

Protecting the Blind Side of Title VII from the Blitz of Textualism

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I. Introduction

In January of 2022, Brian Flores (“Flores”) received a text message from New England Patriots’ head coach Bill Belichick (“Belichick”), who wanted to congratulate him on being selected as the next head coach of the New York Giants.¹ Flores made a name for himself by being the defensive play-caller for Belichick’s New England Patriots in Super Bowl LIII and holding the Los Angeles Rams, who scored the second most points in the league that season,² to a mere 3 points.³ The very next day after the Super Bowl, Flores was named the head coach of the Miami Dolphins, taking over a team that was coming off two straight losing seasons and a bottom-of-the-barrel-defense.⁴ Three years later, the Miami Dolphins decided to part ways with Flores, allegedly due to lack of performance.⁵ So, when Flores received Belichick’s congratulatory message, it seemed as though Flores was receiving a second shot at leading a

¹ See Class Action Complaint & Demand for Jury Trial at 7, *Flores v. National Football League*, No. 1:22-cv-00871 (S.D.N.Y. Feb. 1, 2022) [hereinafter *Flores Complaint*].

² See *2018 NFL Standings & Team Stats*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/years/2018/index.htm#> (last visited Nov. 1, 2023).

³ Cameron Wolfe, *Brian Flores Springs into Dolphins Rebuild off Super Bowl Triumph*, ESPN (Feb. 4, 2019, 3:24 PM), https://www.espn.com/blog/miami-dolphins/post/_id/28578/brian-flores-springs-into-dolphins-rebuild-off-super-bowl-triumph.

⁴ Cameron Wolfe, *Dolphins make Patriots Assistant Brian Flores their next Head Coach*, ESPN (Feb. 4, 2019, 3:06 PM), https://www.espn.com/nfl/story/_id/25925144/dolphins-make-patriots-assistant-brian-flores-coach.

⁵ Marcel Louis-Jacques, *Miami Dolphins fire Coach Brian Flores after Three Seasons; GM Chris Grier to Remain*, ESPN (Jan. 10, 2022, 9:39 AM), https://www.espn.com/nfl/story/_id/33034467/miami-dolphins-fire-coach-brian-flores-three-seasons; but see *Flores Complaint*, *supra* note 1, at 5–6 (alleging that Flores was actually fired for refusing to engage in unlawful tampering as well as refusing to purposefully lose games in order to “tank” for a better draft pick).

team in the National Football League (“NFL”); the only problem was that Flores had not even interviewed for the Giants job yet.⁶

After receiving this confounding congratulatory message, Flores and Belichick went back and forth, Belichick telling Flores that, from what he has heard, Flores is “their guy” and has the Giants job locked down, with Flores responding that he has not interviewed yet but is feeling confident that he will land the job.⁷ Finally, Flores asked Belichick if Belichick was mistakenly talking to Brian Flores, thinking Flores was Brian Daboll (“Daboll”);⁸ Belichick, realizing his mistake, responded with the now infamous message: “[s]orry – I fucked this up. I double checked and misread the text. I think they are naming Brian Daboll. I’m sorry about that. BB.”⁹

Unbeknownst to Flores, the decision had been made before he even had a chance to interview for the Giants job.¹⁰ Now, someone unfamiliar with the NFL may ask, what is wrong with hiring a candidate before interviewing everyone? General courtesy aside, the Giants could have hired Daboll before interviewing Flores based on Daboll’s resume. Daboll had been an offensive coordinator before he became the Giant’s head coach,¹¹ while Flores was technically only an assistant and positions coach.¹² The decision could have been based on an incredible interview Daboll had that left no doubt in the Giants’ mind that nobody could possibly be better for the job. Regardless of whatever conceivable reason the average person could come up with, there is one major problem with the Giants’ decision: the Rooney Rule.

⁶ See Flores Complaint, *supra* note 1, at 6–7.

⁷ *Id.* at 7.

⁸ At the time of writing, Brian Daboll is currently the New York Giants head coach and, like Flores, a former assistant coach under Belichick. See *Biography*, GIANTS, <https://www.giants.com/team/coaches-roster/brian-daboll> (last visited Nov. 1, 2023).

⁹ Flores Complaint, *supra* note 1, at 7.

¹⁰ *Id.* at 6–7.

¹¹ See *Biography*, *supra* note 8.

¹² See *Biography*, VIKINGS, <https://www.vikings.com/team/coaches-roster/brian-flores> (last visited Nov. 1, 2023).

The Rooney Rule will be discussed in more detail below,¹³ but for now, all that is important to know is that the Rooney Rule is a diversity and inclusion initiative taken on by the NFL that requires teams to *interview* minority candidates for head coaching, coordinator, and front-office positions.¹⁴ By hiring Daboll before even interviewing Flores, the Giants did what other teams had only ever been accused of doing in the past: interviewing Flores, a minority, for the sole reason of checking a box to satisfy the Rooney Rule.¹⁵ Had it not been for Belichick mistakenly texting his former protegee, the Giants likely would have gotten away with violating the Rooney Rule. Due to the Giant’s disregard for the Rooney Rule, Flores has gone on to file a class action lawsuit¹⁶ against the NFL for discriminatory hiring practices.¹⁷

¹³ See *infra* Section II.A.

¹⁴ See *The Rooney Rule*, FOOTBALL OPERATIONS, <https://operations.nfl.com/inside-football-ops/inclusion/the-rooney-rule/> (last visited Nov. 1, 2023).

¹⁵ See e.g., Jason Owens, *Marvin Lewis talks Rooney Rule after Cowboys Interview: 'Nobody's Going to tell them who to Hire'*, YAHOO!SPORTS (Jan. 8, 2020) [https://sports.yahoo.com/marvin-lewis-talks-rooney-rule-after-cowboys-interview-nobodys-going-to-tell-them-who-to-hire-004608619.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xiLmNvbS8&guce_referrer_sig=AQAAAN2PIAnKZ8bIBAU0AIC338zqSi6biv376ByhiTAKFIGS6hoYGZz83biQ3SW09kmhmSCFxixc7sh7iGu79ZOVKQJyrXJRQ-](https://sports.yahoo.com/marvin-lewis-talks-rooney-rule-after-cowboys-interview-nobodys-going-to-tell-them-who-to-hire-004608619.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xiLmNvbS8&guce_referrer_sig=AQAAAN2PIAnKZ8bIBAU0AIC338zqSi6biv376ByhiTAKFIGS6hoYGZz83biQ3SW09kmhmSCFxixc7sh7iGu79ZOVKQJyrXJRQ-e1le40MdKJgLO6VwYmd68RgtJASk9NDc1hH3bjH7m9gyjmsbUY3xJOFoc0McxSKhOBP3HcyULpd7wU)

(discussing the possibility that the interview of Marvin Lewis, a minority, by the Dallas Cowboys was done only to satisfy the Rooney Rule before hiring Mike McCarthy, a white man). In fact, the Giants incident was not the first time Flores was potentially interviewed only to satisfy the Rooney Rule. See Flores Complaint, *supra* note 1, at 8 (calling Flores’ 2019 interview with the Denver Broncos a “sham” and alleging that the Broncos’ executives arrived late and “disheveled” from drinking the night before the interview).

¹⁶ Flores Complaint, *supra* note 1, at 47. The Flores Complaint plead that the proposed class includes people who have:

[B]een discriminatorily denied positions as Head Coaches, Offensive and Defensive Coordinators and Quarterbacks Coaches, as well as General Managers . . . ; been discriminatorily subjected to sham and illegitimate interviews . . . ; been subjected to discriminatory retention practices and/or termination decisions . . . ; been subjected to disparate terms and conditions of employment, including but not limited to, lack of opportunity and harm to professional reputation . . . ; and . . . been subjected to unequal compensation relative to their white peers.

¹⁷ See *id.* at 52–56.

