus our efforts on more pressing matters.

The Complaint presents multiple quotes from the NFL regarding racial diversity shortcomings as evidence of racism.<sup>135</sup> This may be an effective tactic by the Plaintiff, as it could make the Defendants appear inconsistent if they respond by touting the success of their diversity initiatives. However, punishing the Defendants for being upfront about the need for improvement in the area of diversity may have unintended consequences for how forthright corporations will be willing to be about diversity issues. Incentivizing corporations to keep diversity problems secret could have a detrimental effect on the ability to address such issues.<sup>136</sup>

Similarly, the Complaint references Commissioner Roger Goodell's public support for the Black Lives Matter movement and the creation of a \$250 million foundation for social justice.<sup>137</sup> It is unclear why this was mentioned at all, as it seems to minimize claims of the NFL as an "insidious" institution "rife with racism."<sup>138</sup> The Complaint ends this section by stating that these actions were "too little too late" and that some people viewed them as "hypocritical" and "pandering."<sup>139</sup> Attacking an institution for funding a quarter-of-a-billion-dollar social justice foundation sends mixed messages at best.

One of the named Defendants accused of racial discrimination—the Dolphins—serves as an illustration for another potential unintended consequence of the lawsuit. The Dolphins were recog-

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134. See Complaint, *supra* note 2, at 7.

135. See *id.* at 23–24.

136. See Barnes, *supra* note 127 (noting that any such secrecy is not present in this case because Goodell said that the lack of diversity among head coaches is "unacceptable."). This could potentially be interpreted as an implicit admission of wrongdoing because it likely would not be classified as unacceptable if the current level of diversity were the result of a pure meritocracy. See Complaint, *supra* note 2, at 24 ("Rooney Rule has failed to yield any meaningful change to an institution so dully steeped in discriminatory practices.").

137. See Complaint, *supra* note 2, at 23.

138. *Id.* at 7, 11.

139. *Id.* at 23.

nized as one of the “blackest organizations in the NFL” as far as coaches, managers, and owners.<sup>140</sup> Punishing such an organization for firing one of these individuals may send a dangerous message to other organizations considering hiring a Black coach. Simply put, if an employer is considering hiring one of two candidates, and if there is potentially an additional cost to eventually firing employee A but no such additional cost to firing candidate B, this makes candidate B more desirable by comparison. As applied to the present case, if an NFL team knows it can fire a white coach with impunity, but firing a Black coach potentially results in lawsuits and public criticism, this provides an incentive to hire the former over the latter. Such an incentive structure is counterproductive to increasing minority representation among coaches in the NFL.

The rationale described in the preceding paragraph is not without criticism, however. Such a basis for hiring a white coach over a comparable Black coach would violate existing employment discrimination laws if it could be proven. Existing case law maintains that the risk of an employment discrimination lawsuit is not a justifiable defense to a discriminatory hiring practice.<sup>141</sup> Additionally, as the Giants are now learning, not hiring a Black coach may also lead to an employment discrimination lawsuit.<sup>142</sup> Therefore, any potential benefit to avoiding a wrongful termination lawsuit for hiring a Black coach may largely be offset by the addition of a potential employment discrimination hiring claim.

The threat of potentially creating an incentive against hiring Black coaches is not the only manner in which such lawsuits may have unintended consequences that harm the very Black coaches they were intended to help. Such litigation and policies to promote Black coaches by the NFL may also have the unintended consequence of denigrating the achievements of Black coaches. For example, the NFL gives extra draft picks to teams that develop minority coaches.<sup>143</sup> The Complaint calls for the extension of this practice.<sup>144</sup>

Some football fans may view this more as a bribe and reason that if such candidates were qualified on the merits, then NFL

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140. See Riley, *supra* note 40.

141. See Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171, 404 P.3d 504, 509 (Wash. 2017) (“An employer, ESD 171, discriminated against a person, Zhu, by refusing to hire him, and the jury determined that it did so because Zhu opposed practices forbidden by WLAD by suing Waterville for racial discrimination.”).

