

Law Profs Throw Flag On NFL's 'Unconscionable' Arbitration

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By **David Steele** · [Listen to article](#)

Law360(July 19, 2024, 7:28 PM EDT)-- Allowing the NFL's arbitration system, with commissioner Roger Goodell as the arbitrator, to prevail in Brian Flores' discrimination dispute with the league is "unconscionable" and "egregious," a dozen law professors have told the Second Circuit in an amicus brief supporting the former Miami Dolphins head coach.

The brief, written by Imre S. Szalai of Loyola University New Orleans College of Law and filed on Thursday, said that if the Second Circuit rules in favor of the NFL on sending all or part of Flores' proposed class action to arbitration, it "could undermine the legitimacy and fairness of arbitration for hundreds of millions of workers and consumers governed by arbitration agreements." Enforcing the league's arbitration clause, it continued, "could transform arbitration as it has been practiced for decades and damage the credibility of arbitration as a viable form of dispute resolution."

Szalai, a renowned expert in arbitration history and law, wrote a similar amicus brief **in March 2023** asking a district court to reconsider the decision to send his claims against the NFL, the Arizona Cardinals, the Dolphins and the Tennessee Titans to arbitration. Ten of the

other 11 colleagues who signed onto the 2023 brief signed onto the Second Circuit one – because the one who did not could not be reached on short notice, Szalai told Law360 Friday, and another professor agreed to join "within five minutes."

The NFL has appealed the 2023 lower court ruling that the part of Flores' suit against the league, the New York Giants, the Denver Broncos and the Houston Texans must stay in federal court rather than going to arbitration. Flores filed a brief **July 11** asking the Second Circuit to uphold the ruling. Flores filed the proposed class action in February 2022 in New York federal court, accusing the league of systemic racism in its hiring of coaches and general managers.

Besides being unconscionable because it is imposed unilaterally by the league, the law professors' amicus brief said, a system with the commissioner in charge is "contrary to the norms of fundamental fairness developed by the arbitration community." It also stands in stark contrast to companies that adhere to the Federal Arbitration Act and follow the precedent established in the Supreme Court's 1991 ruling in *Gilmer v. Interstate/Johnson Lane Corp.*, and that use the American Arbitration Association to employ neutral arbitrators to resolve disputes.

Having Goodell, hired and paid by the NFL team owners, as the arbitrator is "highly problematic," the brief said.

As an example of widely accepted arbitration practice, the brief pointed to Walmart, an international corporation that uses the American Arbitration Association in its dispute resolutions. If the NFL's system receives approval from the courts, the brief said, "nothing would legally stop Walmart and every other company from modifying their arbitration clauses so that all employment and consumer disputes must now be resolved through arbitration with the company's CEO, or another company executive, serving as the sole arbitrator."

Such a move, Szalai said Friday, "would set a horrible precedent. It would be the end of arbitration as we know it."

"We are extremely grateful for the support of these legal scholars who recognize the importance and wide-reaching implications of the issue before the Second Circuit," Flores' attorneys told Law360 in an email Friday. "It should not be controversial that employers, including the NFL, should not be permitted to have their own executives decide whether or not they violated the anti-discrimination laws."

Representatives for the NFL did not immediately reply to a request for comment Friday.

Flores is represented by David E. Gottlieb, Michael J. Willemin and Douglas H. Wigdor of Wigdor LLP and John Elefterakis, Nicholas Elefterakis, Raymond Panek and Johnson Atkinson of Elefterakis Elefterakis & Panek.

The NFL and its teams are represented by Brad S. Karp, Kannon K. Shanmugam, Lynn B. Bayard, Brette Tannenbaum and William T. Marks of [Paul Weiss Rifkind Wharton & Garrison LLP](#).

The case is Brian Flores et al. v. The [National Football League](#) et al., case number [23-1185](#), in the [U.S. Court of Appeals for the Second Circuit](#).

--Editing by Peter Rozovsky.

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Nature of Suit

3442 CIVIL RIGHTS-Jobs

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