Currently, the Rooney Rule is a lawful affirmative action program due to Supreme Court precedent in interpreting Title VII of the 1964 Civil Rights Act (“Title VII”).¹⁸ However, the legal status of the Rooney Rule could potentially be soon called into question. Just this year, the Supreme Court decided *Students for Fair Admissions v. President & Fellows of Harvard College*¹⁹ and struck down the affirmative action plans of Harvard University and the University of North Carolina on Equal Protection grounds.²⁰ While on its face, this decision would not make the Rooney Rule illegal due to the *Students for Fair Admissions* decision being an Equal Protection Clause case,²¹ there is a possibility that the concurring opinions of Justices Neil Gorsuch²² and Clarence Thomas²³ opened the door for the legality of private affirmative action programs to be challenged. Along with the rise of textualism in statutory interpretation,²⁴ now more than ever could be the time for cases like *United Steelworkers of America v. Weber*²⁵ to be overturned, rendering private affirmative action initiatives like the Rooney Rule illegal.²⁶

¹⁸ See generally *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1971) (holding that private affirmative action programs do not violate the anti-discrimination provisions of Title VII); see also *infra* Section II.B (discussing the legality of private affirmative action programs in more detail).

¹⁹ *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

²⁰ See *id.* at 230.

²¹ *Students for Fair Admissions*, 600 U.S. at 190–91; see also *Implications for Private Employers of the Supreme Court’s Harvard Decision Banning Race-Based Affirmative Action in College Admissions*, CROWELL (July 14, 2023), <https://www.crowell.com/en/insights/client-alerts/implications-for-private-employers-of-the-supreme-courts-harvard-decision-banning-race-based-affirmative-action-in-college-admissions#:~:text=Given%20the%20limited%20scope%20of,private%20employers%2C%20including%20federal%20contractors> (discussing why the *Students for Fair Admissions* case does not implicate private affirmative action agreements like the Rooney Rule).

²² See *Students for Fair Admissions*, 600 U.S. at 290 (Gorsuch J., concurring) (stating that Title VII codifies a “categorical rule of ‘individual equality, without regard to race.’” (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416 n. 19 (1978) (Stevens J., concurring in the judgment in part and dissenting in part))).

²³ See *id.* at 232 (Thomas J., concurring) (arguing that “all forms of discrimination based on race—including so-called affirmative action—are prohibited under the Constitution . . .”).

²⁴ See *infra* Section II.C.

²⁵ *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1971).

²⁶ See *infra* Section II.C. (discussing the current state of *stare decisis* and the recent Supreme Court cases that have been overturned).

This paper will discuss whether there is a textualist defense of private affirmative action under Title VII. Part II will discuss the history of the Rooney Rule,²⁷ Title VII,²⁸ as well as the rise of textualism in statutory interpretation.²⁹ Part III will analyze Title VII's anti-discrimination provisions from a textualist perspective and determine whether the Rooney Rule would violate the text of Title VII,³⁰ and advocate for why affirmative action programs like the Rooney Rule should be protected.³¹ Lastly, Part IV will conclude the paper.³²

II. Background

A. The History of the Rooney Rule

The first black NFL head coach came during the NFL's infancy in 1921 when Fritz Pollard, the same man who was the first black player in NFL history,³³ became the co-head coach of the Akron Pros.³⁴ Despite this early success, there would not be another black NFL head coach until 1989, a staggering sixty-eight years after Fritz Pollard, the then Los Angeles Raiders named Art Shell ("Shell") as head coach.³⁵ Shell is considered by many, including the NFL,³⁶ to be the first black NFL head coach of the *modern* era, which is after the American Football League merged with the NFL in 1970.³⁷ Shell went on to have fairly good tenure as the Raiders' head coach,

²⁷ See *infra* Section II.A.

²⁸ See *infra* Section II.B.

²⁹ See *infra* Section II.C.

³⁰ See *infra* Section III.A.

³¹ See *infra* Section III.B.

³² See *infra* Part IV.

³³ *Meet Four Men Who Broke The NFL's Color Line*, NFLPA, <https://nflpa.com/posts/meet-the-four-men-who-broke-the-nfl-s-color-line> (last visited Nov. 5, 2023).

³⁴ *Firsts by Black Players, Coaches & Officials in the NFL*, NFL, <https://www.nfl.com/photos/firsts-by-african-americans-in-the-nfl-09000d5d826ca97b> (last visited Nov. 5, 2023).

³⁵ Mike Freeman, *A Brief History of Black NFL Coaches*, USA TODAY, <https://www.usatoday.com/storytelling/graphic-novels/sports/nfl/history-nfl-black-coaches/1663620921633/> (last visited Nov. 5, 2023).

³⁶ See NFL, *supra* note 34 (official NFL website acknowledging Shell as the first modern era black head coach).

³⁷ See Freeman *supra*, note 35.

coaching the Raiders to five winning seasons and three playoff berths,³⁸ including a trip to the conference title game in his second year as head coach.³⁹

Between Shells' appointment in 1989 and 2022, there were 191 head coaching vacancies on NFL teams, and only twenty-four of them were filled by black coaches.⁴⁰ Despite the fact that some of them found great success,⁴¹ the lack of black coaches in a sport mainly played by black men⁴² seemed to be a problem. So much of a problem that things came to a head in 2002 when Minnesota Vikings' head coach Dennis Green ("Green"), the second black head coach in modern NFL history,⁴³ and Tampa Bay Buccaneers' head coach Tony Dungy ("Dungy"), who later became the first black coach in NFL history to win a Super Bowl,⁴⁴ were fired.⁴⁵ These firings were strange due to the success that these coaches created with their respective teams. Dungy had taken over a team considered to be the "doormat" of the league and turned them into a

³⁸ See *Art Shell*, PRO FOOTBALL REFERENCE, <https://www.pro-football-reference.com/coaches/ShellAr0.htm> (last visited Nov. 5, 2023).

³⁹ Mike Freeman, *Art Shell Reflects on Becoming NFL's 1st Black Head Coach in Modern Era*, BLEACHER REPORT (OCT. 9, 2014), <https://bleacherreport.com/articles/2216541-25-years-later-art-shell-reflects-on-becoming-the-nfls-first-black-head-coach>.

⁴⁰ Fred Bowen, *The NFL has only 3 Black Head Coaches. That needs to Change*, THE WASH. POST (Sep. 29, 2022), <https://www.washingtonpost.com/kidspost/2022/09/29/nfl-has-only-3-black-head-coaches-that-needs-change/>.

⁴¹ For example, Dennis Green of the Minnesota Vikings coached the team to eight playoff appearances despite having seven different starting quarterbacks from 1992–2001, and Mike Tomlin of the Pittsburgh Steelers became the youngest head coach to ever win a Super Bowl. See Freeman *supra*, note 35.

⁴² See Guadalupe Marquez-Velarde et al., *The Paradox of Integration: Racial Composition of NFL Positions from 1960 to 2020*, 9 SOCIO. OF RACE & ETHNICITY 451, 458 fig.1 (2023) (showing that between 1977–2020, a majority of NFL players have been black).

⁴³ Freeman *supra*, note 35.

⁴⁴ *Id.*

⁴⁵ See Mike Freeman, *PRO FOOTBALL; With a Game to Play, The Vikings Fire Green*, THE N.Y. TIMES (Jan. 5, 2002), <https://www.nytimes.com/2002/01/05/sports/pro-football-with-a-game-to-play-the-vikings-fire-green.html> (discussing Green's firing); See The Associated Press, *PRO FOOTBALL; Dungy Will Sign Contract With Colts*, THE N.Y. TIMES (Jan. 23, 2002) <https://www.nytimes.com/2002/01/23/sports/pro-football-dungy-will-sign-contract-with-colts.html> (discussing Dungy's appointment to the Indianapolis Colts after being fired from the Buccaneers).

competitive team in the NFL.⁴⁶ In six years under Dungy, the Buccaneers went to the playoffs four times.⁴⁷ Meanwhile, Green had taken the Vikings to the playoffs eight out of ten years.⁴⁸

These firings invigorated civil rights attorneys Cyrus Mehri (“Mehri”) and Johnnie Cochran Jr. (“Cochran”) to take action against the NFL due to their belief that black coaches in the NFL were fired despite their on-field success.⁴⁹ In order to prove their suspicion, the pair commissioned a report entitled “BLACK COACHES IN THE NATIONAL FOOTBALL LEAGUE: Superior Performance, Inferior Opportunities.”⁵⁰ This report included a study comparing various statistics of head coaches over the previous fifteen seasons—1986–2001—and broke down the results by race.⁵¹

The study concluded that black head coaches won more regular season games,⁵² went to the playoffs more often,⁵³ won more games in their first season coaching,⁵⁴ and went to the playoffs in their first season coaching more often when compared to their white counterparts.⁵⁵ The study also noted that in their last season before being fired, black head coaches won more regular season games than white coaches did in their last season.⁵⁶ Finally, the study rebutted a potential counter-argument by pointing out that black head coaches won more games with the same team

⁴⁶ Global Sports Matters Podcast, *The True Origins of the Rooney Rule: Part 1*, GLOBAL SPORTS MATTERS, at 5:16 (Feb. 5, 2021), <https://globalsportmatters.com/listen/2021/02/05/the-true-origins-of-the-rooney-rule-part-1/> (this podcast includes snippets of interviews with Cyrus Mehri, one of the attorneys who spearheaded the creation of the Rooney Rule, and N. Jeremi Duru, a law professor who wrote a book on the Rooney Rule).

