No. 24-61

In the Supreme Court of the United States

MICHAEL CLOUD,

Petitioner,

— v.—

THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICI CURIAE BRIEF OF ADVOCACY FOR FAIRNESS IN SPORTS AND PROFESSOR ROGER BARON IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amici curiae Advocacy for Fairness in Sports and Professor Roger Baron have no personal stake in this case's outcome. Professor Baron is a Professor Emeritus at the University of South Dakota School of Law, specializing in the Employee Retirement Income Security Act of 1974 (ERISA). Professor Baron has an academic interest in ERISA and has published numerous articles regarding it.

Advocacy for Fairness in Sports is a nonprofit that advocates for the rights of retired, injured athletes and contributes to national media investigations about concussions and the NFL's retirement plan. It has seen the suffering that players endure from their NFL-caused brain injuries and the hardships they face pursuing benefits in a process stacked against them.

Amici share an interest in seeing ERISA law develop to protect ERISA participants consistent with ERISA's purpose that it be administered in "the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b).

SUMMARY OF ARGUMENT

This case is a symptom of a larger, long-running problem. The problem starts with the NFL's troubled

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[1] Amici curiae affirm that counsel of record for all parties were given timely notice of amici's intent to file this brief in support of petitioner in accordance with Supreme Court Rule 37.2. Amici also affirm that no counsel for a party authored this brief in whole or part, and that no party, counsel for a party, or any person other than amici curiae or their counsel made a monetary contribution toward the preparation and submission of this brief.

history with concussions—years of denying (and arguably covering up) the link between concussions and brain damage.[2] And continues today with the Bert Bell/Pete Rozelle NFL Players Retirement Plan, which schemes to deny benefits to the veteran players hobbled or totally disabled by their traumatic brain injuries.[3] The NFL made billions off the blood, sweat, and brain-crushing collisions of these gridiron gladiators, but once they retire and stop generating revenue, the NFL refuses to live up to its promises.

This problem continues to fester at the center of American culture in the country's most popular sport. In both this case and many others like it, the NFL Plan reveals its aim—to work against its beneficiaries' interests to wrongfully deny promised benefits. It does so despite its obligation as a fiduciary under ERISA to do the opposite: to "discharge [its] duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1). Rather than act as a fiduciary for players like Cloud, the NFL Plan chooses to be their adversary.

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[2] *See, e.g.*, *FRONTLINE: League of Denial: The NFL's Concussion Crisis* (PBS television broadcast Oct. 8, 2013), https://www.pbs.org/wgbh/frontline/documentary/league-of-denial/.

[3] *See* Will Hobson, *How the NFL avoids paying disabled players—with the union's help*, WASH. POST (Feb. 8, 2023), https://www.washingtonpost.com/sports/2023/02/08/nfl-disability-players-union/.

Amici support Michael Cloud's petition and the arguments he raises for why this case merits review. Cloud has identified a worthy circuit split over the standard of review in ERISA cases in a worthy case with a worthy petitioner. Rather than reiterate the strengths of Cloud's petition for review on the merits, however, Amici offer two alternative paths for the Court, should it conclude that the existing split is not yet mature enough to resolve. The Court should consider granting certiorari, vacating the Fifth Circuit's decision, and remanding to either:

(1) reconsider its decision in light of *Loper Bright Enters.* v. *Raimondo*, 144 S. Ct. 2244 (2024), whose overruling of blanket deference to agencies' statutory interpretation may impact the analogous deference the Fifth Circuit gives to ERISA plan administrators; or

(2) review Cloud's claim under a de novo standard of review. The NFL Plan missed its decision deadline and thus forfeited a deferential standard of review.

Either path offers a simple and efficient way to resolve Cloud's petition and ensure justice is done.

The NFL Plan will continue to violate its fiduciary duties and wrongfully deny claims for former players like Cloud who are suffering from degenerative brain injuries until it is forced to stop. Amici therefore respectfully request that the Court grant Cloud's petition, or grant, vacate, and remand it, to make the NFL Plan stop.