142. See Complaint, *supra* note 2.

143. See Battista, *supra* note 24.

144. See *id.*

teams' desires to win would be all that is needed to get them hired. The fact that special enticements are needed could be interpreted as implying inferiority. This is not necessarily true, but some may interpret such policies this way. Such beliefs—regardless of whether they are true or not—could serve to undermine the accomplishments of minority coaches, thus unfairly setting them up for failure. Furthermore, the practice of incentivizing the hiring of Black coaches may function to validate the perceived martyrdom status that some white supremacist groups promote for recruitment purposes.<sup>145</sup> Even anti-discrimination advocates are susceptible to behavior that advances harmful stereotypes on this subject. A recent example is how the media and even the NFL refer to the hiring of a minority candidate as a “minority hire”<sup>146</sup> or a “diversity hire,”<sup>147</sup> as if these hiring decisions were somehow separate and distinct from the standard, merit-based hiring practice.

An example of how this manner of focusing on race can serve to diminish the achievements of minority coaches is found in the Dolphins' hiring of a new head coach. The man they hired, Mike McDaniel, was a qualified candidate.<sup>148</sup> Unfortunately, much of the news of his hiring overlooked his qualifications and instead focused on his minority status and the implication that the Dolphins may have hired him in an effort to create an appearance of racial tolerance amid being a named Defendant in the Flores lawsuit. One headline framed the announcement of McDaniel's hiring as, “Miami Dolphins Hire Multi-Racial Head Coach Amid NFL's Coaching Diversity Controversy.”<sup>149</sup>

The drafters of the Flores Complaint have a fiduciary obligation to zealously advocate for the interests of their client regardless of any negative consequences to society at large.<sup>150</sup> And in this way,

145. See Olga Khazan, *How White Supremacists Use Victimhood to Recruit*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/science/archive/2017/08/the-worlds-worst-support-group/536850/> [https://perma.cc/2MY9-4B7Y].

146. See Barnes, *supra* note 127.

147. Kevin Patra, *NFL Announces 37 Compensatory Picks in 2021 NFL Draft for 17 Teams*, NAT'L FOOTBALL LEAGUE (Mar. 10, 2021, 3:20 PM) <https://www.nfl.com/news/nfl-announces-36-compensatory-picks-in-2021-nfl-draft-for-17-teams> [https://perma.cc/Q25C-G734].

148. See Alain Poupert, *Mike McDaniel's Road to Becoming Dolphins Head Coach*, SPORTS ILLUSTRATED (Feb. 7, 2022), <https://www.si.com/nfl/dolphins/news/miami-dolphins-new-coach-mike-mcdaniel-and-his-road-to-his-new-position> [https://perma.cc/62SF-USF3].

149. See Barnes, *supra* note 127.

150. See MODEL RULES OF PROF. CONDUCT r. 1.3 (Am. Bar Ass'n 2020) (explaining that lawyer should “take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor [and] act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf”).

this section is not a criticism of the Complaint. However, the presence of unintended consequences is nevertheless a reality. Additionally, the negative effects of the hyperbolic rhetoric used in the Complaint may have similar unintended consequences on the judge assigned to the case. For example, they may be interpreted by the judge as insulting, desperate, and evidence of a weak case.

#### XI. ROONEY RULE

There is unfortunately no mechanism through which policies implemented with good intentions for racial justice necessarily produce such results. Policies can have unintended consequences that result in more harm than good. The NFL's Rooney Rule illustrates this principle.<sup>151</sup> The Rule mandates that NFL teams must interview a specific number of minority candidates before hiring coaches.<sup>152</sup>

Some anti-discrimination advocates have noted that the Rooney Rule has made it harder for Black coaches to obtain employment.<sup>153</sup> The Complaint acknowledges that the Rooney Rule created a stigma around Black coaches.<sup>154</sup> The practice of giving a sham interview to a Black candidate to satisfy the Rule was known derogatorily as a "Rooney Rule Interview."<sup>155</sup>

The negative consequences of the Rooney Rule extend beyond just the sham interviews that Black candidates may have endured. Forcing teams to conduct interviews when they already know who they want to hire may subconsciously breed animosity against those minority candidates being interviewed. It may subconsciously cause them to associate interviewing minority candidates as a waste of time.