⁴⁷ *Id.* at 5:30.

⁴⁸ *Id.* at 5:50.

⁴⁹ *Id.* at 7:15.

⁵⁰ *Id.* at 7:40; see also Johnnie L. Cochran, Jr. & Cyrus Mehri, *BLACK COACHES IN THE NATIONAL FOOTBALL LEAGUE: Superior Performance, Inferior Opportunities* (Sep. 30, 2002), <https://s3.documentcloud.org/documents/23117804/black-coaches-in-the-nfl.pdf>.

⁵¹ See Cochran & Mehri, *supra* note 50, at 1–6.

⁵² *Id.* at 2.

⁵³ *Id.* at 2–3.

⁵⁴ *Id.* at 3.

⁵⁵ *Id.*

⁵⁶ *Id.* at 4.

as a previous white coach.⁵⁷ In other words, to combat the counter-argument that the black head coaches were winning more games only due to the fact that they were being hired by better teams, the study showed that the previous white head coach won fewer games than the black head coach that replaced them.⁵⁸ Overall, the study supports the key inference that black head coaches were being let go despite outperforming white head coaches in most meaningful statistics, likely due to black head coaches being held to a higher standard.⁵⁹

The source of this heightened standard could come from the stereotype surrounding black football players that they are not “smart” enough to play certain positions.⁶⁰ Black players have frequently been said to have superior athletic ability when compared to white players who utilize their “mental abilities” in order to succeed.⁶¹ In a study of sports publications leading up to the NFL draft,⁶² researchers found that black quarterback prospects had fewer positive mental statements said about them in comparison to white quarterback prospects and black prospects had more negative mental statements said about them as compared to white prospects.⁶³ In other words, black draft prospects were frequently criticized for not being intelligent enough to play quarterback, while white prospects were hailed for their intelligence.⁶⁴ This stereotype perpetuates the idea that black coaches are viewed as less intelligent than white coaches, and given that the coaching position is almost exclusively mental; this stereotype would bar black coaches from being seriously considered for head coaching slots.

⁵⁷ *Id.* at 5.

⁵⁸ *See id.*

⁵⁹ *Id.* at 6.

⁶⁰ Eugenio Mercurio & Vincent F. Filak, *Roughing the Passer: The Framing of Black and White Quarterbacks Prior to the NFL Draft*, 21 THE HOW. J. OF COMM’N 56, 57 (2010).

⁶¹ *Id.* at 60–61.

⁶² *See id.* at 56.

⁶³ *Id.* at 64.

⁶⁴ *See id.*

Coming back to the Cochran and Mehri report, after telling the success stories of specific black head coaches,⁶⁵ the report then goes on to give examples of highly qualified black head coaching candidates who were either never interviewed for a head coaching position or were never seriously considered for the position when they were interviewed.⁶⁶ The report gave four explanations for the statistical discrepancies: no diversity of decision-makers,⁶⁷ no diverse final candidates, the NFL's anti-tampering policy, and the stigma of a black coach being passed over.⁶⁸ The report then concluded with a recommendation of how to fix the discrepancies in the NFL by rewarding teams with draft picks for hiring diverse candidates for front-office positions and punishing teams by stripping their draft picks if they do not have a diverse slate of final candidates for head coach vacancies.⁶⁹

After creating this report, Mehri and Cochran held a press conference to announce the report, and Cochran made the bold proclamation: "If they don't negotiate, we'll litigate."⁷⁰ This threat, along with copies of the report, made it to the NFL's general counsel and team owners, who agreed to meet with Mehri.⁷¹ During the meeting, the suggestion of taking away draft picks from teams who did not interview diverse candidates was quickly shot down, but the concept of requiring teams to have a diverse slate of candidates for head coaching positions was met with general positivity.⁷² Afterward, NFL Commissioner Paul Tagliabue appointed Pittsburgh Steelers

⁶⁵ Cochran & Mehri, *supra* note 50 at 6–8.

⁶⁶ *Id.* at 8–10.

⁶⁷ At the time, all thirty-two team owners were white, and only one general manager out of thirty-two was black. *See id.* at 13.

⁶⁸ *Id.* at 13–14.

⁶⁹ *Id.* at 14–15.

⁷⁰ Global Sports Matters Podcast, *supra* note 46 at 11:40.

⁷¹ *Id.* at 16:05.

⁷² *Id.* at 17:50.

owner Dan Rooney as chair of the new diversity committee that ended up creating what is now known as “the Rooney Rule.”⁷³

The initial iteration of the Rooney Rule was met with some successes but also some failures. Marvin Lewis, a black defensive coordinator, ended up becoming the Cincinnati Bengals head coach, while the Dallas Cowboys owner Jerry Jones engaged in a sham interview with Dennis Green.⁷⁴ The Rooney Rule has substantially changed in the years since its adoption, from expanding the requirement in 2009 to general manager interviews to 2020, when the league required teams to interview *two* minority candidates for all front-office positions, head coaching positions, and coordinator positions.⁷⁵ But, perhaps the most significant change in the history of the Rooney Rule came in 2022 when all NFL teams were required to *hire* a minority offensive assistant coach in addition to their previous interview requirements for the 2022 season.⁷⁶ The offensive assistant coach’s salary would be paid for by a league-wide fund, and the coach was required to “work closely with the head coach and the offensive staff.”⁷⁷ The stated goal of the expansion was to get minorities into positions where they could eventually become highly coveted offensive-minded coaches.⁷⁸ The legal basis for a program like the Rooney Rule to exist is Title VII of the 1964 Civil Rights Act⁷⁹ and a Supreme Court Case,⁸⁰ but the particulars of each deserve elaboration.

⁷³ *Id.* at 25:00–30:00.

⁷⁴ *Id.* at 31:00–36:00.

⁷⁵ Julia O’Connell, *The True Origins Of The Rooney Rule: Part 2*, GLOBAL SPORTS NETWORK (Feb. 11, 2021), <https://globalsportmatters.com/listen/2021/02/11/the-true-origins-of-the-rooney-rule-part-2/>

⁷⁶ Kevin Seifert, *NFL says all Teams must add Minority Offensive Coach, Expands Rooney Rule to Include Women*, ESPN (Mar. 8, 2022, 5:51 PM), https://www.espn.com/nfl/story/_/id/33617341/nfl-says-all-teams-add-minority-offensive-coach-expands-rooney-rule-include-women.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ 42 U.S.C. §§ 2000e–2000e-17.

⁸⁰ *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1971).

B. Title VII and *United Steelworkers of America v. Weber*

The Civil Rights Act of 1964 touches on a variety of topics, from voting rights in Title I⁸¹ to public education in Title IV.⁸² But most importantly, for the purposes of this paper, Title VII of the act deals with employment as noted by the title of the subchapter of the United States Code it is housed in.⁸³ A key provision from Title VII Rule is 42 U.S.C. § 2000e-2(a), which forbids certain employment practices by an employer.⁸⁴ That section declares it to be an unlawful employment practice for an employer to:

[F]ail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [their] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [their] status as an employee, because of such individual’s race, color, religion, sex, or national origin.⁸⁵

This provision of Title VII was at issue in the *Weber* case, where the Court declared that Title VII does not prohibit “race-conscious affirmative action plans.”⁸⁶ In *Weber*, a plant that had a historical practice of excluding black people from craft positions and a union entered into a collective bargaining agreement in order to cure the racial imbalance in its workforce.⁸⁷ Before

⁸¹ See 42 U.S.C. §§ 1997–1997j.