ARGUMENT

I. This case is a prime candidate to be granted, vacated, and remanded.

The Court has two independent paths to grant, vacate, and remand this case for further consideration. First, given the Court's recent decision in *Loper* overruling agency deference, the Court can grant, vacate, and remand for the Fifth Circuit to review, in the first instance, whether this analogous deference nevertheless applies to ERISA plan administrators. Second, because the NFL Plan forfeited any deference it might have been owed by missing the deadline for issuing its decision, the Court can grant, vacate, and remand for the Fifth Circuit to review Cloud's claim under the correct standard of review: de novo. Either would be a swift and just course to resolving this unfortunate case.

A. Deference to ERISA plan administrators is analogous to agency deference and thus should be reevaluated in light of *Loper*.

As the NFL Plan pointed out below in arguing that it is owed broad deference, courts analogize judicial review of ERISA plan decisions to review of administrative agency decisions. *Crosby* v. *La. Health Serv. & Indemn. Co.*, 647 F.3d 258, 264 (5th Cir. 2001). This is because ERISA plan administrators are akin to agency bureaucrats; plan administrators interpret plan terms and ERISA law in the same ways that agency bureaucrats interpret regulations and statutes. But after *Loper*, such agency deference is no more. The circuit courts have not yet addressed whether the abolition of agency

deference impacts the analogous deference given to ERISA plan administrators. The Fifth Circuit surely recognized that it might, with five judges voting to rehear Cloud's case en banc while *Loper* was pending. Because *Loper* issued three months after the en banc denial, the Fifth Circuit did not get the chance to address this issue. It should be given that chance now.

Indeed, there are strong reasons to doubt that ERISA plan administrators are owed deference when agency bureaucrats are not. ERISA does not set out a standard of review. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 109 (1989). The abuse-of-discretion standard so often applied in ERISA cases, much like the deferential standard that used to apply when reviewing agency decisions, is judge-made. And like many well-intentioned judge-made rules, it is prey to the law of unintended consequences.

For example, deference can create a sense of entitlement for plan administrators just as it can for agencies. *See, e.g.*, Raymond M. Kethledge, *Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench*, 70 VAND. L. REV. EN BANC 315, 324 (2017) (stating that "[t]here is no getting around the fact that *Chevron* deference has created a palpable sense of entitlement among executive agencies, particularly when they show up in court"). This deference encourages sloppy work and tempts plan administrators to cut corners—which is what the NFL Plan did here and habitually does when reviewing claims and appeals. The NFL Plan knows that it has virtually unfettered discretion, so it did not bother to inform itself about Cloud's case before ruling on it. Pet. App. 11a-12a.

This was no accident—the NFL Plan would often push 100 appeals through a meeting in about 10 minutes. Pet. App. 11a.

Deference also robs participants of the benefit of their bargain. When employees and employers draft an ERISA plan, they bargain for its terms and provisions. Deferring to plan administrators' interpretations of these terms and provisions allows them to choose definitions favorable to the plan, regardless of what was bargained for. So even if the employees bargained for a term with a clear legal meaning, plan administrators can apply a different meaning so long as their interpretation is colorable. As the Court is well-aware, there are many colorable yet clearly wrong interpretations. Blind deference allows plan administrators to pick their preferred outcome then back-into a colorable interpretation that supports it. Abuse of discretion is too low a standard to police this type of gamesmanship.

And deference aids inconsistency. Deference allows plan administrators to apply not just clearly wrong interpretations, but shifting ones. Although most agency determinations are public, plan determinations are not. Because they are private, rarely does anyone but the plan administrators know whether their interpretations are consistent between claims. Most plan participants have no way to know whether plan administrators are using consistent interpretations, so they have no way to know whether they can challenge a denial on that basis. Abuse of discretion is too low a standard to police this type of gamesmanship, either.

Anyone skeptical of deference to agency bureaucrats should therefore be at least as skeptical of deference to plan administrators.

Because the justifications for deferring to ERISA plan administrators are as precarious as the no-longer-valid justifications for deferring to agency bureaucrats, Cloud's petition should be granted; the decision below vacated; and the case remanded to the Fifth Circuit for it to review in the first instance what deference, if any, should be given to plan administrators.

B. The Fifth Circuit should reevaluate Cloud's claim under the correct standard—de novo—because the NFL Plan forfeited deferential review.

The Court may also grant, vacate, and remand with instructions for the Fifth Circuit to review this case under the correct de novo standard of review. De novo is the proper standard to apply because the NFL Plan failed to meet the deadline to issue its benefits determination.