The Rooney Rule may also send mixed signals to teams regarding whether the ultimate goal is Black representation or merely the perception of equal opportunity. One NFL position coach explained:

When you think about it, it's the perfect cover story. If you tell a bunch of billionaires they don't have to care (as long as they can just make it look like they care), and then you

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151. See Complaint, *supra* note 2, at 5 (acknowledging Rooney Rule "may have been well intentioned," and then continues to acknowledge harm it has caused).

152. See Nat'l Football League Operations, *supra* note 61.

153. See Harriot, *supra* note 75.

154. See Complaint, *supra* note 2, at 5.

155. See *id.* at 45.

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tell them exactly how to make it look like they care;  
they're gonna game the system every time.<sup>156</sup>

The NFL's response to the evidence that suggests the Rooney Rule is not only ineffective, but potentially counterproductive, is unfortunate in that they doubled down. For example, they increased the number of minorities that must receive an in-person interview before filling a head coach position, likely exacerbating the problems with the Rule.<sup>157</sup>

## XII. CONCLUSION

The difficulty of winning an employment discrimination case at trial, the apparent weakness of the facts in Flores's case, the alleging of a Section 1981 violation rather than Title VII, and the timing of the lawsuit all call into question the strategy being implemented.<sup>158</sup> For example, Flores was under consideration for a position with the Houston Texans ("Texans") when the lawsuit was filed.<sup>159</sup> He also interviewed with the New Orleans Saints ("Saints") the day this lawsuit was filed.<sup>160</sup> Both the Texans and the Saints are named Defendants to the litigation and accused of discriminatory conduct.<sup>161</sup> If Flores truly wanted either of those jobs, it is unclear why he did not wait to hear back before filing the lawsuit. Perhaps he reasoned that if he did receive an offer, it would significantly diminish the strength of his lawsuit.

Flores's attorney—a highly renowned employment discrimination expert—chose Section 1981 instead of Title VII to pursue a cause of action.<sup>162</sup> The differences between these two laws may pro-

156. See Harriot, *supra* note 75.

157. See Nat'l Football League Operations, *supra* note 61.

158. See Michele Weldon, *It's Everywhere: In Employment Discrimination, the Law Usually Wins, Not You*, HUFFINGTON POST (Oct. 8, 2017, 11:53 AM), [https://www.huffpost.com/entry/its-everywhere-in-employment-discrimination-the\\_b\\_59da496ae4b08ce873a8cefa](https://www.huffpost.com/entry/its-everywhere-in-employment-discrimination-the_b_59da496ae4b08ce873a8cefa) [<https://perma.cc/QL8D-MA3D>] (discussing Plaintiffs' odds of winning an employment discrimination lawsuit at trial are only 2% and plaintiffs are nine times more likely to have their case dismissed than to win at trial).

159. See Sarah Barshop, *Houston Texans GM Nick Caserio: Brian Flores' Lawsuit Didn't Affect Decision that Resulted in Lovie Smith as New Head Coach*, ESPN (Feb. 8, 2022), [https://www.espn.com/nfl/story/\\_/id/33244964/houston-texans-gm-nick-caserio-brian-flores-lawsuit-affect-decision-hire-lovie-smith-coach](https://www.espn.com/nfl/story/_/id/33244964/houston-texans-gm-nick-caserio-brian-flores-lawsuit-affect-decision-hire-lovie-smith-coach) [<https://perma.cc/73TT-4EA2>].

160. See Vincent Frank, *New Orleans Saints Call Brian Flores 'Impressive Candidate' Following Interview*, SPORTSNAUT (Feb. 2, 2022), <https://sportsnaut.com/new-orleans-saints-call-brian-flores-impressive/> [<https://perma.cc/3D8D-GL26>].