⁸² See 42 U.S.C. §§ 2000c–2000c-9.

⁸³ See 42 U.S.C. §§ 2000e–2000e-17 (the name of Subchapter VI is “Equal Employment Opportunities”).

⁸⁴ See *id.* at § 2000e-2(a).

⁸⁵ *Id.*

⁸⁶ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 197 (1971).

⁸⁷ *Id.* at 197–98.

entering into this agreement, less than 2% of the skilled craftworkers in the city the plant was in were black despite there being a much higher percentage of blacks in the local workforce.⁸⁸ To combat this discrepancy, the plant created a training program for its employees that would give them the experience needed to be promoted to craft positions.⁸⁹ While the selection of who would be in the program was based on seniority, at least half of the trainees had to be black.⁹⁰ The case arose when a white worker, Brian Weber (“Weber”), was rejected from participating in the training program despite having more experience than some of the black applicants who were selected.⁹¹ Weber claimed that by requiring half of the spots in the training program to be filled by blacks, the plant engaged in discrimination in violation of Title VII.⁹²

Justice William Brennan, who authored the majority, framed the issue as a narrow one, whether Title VII *forbids* private affirmative action programs that grant preferential treatment based on race.⁹³ Weber argued that a literal reading of Title VII forbids racial discrimination in hiring, and since a black worker was deliberately chosen over a white person, the plant engaged in unlawful discrimination.⁹⁴ The Court acknowledged the validity of this argument but dismissed it, stating that relying too strictly on the text of the statute would be contrary to its purpose and would go against the legislative history.⁹⁵ The court examined the legislative history and concluded that the primary purpose of Title VII was to help with “the plight of the Negro in [this country’s] economy,”⁹⁶ and in order to do that, Congress recognized that it must “open

⁸⁸ *Id.* at 198–99.

⁸⁹ *Id.* at 199

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 199–200.

⁹³ *Id.* at 200.

⁹⁴ *Id.* at 201. (the Court noted that a previous case had held that Title VII protects whites against discrimination too *see id.* at 200–201 (citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 281 n.8 (1976))).

⁹⁵ *Id.* at 201–202.

⁹⁶ *Id.* at 202 (quoting 110 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

employment opportunities for Negroes in occupations which [had] been traditionally closed to them.”⁹⁷ The court reasoned that it would be “ironic” for Title VII, the purpose of which was to combat racial injustice and remedy the harms of past discrimination, to also outlaw private agreements meant to remedy those past harms.⁹⁸

The Court briefly analyzed another section of Title VII, § 2000e-2(j), to bolster its conclusion.⁹⁹ In short, that provision states that Title VII does not *require* employers to grant preferential treatment based on race due to historical imbalances.¹⁰⁰ The Court looked to the text of the provision, as well as the legislative history, to conclude that the natural inference of that section permits voluntary affirmative action programs.¹⁰¹ The Court concluded its opinion by noting features of the plant’s plan that distinguished it from an illegal plan that would “unnecessarily trammel the interests of the white employees.”¹⁰² These features were the fact that the plan did not replace white workers with black workers, the plan did not bar the advancement of white workers, and the plan’s limited temporal nature.¹⁰³

The then-Justice William Rehnquist filed a fairly lengthy dissent where he criticized the court’s opinion, which he believed to be Orwellian in nature.¹⁰⁴ Rehnquist believed that the text of Title VII clearly made the plant’s program illegal and that the majority’s reliance on the

⁹⁷ *Id.* at 203 (quoting 120 CONG. REC. 6548 (1964) (remarks of Sen. Humphrey)).

⁹⁸ *Id.* at 204.

⁹⁹ *Id.* at 204–205.

¹⁰⁰ See 42 U.S.C. § 2000e-2(j) (“[n]othing contained in this subchapter shall be interpreted to require any employer . . . subject to this subchapter to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.”).

¹⁰¹ *Weber*, 443 U.S. at 205–207.

¹⁰² *Id.* at 208.

¹⁰³ *Id.* at 208–209.

¹⁰⁴ See *id.* at 219–20 (Rehnquist, J., dissenting) (comparing the Court’s opinion to a moment in George Orwell’s novel 1984 where a speaker transitions from saying that Oceania is at war with Eurasia to Oceania being at war with Eastasia).

purpose of Title VII went against the plain meaning of the text, which should be followed.¹⁰⁵ Rehnquist also rebuked the Court’s interpretation of the legislative history, which he believed the Court relied on to “avoid the plain language of [Title VII].”¹⁰⁶ According to Rehnquist, the legislative history showed that Title VII stood for the proposition that *all* racial discrimination in hiring and firing decisions was unlawful.¹⁰⁷ In other words, “race . . . [is] not to be used as the basis for hiring and firing.”¹⁰⁸ Rehnquist then rebutted the court’s argument regarding § 2000e-2(j)¹⁰⁹ by first pointing out that the concept of that section allowing employers to voluntarily enter into affirmative action programs was never considered during the lengthy Senate debates.¹¹⁰ Due to this silence on the topic and § 2000e-2(a)’s prohibition on all discrimination, the concept of voluntary affirmative action seemed unlikely.¹¹¹ Secondly, Rehnquist claims that the legislative history makes clear that the inclusion of § 2000e-2(j) was in response to concerns of opponents of Title VII that it would require employers to grant preferential treatment and that employers would grant preferential treatment so even if not required by Title VI.¹¹² In other words, the second concern was that if Title VII was silent on whether or not preferential treatment was required, employers would do it anyway.¹¹³

Rehnquist wrapped up his dissent by reiterating that Title VII’s text, when read against all the legislative history, not just the history the majority chose to consider, does not permit voluntary preferential treatment based on race because “such racial discrimination is plainly proscribed by

¹⁰⁵ *Id.* at 228; *see also id.* at 228 n.9 ((citing *Caminetti v. United States*, 242 U.S. 470, 490 (1917) which held “[i]f the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.”).

¹⁰⁶ *Id.* at 228–30.

¹⁰⁷ *Id.* at 238.

¹⁰⁸ *Id.* (quoting 110 CONG. REC. 6549 (1964) (remarks of Sen. Humphrey)).

¹⁰⁹ *See supra* p. 13.

¹¹⁰ *Weber*, 443 U.S. at 244–45 (Rehnquist, J., dissenting).

¹¹¹ *Id.*

¹¹² *Id.* At 244–246.

¹¹³ *See id.*

§§ [2000e-2](a) and (d).”¹¹⁴ Rehnquist also noted that if Congress had wanted to permit such preferential treatment, it knew how to do so because, in another section contained in § 2000e-2, Congress explicitly exempted preferential treatment of Indians.¹¹⁵ Rehnquist infers that because this section allows for affirmative action for Indians, it must mean that the other provisions of Title VII do not allow for preferential treatment based on race because if that is what Congress wanted, it would have made it clear in those other sections.¹¹⁶ After stressing the importance of first looking to the text of a statute,¹¹⁷ Rehnquist stated that even if an affirmative action program is good in nature, it still “demean[s] one in order to prefer another.”¹¹⁸

Despite Rehnquist’s arguments to the contrary, if private voluntary affirmative action programs have been legal under Title VII since 1971 and if the Rooney Rule has been in place since the early 2000s, why are they at issue in 2023? The answer is two-fold: textualism and *stare decisis*.

C. Current Legal Landscape

1. *The Rise of Textualism*

While the majority in *Weber* mostly based its opinion on the statutory purpose gleaned from legislative history,¹¹⁹ modern courts are more wary of doing so.¹²⁰ Once referred to as “The New

¹¹⁴ *Id.* At 252–53.

¹¹⁵ *Id.* At 253; *see also* 42 U.S.C. § 2000e-2(i) (“[n]othing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.”).

¹¹⁶ *See Weber*, 443 U.S. at 253 (Rehnquist, J., dissenting) (this method of statutory interpretation is known as *expressio unius est exclusio alterius* and will be discussed later *infra* pp. 24–25).

¹¹⁷ *See id.* At 253–54.

¹¹⁸ *See id.* At 254.

¹¹⁹ *See supra* pp. 12–13.