Even if there were no circuit split over the standard of review under *Firestone*, and even if the NFL Plan's interpretations of plan terms were otherwise entitled to some deference, the NFL Plan forfeited that deference when it missed the deadline to make its decision. The Fifth Circuit therefore should have reviewed Cloud's claim de novo rather than review the NFL Plan's denial for an abuse of discretion.

Federal law required the NFL Plan to notify Cloud "of the benefit determination as soon as possible, but not later than 5 days after the benefit

determination is made." 29 C.F.R. § 2560.503-1(i)(3)(ii) The NFL Plan blew that five-day deadline. Pet. App. 94a-95a. Because the NFL Plan missed the deadline for issuing its decision, Cloud's "claim should have been reviewed de novo." *Fessenden* v. *Reliance Standard Life Ins. Co.*, 927 F.3d 998, 1007 (7th Cir. 2019) (Barrett, J.); *see Univ. Hosp. of Cleveland* v. *Emerson Elec. Co.*, 202 F.3d 839, 846 n.3 (6th Cir. 2000) ("[T]here is undeniable logic in the view that a plan administrator should forfeit deferential review by failing to exercise its discretion in a timely manner."). So, even if abuse of discretion were otherwise the correct standard to apply in ERISA cases, the Fifth Circuit should not have applied deferential review here. That reason alone justifies remand for further consideration in light of the correct standard of review: de novo.

The NFL Plan's only response, which it repeatedly invoked to excuse its litany of transgressions, was that it need not strictly comply with ERISA or the plan's terms; it need only substantially comply. This argument, however, exposes the NFL Plan's dereliction of its fiduciary duties. The NFL Plan relied on alleged foot faults by a beneficiary with a degenerative brain injury to deny Cloud the benefits he is unquestionably owed, but now insists the courts should ignore its own mistakes as insubstantial. In other words, strict compliance for Cloud, but not for Cloud's fiduciary. That double-standard is plainly unfair and the opposite of how a fiduciary must act.

In any event, the substantial-compliance doctrine does not apply to the NFL Plan's missed deadline. A plan cannot "substantially comply" with a missed

deadline because "[s]ubstantial compliance with a deadline requiring strict compliance is a contradiction in terms." *Fessenden*, 927 F.3d at 1004. Thus, the NFL Plan's only excuse is no excuse at all.

Because the NFL Plan forfeited any entitlement to a deferential review of its benefits determination, the Fifth Circuit should have reviewed Cloud's claim de novo. Thus, the Court may also grant, vacate, and remand this case for reconsideration in light of the proper standard: a de novo review of Cloud's claim.

II. This is a worthy case to address the deference owed to ERISA plan administrators because the NFL Plan is so unworthy of it and will keep abusing it with countless players like Cloud suffering from traumatic brain injuries.

The NFL Plan is the very model of an entitled, abusive decision-maker; it is the exception that makes the rule. The NFL Plan's history of misconduct is why this case is an ideal vehicle to address (whether here or on remand) the issue of what deference, if any, courts owe ERISA plan administrators. Any rules for such deference should be set to prevent bad actors from further abusing their power. Bad actors like the NFL Plan here.

When stripped of its (undeserved) deference, the NFL Plan's decision here, like in countless other cases across the country,[4] cannot withstand even

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[4] *See, e.g.*, *Dimry* v. *Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 2022 WL 1786576, at *3 (N.D. Cal. June 1, 2022) (the NFL Plan abused its discretion by denying benefits because it showed "an intent to deny [the participant's] benefits application regardless of the evidence"); *Solomon* v. *Bert*

modest scrutiny. That is what the district court determined in its opinion reversing the NFL Plan's denial of Cloud's reclassification claim. After a six-day trial where only the NFL Plan called witnesses, the court found that the NFL Plan "wrongfully and arbitrarily" denied Cloud's claim using "post hoc rationalizations" to deny benefits "regardless of the evidence" while "shirk[ing] its fiduciary obligations under both ERISA and the Plan itself." Pet. App.21a, 89a, 124a, 125a. And that just barely scratches the surface of all the inconsistencies, deficiencies, and wrongs that the court uncovered.