161. See Complaint, *supra* note 2, at 11.

162. See *id.* at 52.

vide some insight into the strategy. Title VII allows for recovery under a disparate impact theory, while Section 1981 does not.<sup>163</sup> Title VII requires that one must first exhaust his administrative remedies with the Equal Employment Opportunity Commission, while there is no such requirement under Section 1981.<sup>164</sup> Section 1981 has a longer statute of limitations than Title VII.<sup>165</sup> And perhaps most importantly, Title VII has strict caps on monetary damages, while there is no such cap under Section 1981.<sup>166</sup>

As Flores's attorney is no doubt aware, a unanimous 2020 Supreme Court ruling in *Comcast Corp. v. National Association of African American-Owned Media*<sup>167</sup> significantly increased the difficulty of prevailing in a Section 1981 case.<sup>168</sup> There, the Court ruled that a plaintiff in a Section 1981 action "bears the burden of showing that race was a but-for cause of its injury," and that burden "remains constant" "through the life of the lawsuit."<sup>169</sup> This overruled the Ninth Circuit's implementation of the less-stringent standard whereby race need only be a "motivating factor."<sup>170</sup>

This potentially landmark case is only in the early stages of litigation. The Defendants claim to have strong evidence to rebut the Complaint's allegations.<sup>171</sup> While this Article primarily focuses on areas of weakness for Flores's case, there is likely enough to survive a Rule 12(b)(6) motion to dismiss.<sup>172</sup> The ultimate outcome of the case could be contingent upon Flores's ability to find a smoking gun during discovery proving employment discrimination. Absent such a finding, it appears unlikely that there is enough to satisfy the onerous standard of but-for causation under Section 1981.<sup>173</sup>

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163. See Zuckerman Law Whistleblower Practice Group, *supra* note 45.

164. See *id.*

165. See *id.*

166. See *id.*

167. 140 S. Ct. 1009 (2020).

168. See *id.* at 1014 ("Under [but-for causation], a plaintiff must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred.").

169. See *Comcast Corp.*, 140 S. Ct. at 1014–15.

170. See *id.* at 1017–19.

171. For a discussion of Giants' evidence to rebut the Complaint's allegations, see *supra* notes 70-72 and accompanying text.

172. See *Tackling the Most Important Topics of Law School: Rule 12(b)(6)'s "Failure to State a Claim,"* THOMSON REUTERS (Aug. 3, 2019), <https://legal.thomsonreuters.com/blog/12b6-failure-to-state-a-claim/> [<https://perma.cc/38P2-G7FM>] ("As a practical matter, Rule 12(b)(6) motions are rarely successful . . .").

173. For a discussion of causation under Section 1981, see *supra* notes 169-170 and accompanying text.

APPENDIX A

List of current NFL Head Coaches who never played in the NFL.<sup>174</sup>

Arthur Smith, Atlanta Falcons  
John Harbaugh, Baltimore Ravens  
Sean McDermott, Buffalo Bills  
Matt Rhule, Carolina Panthers  
Matt Eberflus, Chicago Bears  
Zac Taylor, Cincinnati Bengals  
Kevin Stefanski, Cleveland Browns  
Mike McCarthy, Dallas Cowboys  
Nathaniel Hackett, Denver Broncos  
Matt LaFleur, Green Bay Packers  
Lovie Smith, Houston Texans  
Andy Reid, Kansas City Chiefs  
Josh McDaniels, Las Vegas Raiders  
Brandon Staley, Los Angeles Chargers  
Sean McVay, Los Angeles Rams  
Mike McDaniel, Miami Dolphins  
Bill Belichick, New England Patriots  
Dennis Allen, New Orleans Saints  
Brian Daboll, New York Giants  
Robert Saleh, New York Jets  
Nick Sirianni, Philadelphia Eagles  
Mike Tomlin, Pittsburgh Steelers  
Kyle Shanahan, San Francisco 49ers  
Pete Carroll, Seattle Seahawks  
Bruce Arians, Tampa Bay Buccaneers

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174. People who were drafted into the NFL but cut before the season started are not counted as having played in the NFL for the purposes of this list.