¹²⁰ *See e.g.*, *Groff v. DeJoy*, 600 U.S. 447, 468 (2023) (stating “as we have stressed over and over again in recent years, statutory interpretation must ‘begi[n] with,’ and ultimately heed, what a statute actually says.” (quoting *National Assn. of Mfrs. v. Department of Defense*, 583 U. S. 109, 127 138 (2018))); *see also* *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (stating that “[e]ven those of us who sometimes consult legislative history will never allow it to be used to ‘muddy’ the meaning of ‘clear statutory language.’” (quoting *Milner v. Dep’t of Navy*, 562 U.S. 562, 572 (2011))).

Textualism,”¹²¹ this style of statutory interpretation is not so “new” in 2023.¹²² Textualism aims to abandon the notion that a statute’s spirit or purpose can overcome clear statutory text.¹²³

Textualists argue that due to the text of the statute being the only thing that goes through the constitutional process of bicameralism and presentment,¹²⁴ interpreters of statutes should strictly adhere to a statute’s text even in situations where the text seems contrary to the purported congressional purpose.¹²⁵ Textualists argue that legislative history, which, unlike the text of a statute, does not go through bicameralism and presentment, is an ineffective tool for statutory interpretation in part due to the potential for judges to cherry-pick favorable legislative history and disregard legislative history that cuts against their arguments.¹²⁶ A great example of this issue is the two opinions from *Weber* discussed above,¹²⁷ where both Justices Brennan and Rehnquist utilize different pieces of statutory history to come to opposite conclusions regarding the meaning of Title VII’s anti-discrimination provisions.¹²⁸

The philosophy of textualism can essentially be boiled down to: “[I]f the language of a statute is clear, that language must be given effect.”¹²⁹ It should be noted, however, that even strictly adhering to this form of textualism does not mean always literally adhering to the words

¹²¹ See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (discussing the move from the “traditional” approach of a soft plain meaning rule and use of legislative history towards the new, at the time, approach of more strictly relying on the plain text of a statute).

¹²² See sources cited *supra* note 120.

¹²³ Tara Leigh Grove, *The Misunderstood History of Textualism*, 117 NW. UNIV. L. REV. 1033, 1071 (2023).

¹²⁴ See U.S. CONST. art. I, § 7, cl. 2 (this clause requires that all bills must first pass through both houses, i.e., bicameralism, and be presented to the president for signature, i.e., presentment, before becoming law).

¹²⁵ Grove, *supra* note 123.

¹²⁶ *Id.* at 1071–72 (quoting Justice Anthony Kennedy that “[j]udicial investigation of legislative history has a tendency to become . . . an exercise in ‘looking over a crowd and picking out your friends.’” (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005))).

¹²⁷ See *supra* Section II.B.

¹²⁸ See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201–205 (1971) (portion of the opinion where Brennan discusses the legislative history of Title VII); see *id.* at 230–52 (Rehnquist, J., dissenting) (portion of the dissent where Rehnquist discussed the legislative history of Title VII).

¹²⁹ See Grove, *supra* note 123 at 1073 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment)).

of a statute.¹³⁰ Due to this rise of textualism in statutory interpretation, if the Court were to analyze the legality of private affirmative action programs by only analyzing the text of the statute, it could come to the Rehnquist conclusion that affirmative action programs discriminate based on race by definition.¹³¹ However, this would require overturning a case like *Weber*, which, due to recent trends in the Supreme Court, is not as unlikely as one may think.

2. *Stare Decisis and the Current Supreme Court*

Stare Decisis is the doctrine that states the Court must follow its precedents.¹³² However, recent cases such as *Dobbs v. Jackson Women’s Health Organization* show that the current Court is more willing to overturn precedent than past Courts.¹³³ This brings us to *Students for Fair Admissions*,¹³⁴ which, while not a case that deals with Title VII, is a case that potentially opened the door for a challenge to *Weber* and voluntary affirmative action agreements.

Students for Fair Admissions held that the race-conscious admissions policies of Harvard University and the University of North Carolina (“UNC”) were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.¹³⁵ However, Justice Gorsuch authored a concurring opinion, joined by Justice Thomas,¹³⁶ that argued that not only were the practices of Harvard and UNC unconstitutional, but they were also a violation of Title VI of the Civil Rights Act.¹³⁷ Title VI prohibits discrimination in programs or activities that receive federal

¹³⁰ *See id.* at 1074–75.

¹³¹ *See Weber*, 443 U.S. at 228 (Rehnquist, J., dissenting).

¹³² WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON STATUTORY INTERPRETATION* 102 (2012).

¹³³ *See Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022); *see also Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONST. ANNOTATED, <https://constitution.congress.gov/resources/decisions-overruled/> (last visited Nov. 11, 2023) (list of every Supreme Court case in history that has been overturned shows that the ten most recent cases where the Court overturned its precedent have come since 2018 which constitutes almost 5% of all overturned cases).

¹³⁴ *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

¹³⁵ *Id.* at 230.

¹³⁶ *Id.* at 287 (Gorsuch, J., concurring).

¹³⁷ *Id.*

assistance,¹³⁸ and since both universities received federal assistance, Gorsuch argued that Title VI applies to both universities to prohibit their discrimination.¹³⁹ Gorsuch first asserted the principle of statutory interpretation that a court must “apply [a] law's terms as a reasonable reader would have understood them at the time Congress enacted them” and concluded that the word discriminate meant “treating one person worse than another similarly situated person on the ground of race.”¹⁴⁰ In other words, if a student is selected on the basis of their race, then there has been unlawful discrimination because black and Hispanic applicants have benefited from the treatment while white and Asian applicants are not selected and therefore treated worse based on their race.¹⁴¹

Most importantly, for purposes of this paper, Gorsuch, in a short paragraph, noted that the concept of discrimination meaning treating others who are similarly situated differently, also shows up in Title VII's anti-discrimination provision.¹⁴² Gorsuch then stated that courts should presume that since Congress chose to use the same words in both Title VI and Title VII, the words have the same meaning.¹⁴³ Gorsuch then concluded this short detour by stating that both Title VI and Title VII “codify a categorical rule of ‘individual equality, without regard to race.’”¹⁴⁴ In this paragraph, Gorsuch seems to be adopting the position that if an employer were to make an employment decision based on the race of the applicant, i.e., a Title VII violation according to Gorsuch, then the employer has discriminated since they have treated similarly

¹³⁸ See 42 U.S.C. § 2000d (“[n]o person in the United States shall, on the ground of race . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

¹³⁹ See *Students for Fair Admissions*, 600 U.S. at 287–88 (Gorsuch, J., concurring).

¹⁴⁰ *Id.* at 288.

¹⁴¹ *Id.* at 296–96.

¹⁴² *Id.* at 290.

¹⁴³ *Id.* (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005)).

¹⁴⁴ *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 416, n.19 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part)).

situated persons differently based on race. It should be noted that this paragraph by Justice Gorsuch was not an explicit call to reconsider *Weber*, as opposed to something like Justice Thomas' concurring opinion in *Dobbs*.¹⁴⁵ However, it still has the potential to encourage litigants to challenge voluntary affirmative action programs on the basis that they amount to unlawful discrimination in hopes the Court will take the case and overturn *Weber*. While only Justice Thomas signed on to Gorsuch's concurrence,¹⁴⁶ what would happen if two other Justices were convinced to hear a case asking the Court to overturn *Weber*?¹⁴⁷ Research has shown a potential indirect link between public attention and the decision of the Court to grant *certiorari* by way of interest groups filing amicus briefs.¹⁴⁸ So given the public's opinion on race-conscious hiring practices,¹⁴⁹ a potential case brought before the Court does not seem so far-fetched.

III. Argument

In light of the rise of textualism and the seeming abandonment of legislative history, if *Weber* were to be challenged, would the Rooney Rule survive since it is a program that makes employment decisions like selecting interview candidates and hiring offensive assistants based on race? In other words, is there an argument that would protect the Rooney Rule based on the text of Title VII?

¹⁴⁵ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2301–02 (2022) (Thomas, J., concurring) (calling on the Court to “reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”)

¹⁴⁶ See *Students for Fair Admissions*, 600 U.S. at 287 (Gorsuch, J., concurring).

¹⁴⁷ According to Supreme Court procedures, votes from only four of the nine Justices are needed to accept a case for review. See *Supreme Court Procedures*, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Dec. 13, 2023).

¹⁴⁸ See Matthew Montgomery, *Public Attention and Certiorari: The Impact of Public Attention on Supreme Court Petitions 13–28* (May 6, 2019) (Ph.D. dissertation, Georgia State University) (ScholarWorks) (discussing the impact of amicus briefs filed by interest groups in response to public opinion on the Court's decision to grant *certiorari*).

¹⁴⁹ See Juliana Menasce Horowitz, *Americans see Advantages and Challenges in Country's Growing Racial and Ethnic Diversity*, PEW RSCH. CTR. (May 8, 2019), <https://www.pewresearch.org/social-trends/2019/05/08/americans-see-advantages-and-challenges-in-countrys-growing-racial-and-ethnic-diversity/#broad-support-for-workplace-diversity-but-most-say-applicants-race-and-ethnicity-should-not-be-a-factor-in-hiring-and-promotions> (finding that 74% of Americans believe that only a person's qualifications should be taken into account for hiring and that their race and ethnicity should not be considered).

It should be noted from the outset that *Students for Fair Admissions* does not make private affirmative action agreements like the Rooney Rule illegal. Because the Rooney Rule is a private agreement, there is no state action that would implement the Equal Protection Clause of the Fourteenth Amendment that the Court used to strike down the race-conscious admissions practices in *Students for Fair Admissions*.¹⁵⁰

Because the Rooney Rule has two components, an interview requirement and a hiring requirement,¹⁵¹ each will be analyzed under the text of Title VII in turn, but in sum, the interview requirement is safe. However, the hiring requirement seems to be in jeopardy.

A. The Interview Requirement of the Rooney Rule Violates Neither Provision of § 2000e-2.

1. § 2000e-2(a)(1) deals with hiring and firing, not interviewing.

As a reminder, the Rooney Rule requires NFL teams to interview two minority candidates when interviewing for all front-office positions, head coaching positions, and coordinator positions.¹⁵² On its face, § 2000e-2(a)(1) is not applicable to the Rooney Rule because that provision deals with hiring, firing, and conditions of employment.¹⁵³ In relevant part, § 2000e-2(a)(1) states that an employer may not “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [their] compensation, terms, conditions, or privileges of employment, because of such individual’s race”¹⁵⁴ As a

¹⁵⁰ By its text, the Fourteenth Amendment only applies to the government *see* U.S. CONST. amend. XIV, § 1 (stating that “No *state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *state* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)); *see also* *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (“the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”).

¹⁵¹ *See supra* p. 10.

¹⁵² *See The Rooney Rule, supra* note 14.

¹⁵³ *See* 42 U.S.C. § 2000e-2(a)(1).

¹⁵⁴ *Id.*

requirement to *interview* minority candidates, the Rooney Rule does not violate this provision. Clearly, choosing to interview a minority candidate has nothing to do with a refusal to hire based on race or discharging an employee because of their race.

The requirement to interview a minority also does not discriminate against them in the form that § 2000e-2(a)(1) contemplates. That section only covers discrimination against a person “with respect to [their] *compensation, terms, conditions, or privileges of employment.*”¹⁵⁵ Even if we assume that discrimination merely means a differentiation between candidates,¹⁵⁶ the interview has nothing to do with either their compensation or their terms, conditions, or privileges of their employment.

2. The interview requirement does not deprive individuals of employment opportunities.

The interview requirement also does not violate § 2000e-2(a)(2). In relevant part, this section states that an employer may not “classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [their] status as an employee, because of such individual’s race”¹⁵⁷ On its face, this section seems more applicable to the interview requirement than the previous section did. Here, the NFL team’s requirement to interview minority candidates forces them to classify some candidates as minorities based on race in order to satisfy the Rooney Rule. However, upon analyzing the whole section, it becomes clear that this conduct is not prohibited by § 2000e-2(1)(b).

The statute prohibits the classification of applicants based on race only when that classification would deprive them of the employment opportunity or “adversely affect [their]

¹⁵⁵ *Id.* (emphasis added).

¹⁵⁶ The definition of discrimination will be discussed further *infra* Section III.B.

¹⁵⁷ 42 U.S.C. § 2000e-2(a)(2).

status as an employee.”¹⁵⁸ Firstly, requiring the racial classification of applicants does not deprive them of employment opportunities. If anything, requiring the interviewing of minorities increases their chances of employment opportunities, at least in theory. By being selected for the interview, minorities have a better chance of being hired than if they were not interviewed. And since there is no rule in the NFL that caps the number of interviews that a team is allowed to do, the fact that minorities are being selected for interviews does not “unnecessarily trammel the interests of the white employees.”¹⁵⁹ This was a point brought up in *Weber* as additional reasoning for why the plant’s affirmative action program was legal.¹⁶⁰ The reasoning being that because a portion of the applicants for the training program were still white, whites were still able to advance. The reasoning is the same, if not stronger here, interviewing at minimum two minority candidates leaves ample room for white applicants to be interviewed for open positions. And because white candidates can still be interviewed, classifying interviewees based on race does not deprive the white candidates of employment opportunities.

The second reason that the interview requirement does not run afoul of § 2000e-2(1)(b) is that the racial classification of interview candidates does not “adversely affect [their] status as an employee.”¹⁶¹ A candidate who is interviewed for a position is not an employee as defined by Title VII. According to § 2000e, an employee is “an individual employed by an employer,”¹⁶² and because the interviewees have not been hired yet, they are not employed by the NFL team. Therefore, because the adverse effect portion of § 2000e-2(1)(b) seems to apply only to employees, the Rooney Rule does not violate it by classifying interview candidates based on

¹⁵⁸ *Id.*

¹⁵⁹ *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208, (1979).

¹⁶⁰ *See id.* at 208–209.

¹⁶¹ 42 U.S.C. § 2000e-2(a)(2).

¹⁶² 42 U.S.C. § 2000e(f).

race. If Congress had wanted to make the adverse effect portion of § 2000e-2(1)(b) apply to candidates, it could have, but instead, it chose to word the statute in a way that makes it only apply to those already employed.

This is a canon of statutory interpretation known as meaningful variation.¹⁶³ In statutory interpretation, there is a baseline presumption that when the same words are used in a statute, they are assumed to have the same meaning.¹⁶⁴ The canon of meaningful variation is a logical consequence of this presumption, in that if a word is presumed to have a consistent meaning, choosing a different word means that it must have a different meaning than the other word.¹⁶⁵ In this case, the fact that Congress said an employer may not classify based on race when it would “adversely affect [their] status as an *employee*”¹⁶⁶ rather than adversely affect their status as an *applicant* arguably means that it does not apply to applicants.

Even if you assume for the sake of argument that it would apply to applicants, the interview requirement would still not violate § 2000e-2(1)(b). The argument would essentially be that by classifying applicants based on race, the employer is adversely affecting the possibility of an interviewee becoming an employee. In other words, the “status as an employee”¹⁶⁷ phrase from the statute would, in this case, mean their potential for becoming an employee. Even if this argument is accepted, which seems like a stretch, classifying candidates based on race still does not violate the statute because, as stated above,¹⁶⁸ NFL teams are free to interview as many

¹⁶³ It should be noted that canons are not binding rules of statutory interpretation, merely tools that allow an interpreter to make presumptions and inferences based on the text of a statute *see* ESKRIDGE, *supra* note 132, at 328.

¹⁶⁴ *See id.* at 346–47.

¹⁶⁵ *Id.* at 347.

¹⁶⁶ 42 U.S.C. § 2000e-2(a)(2) (emphasis added).

¹⁶⁷ *Id.*

¹⁶⁸ *See supra* p. 22.

candidates as they want, and non-minority candidates still have the potential to be selected. Therefore, their “status as an employee”¹⁶⁹ is not adversely affected.

3. Brennan’s argument in Weber is valid and is applicable to the Rooney Rule.

Using the negative implication argument from Justice Brennan’s majority opinion could strengthen the legitimacy of the interview requirement. Recall from the summary of *Weber* above¹⁷⁰ in the majority opinion, Brennan argued that because § 2000e-2(j) stated Title VII does not *require* employers to grant preferential treatment based on race in response to a historical imbalance, that means that the statute *permits* such preferential treatment.¹⁷¹ Brennan noted that if Congress had wanted to indicate that Title VII did not permit race-conscious employment practices, then it could have easily done so, and since it chose to draft § 2000e-2(j) as is, that means race-conscious programs are legal.¹⁷² While this method of interpretation does place a great deal of weight on what is not in the text of a statute, it does seem to be a natural inference that if one is not required to do something, then one is free to do it as they see fit. In this case, it would apply because, as noted above, the Rooney Rule was enacted in order to fix the racial imbalance at the head coaching position.¹⁷³ Therefore, Brennan’s reading of § 2000e-2(j) would strengthen the argument that the interview requirement is legally valid.

However, recall Justice Rehnquist’s dissent, where he argued against this reading of the statute by chiding the court for “seizing on the word require” to infer that Congress must have meant that race-conscious plans are legal.¹⁷⁴ This can arguably be said to be invoking the canon of statutory interpretation known as *expressio unius est exclusio alterius*, which states that if the

¹⁶⁹ *Id.*

¹⁷⁰ *See supra* Section II.B.

¹⁷¹ *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 204–206 (1979).

¹⁷² *Id.* at 205–206.

¹⁷³ *See supra* Section II.A.

¹⁷⁴ *Weber*, 443 U.S. at 227–28 (Rehnquist, J., dissenting) (internal quotation marks omitted).

legislature specifically enumerates something, that means there is an implicit rejection of what is not listed.¹⁷⁵ In this case, the argument is that by stating that Title VII does not require preferential treatment, Congress rejected the notion that it was allowed because it did not state that it was allowed. However, even in light of Rehnquist’s counter-argument, reading the statute to permit affirmative action is still a persuasive argument on balance. This is because of the analysis based off of the text of § 2000e-2(a) as well as the natural inference of the reading of § 2000e-2(j); the textual canon could be rejected in this case due to its non-binding nature.¹⁷⁶

B. The Hiring Requirement of the Rooney Rule is Harder to Square with the Text of Title VII.

Now that it has been established that the interview requirement does not violate the text of Title VII, it is time to analyze the new hiring requirement. As a reminder, the most recent update to the Rooney Rule required every NFL team to hire a minority offensive assistant coach for the 2022 NFL season.¹⁷⁷

1. Hiring a Minority seems to Violate § 2000e-2(a)(1).

Since the new Rooney rule states that an offensive assistant coach must be hired, it seems to violate the text of § 2000e-2(a)(1). When the minority coach is hired, the team is arguably refusing to hire a non-minority coach for that spot based on the race of the non-minority candidate.¹⁷⁸ This would be a violation because the race of the non-minority coach would not comply with the hiring requirement, and therefore, the team would not be able to select them.

However, a counter-argument to this interpretation would be that NFL teams are free to hire as many coaches as they wish and, therefore, are not refusing to hire a white coach based on race

¹⁷⁵ See ESKRIDGE, *supra* note 132, at 334.

¹⁷⁶ See *id.* at 328.

¹⁷⁷ Seifert, *supra* note 76.

¹⁷⁸ See 42 U.S.C. § 2000e-2(a)(1).

but simply because they are choosing not to for some other reason. Unlike NFL team rosters, which have a finite number of players who are paid a finite amount of money,¹⁷⁹ NFL teams are not constricted in the same way when it comes to coaches.¹⁸⁰ This means that even if the team bases the hiring of an offensive assistant coach on race, the team is still free to hire another white coach for a similar role. This argument is strengthened by the amount of money the teams make in a year,¹⁸¹ meaning that if they want to hire a white coach, even though they have already hired their Rooney Rule compliant hire, they can still afford to do so.¹⁸² This line of reasoning is strengthened even further by the fact that the minority hired by the team is not paid for by the team, but instead, their salary is paid for by the NFL.¹⁸³ This line of reasoning would also combat a potential § 2000-e2(a)(2) argument that by classifying candidates by race, a white coach is deprived of the spot that the minority coach gets. Because the team is allowed to hire as many coaches as they want, the classification does not “tend to deprive [the white coach] of employment opportunities based on their race”¹⁸⁴ since the team could still hire them.

¹⁷⁹ See NFLPA, *NFL Collective Bargaining Agreement*, 171 (2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf (“[d]uring the regular season and postseason, a Club’s Active/Inactive List shall not exceed 53 players”); see *id.* at 207 (“[n]o Club may have a Team Salary that exceeds the Salary Cap.”).

¹⁸⁰ See *id.* at 107 (salary paid to coaches is not part of the calculation for a team’s salary cap).

¹⁸¹ See Mike Ozanian & Justin Teitelbaum, *The NFL’s Most Valuable Teams 2023: Dallas Cowboys Remain On Top At A Record \$9 Billion*, FORBES (Aug. 30, 2023, 6:30 AM), <https://www.forbes.com/sites/mikeozanian/2023/08/30/the-nfls-most-valuable-teams-2023-dallas-cowboys-remain-on-top-at-a-record-9-billion/?sh=1e2f6d3d362c> (reporting that in 2022, the average revenue for an NFL team was \$581,000,000).

¹⁸² See Charlotte Edmonds, *How much do NFL coordinators make in 2022?*, NBC SPORTS BOS. (July 26, 2022), <https://www.nbcsportsboston.com/nfl/new-england-patriots/how-much-do-nfl-coordinators-make-in-2022/261439/> (reporting that the average salary for a coordinator in the NFL is \$1,000,000). Even if a team were to pay an assistant the same amount as a coordinator, which is a higher coaching position than an assistant, it would cost the average NFL team less than a quarter of a percent of their annual revenue to pay them see Ozanian & Teitelbaum *supra* note 181.

¹⁸³ See Seifert, *supra* note 76.

¹⁸⁴ 42 U.S.C § 2000e-2(a)(2).

2. *The Hiring Requirement Could be an Illegal Apprenticeship.*

If a court framed the hiring requirement as a training program or apprenticeship, then it would clearly violate § 2000e-2(d). In relevant part, that section forbids “any employer . . . to discriminate against any individual because of his race . . . in admission to, or employment in, any program established to provide apprenticeship or other training.”¹⁸⁵ If the minority hiring requirement were to be considered an apprenticeship or training program, it would seem to clearly violate the text of this statute due to the fact that a non-minority would not be able to qualify for it.

Apprenticeship and training program are not defined terms in Title VII,¹⁸⁶ but a dictionary from 1963¹⁸⁷ defines an “apprentice” as “one bound by indenture to serve another for a prescribed period with a view to learning an art or trade” and “one who is learning by practical experience under skilled workers a trade, art, or calling.”¹⁸⁸ Based on this definition from the time of the Civil Rights Act, the hiring requirement could be classified as an apprenticeship. The hiring requirement has the stated purpose of “increasing minority participation in the pool of offensive coaches” by having the coach “work closely with the head coach and the offensive staff.”¹⁸⁹ It does not seem to be an outlandish reading of the definition of “apprentice” to conclude that because the offensive assistant works closely with the head coach in order to gain experience to one day be hired as an offensive coach for a team, they are an

¹⁸⁵ 42 U.S.C. § 2000e-2(d).

¹⁸⁶ See 42 U.S.C. § 2000e.

¹⁸⁷ When interpreting older statutes, judges have been known to consult dictionaries from the time the statute was made see *ESKRIDGE*, *supra* note 132, at 329; see also *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 288 (2023) (Gorsuch, J., concurring) (stating that “[t]o ‘discriminate’ against a person meant in 1964 what it means today” when analyzing the word discriminate in Title VI).

¹⁸⁸ MERRIAM-WEBSTER, *WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY* 43 (1963).

¹⁸⁹ See Seifert, *supra* note 76.

apprentice. Therefore, if a court were to adopt this definition of apprentice, the hiring requirement would seem to be illegal under Title VII.

This is similar to the issue that Rehnquist briefly pointed out in *Weber*, where he argued that the training program selection process for the plant seemed to clearly violate the text of § 2000e-2(d).¹⁹⁰ Similar to the NFL requiring teams to hire a minority offensive assistant to gain experience, the plant in *Weber* reserved at least half of the spots in their program for black workers to get training and be promoted.¹⁹¹ Perhaps one way to distinguish the two would be to point out that the NFL plan does not guarantee the minority coach a higher position or even a position on the team after their contract is up.¹⁹² However, if a court adopts the definition of apprentice, this distinction will not matter since a guarantee of a job after the term of service is not in the definition.¹⁹³

3. Brennan's argument from Weber could still apply, but on Balance Could Fail.

While the same logic from Brennan's argument regarding § 2000e-2(j)¹⁹⁴ would still apply to the hiring requirement, Rehnquist's *expression unius* argument seems to be significantly more persuasive. While it can still be argued that by not requiring preferential treatment, Congress implicitly permitted preferential treatment, accepting that argument runs directly against the text of §§ 2000e-2(a)(1) and (j) in a way that the interview requirement did not. If the analysis of the interview requirement presented above¹⁹⁵ are correct, then by also relying on the § 2000e-2(j) argument, a court would not be violating the other provisions. In other words, the provisions are not in conflict with one another. However, the same cannot be said for the hiring requirement. As

¹⁹⁰ See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 226 (1979) (Rehnquist, J., dissenting).

¹⁹¹ See *id.* 197–99 (majority opinion).

¹⁹² See Seifert, *supra* note 76.

¹⁹³ See MERRIAM-WEBSTER, *supra* note 188, at 43.

¹⁹⁴ See discussion *supra* pp. 24–25.

¹⁹⁵ See *supra* Subsections III.A.1–2 (arguing that the interview requirement does not violate the text of the statutes).

stated above,¹⁹⁶ a court could easily find that it is an illegal apprenticeship or conclude that it violates § 2000e-2(a)(1). If a court were to then rely on § 2000e-2(j) to infer that preferential treatment is permissible, it would be derogating two provisions of Title VII that declare that practice to be illegal. This creates an operational conflict in the statute, and a court would not read it in such a way.¹⁹⁷

C. The Hiring Requirement is Important and Needs to be Preserved.

While the original iteration of the Rooney Rule was a triumph for diversity, it has not played out as expected. As noted by the examples of Brian Flores¹⁹⁸ and Dennis Green¹⁹⁹ NFL teams have skirted the Rooney Rule by engaging in sham interviews. However, explicitly avoiding the interview requirement is not the only failure of the original Rooney Rule; its results were lackluster as well. After the Rooney Rule was implemented, the number of head coaches of color rose until it hit a peak of seven in 2006.²⁰⁰ But since then, the number of head coaches of color has stagnated and even cut in half in the latter part of the 2010s.²⁰¹ Only recently has progress been made, with a record of 9 minority head coaches going into the 2024 NFL season.²⁰² Simply put, the Rooney Rule was not doing enough to get more coaches of color into the top jobs. To date, eleven NFL franchises have never had a full-time black head coach in their history.²⁰³ The

¹⁹⁶ See *supra* Subsections III.B.1–2

¹⁹⁷ See ESKRIDGE, *supra* note 132, at 348–49 (discussing the rule against interpreting a provision in derogation of other provisions, which states that “a provision of a statute should not be interpreted in such a way as to derogate from other provisions of the statute.”).

¹⁹⁸ See *supra* Part I.

¹⁹⁹ See *supra* discussion p. 11.

²⁰⁰ See *Field Studies*, GLOB. SPORTS MATTERS, <https://globalsportmatters.com/from-our-lab/2021/02/05/field-studies-nfl-head-coach-hiring-and-pathways-in-the-rooney-rule-era/> (last visited Nov. 11, 2023) (graph entitled “Racial Breakdown of NFL Head Coaches – 2002-03 to 2019-20”).

²⁰¹ See *id.*

²⁰² See Steve Reed, *NFL Reaches ‘Major Milestone’ with Record 9 Minority Head Coaches in Place for the 2024 Season*, AP (Jan. 26, 2024, 6:50 PM), <https://apnews.com/article/minority-head-coaches-nfl-87059103e2051cf726cfbe4e610395b0>.

²⁰³ See Dave Sheinin et al., *Blackout How the NFL Blocks Black Coaches*, WASH. POST (Se. 21, 2022), <https://www.washingtonpost.com/sports/interactive/2022/nfl-black-head-coaches/> (chart entitled “At 13 NFL

full-time nature of the coach is an important distinction because some of those eleven NFL franchises have had interim head coaches who were black, but it is argued that this is “an indication that owners are most willing to entrust their franchises to Black men only when the season already has gone sideways.”²⁰⁴

Another issue is the trend of teams hiring young offensive-minded head coaches, which has the tendency to leave behind black coaches.²⁰⁵ Between 2002 and 2020, thirty-eight offensive coordinators left their positions and became head coaches; only three of them were black.²⁰⁶ The NFL’s offensive assistant hiring requirement is supposed to help with this disparity. By putting minority coaches into offensive positions, they are gaining not only valuable experience but are also being put into the area, the offensive side of the ball, that leads to head coaching jobs. Without the hiring requirement, the NFL will likely go back to its pre-hiring requirement ways and leave black coaches behind.

As the above discussion demonstrated, the text of Title VII and the Rooney Rule are hard, if not impossible at times, to square. Despite the good policy of the NFL having the Rooney Rule, the text of Title VII could block it from achieving the diversity goals the NFL desires. This tension shows that Title VII, as written, is ineffective for achieving modern diversity goals. For its time, Title VII’s provisions were what was needed in order to address the issues of the day, overt and historical exclusion of minorities. However, its provisions are currently insufficient to proactively deal with race-based hiring issues. Therefore, in order to preserve the Rooney Rule,

franchises, still no Black full-time head coach”). *See also* Reed *supra* note 202 (discussing minority head coaches hired after the conclusion of the 2023 NFL season, who were not included in the data in the Blackout piece).

²⁰⁴ *See* Sheinin, *supra* note 203.

²⁰⁵ *See id.* (section entitled “The league’s movement toward young, offensive coaches leaves Black coaches behind”).

²⁰⁶ *See Field Studies, supra* note 200 (table entitled “Next Opportunity for Offensive Coordinators by Race/Ethnicity for 2002-03 – 2019-20”).

as well as affirmative action initiatives like it, Congress needs to amend Title VII in a way that explicitly allows for private affirmative action plans to be legal. It cannot leave it for a court to decide whether or not private affirmative action is allowed because, as noted above,²⁰⁷ there is a possibility that the current Court will adopt Rehnquist's interpretation from *Weber*, rendering the Rooney Rule illegal.

However, even this legislative solution is not perfect. Besides the aforementioned negative public view of affirmative action,²⁰⁸ the legislative process in Congress is lengthy and filled with points in time where legislation can be halted.²⁰⁹ These points are known as "vetogates," and arise from both constitutional requirements²¹⁰ as well as House and Senate rules.²¹¹ Due to these vetogates, simply saying that Congress should amend the text of Title VII to allow for private affirmative action is easier said than done. Furthermore, even if a bill is passed, vetogates are also points in the legislative process that bills are changed due to compromise,²¹² so even if a bill is introduced to protect private affirmative action, there is no guarantee it will be as strong as its sponsors want it to be. Unfortunately, amending Title VII is the only realistic way to protect private affirmative action from a textualist court.²¹³

²⁰⁷ See *supra* Section II.C.

²⁰⁸ See *supra* note 149.

²⁰⁹ See William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J. OF L., ECON., & ORG. 756, 756–57 (2015) (discussing the general concept of vetogates).

²¹⁰ See U.S. CONST. art. I, § 7, cl. 2 (requiring that bills must pass both houses of Congress and then be presented to the President for signature or veto).

²¹¹ See Eskridge, *supra* note, 209 at 758–59 (discussing various vetogates that stem from House and Senate rules).

²¹² *Id.* at 757 (“[a] political system where statutes must pass through a variety of institutional filters, each motivated by somewhat different incentives and interests, is one where . . . statutes that are enacted will tend to have compromises, logrolls, and delegations . . .”).

²¹³ There are other potential solutions such as a constitutional amendment or jurisdiction stripping, but these are so unlikely that they do not warrant discussion.

IV. Conclusion

Just like the outcome of Brian Flores' lawsuit against the NFL, the existence of private affirmative action is uncertain. A case could be brought, or it might not. Even if a case is brought, the Supreme Court may not even take it up. But that does not mean we should stand idly by. By analyzing the past and by tracing judicial trends in statutory interpretation, we can see a potential blitz coming. Instead of hoping the blitz never comes, we need to proactively adjust the protection in order to not be blindsided by a potential challenge to *Weber* and private affirmative action plans like the Rooney Rule.