Tellingly, though the Fifth Circuit reversed the district court, its opinion offered no vindication of the NFL Plan's disgraceful system for reviewing claims and appeals. The Fifth Circuit "commend[ed] the

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Bell/Pete Rozelle NFL Player Ret. Plan, 860 F.3d 259, 261 (4th Cir. 2017) (the NFL Plan abused its discretion because it "failed to follow a reasoned process or explain the basis of its determination" and didn't consider undisputed evidence supporting the participant's claim "including [evidence] of the [NFL] Plan's own expert"); *Giles* v. *Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 2013 WL 6909200, at *1 (D. Md. Dec. 31, 2013) (reversing the NFL Plan's denial of benefits because it abused its discretion); *Stewart* v. *Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 2012 WL 2374661, at *14-15 (D. Md. June 19, 2012) *appeal dismissed*, No. 12-1871 (4th Cir. Jan. 14, 2013) (the NFL Plan abused its discretion because it relied on "a mere scintilla" of evidence to deny the claim); *Moore* v. *Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 282 F. App'x 599, 600 (9th Cir. 2008) (the NFL Plan abused its discretion by terminating benefits based on an unreasonable interpretation of the plan terms and despite "unanimous" medical evidence); *Jani* v. *Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 209 F. App'x 305, 317 (4th Cir. 2006) (the NFL Plan abused its discretion in denying benefits because it "did not rely on substantial evidence to contradict" the expert opinions).

district court for its thorough findings—devastating in detail—which expose[d] the NFL Plan's disturbing lack of safeguards to ensure fair and meaningful review of disability claims" and for "chronicling a lopsided system aggressively stacked against disabled players." Pet. App. 19a. It held that the "record paints a bleak picture" of how appeals are handled, and it noted that "the NFL Plan's review board may well have denied Cloud a full and fair review" and that "Cloud is probably entitled to the highest level of disability pay." Pet. App. 3a, App.7a. Indeed, the NFL Plan did not dispute that Cloud is totally and permanently disabled; that he is suffering from serious cognitive impairments from traumatic brain injuries; or that playing in the NFL caused Cloud's disability. Nor did it challenge a single factual finding by the district court. Its defense has always been quibbles about technicalities to try to excuse its wrongful and arbitrary denial of Cloud's claim.

Despite this indictment of the NFL Plan's "disturbing" system, the Fifth Circuit reversed the district court on one ground: Cloud is not entitled to reclassification because he cannot show "changed circumstances" between his 2014 benefits application (which was denied and which he did not appeal) and his 2016 claim for reclassification. That is, Cloud was not entitled to reclassification because he supposedly could not meet the definition of *changed circumstances*. The problem is that the NFL Plan refuses to stick to one definition or to share its definitions in advance. A definition that the NFL Plan changes at whim is no definition at all.

The NFL Plan has no set definition of *changed circumstances*. Nor does it have two definitions. Or three. Rather, the NFL Plan has at least eight definitions (that we know of). Pet. App. 16a-17a. And it cherry-picks what one it uses on a case-by-case basis. Here, the district court found that the NFL Plan "applied a tortured reading to" the phrase *changed circumstances* to "ensure that Mr. Cloud would be denied benefits" and that the NFL Plan "has a history of applying evolving definition[s] that their own board members testified in court and by deposition was applied on a case-by-case basis." ROA.12629, ROA.14050.[5] Indeed, the NFL Plan has refused to even share its definitions to let players know, when applying for benefits, what they need to show. *E.g.*, *Hudson* v. *NFL League Mgmt. Council*, 2019 WL 5722220, at *5 (S.D.N.Y. Sept. 5, 2019) (Lehrburger, Mag. J.) (the NFL Plan refused to share previous interpretations of *changed circumstances* because they "were not relevant" and would be an "advisory opinion"). So, players are forced to guess how high the hurdle is and how far the NFL Plan will arbitrarily move it later. Such a moving target is the epitome of arbitrary and capricious and is why the NFL Plan is so unworthy of deference. There is no conceivable good-faith reason to withhold definitions of plan terms from players or to change those definitions on a case-by-case basis.

Moreover, the NFL Plan's use of a moving target affected the outcome here. Were it not already clear that the NFL Plan wrongly and arbitrarily denied Cloud's claim regardless of the evidence, that

[5] ROA citations refer to the record on appeal in the Fifth Circuit.

conclusion becomes inescapable given that Cloud can meet at least one of the NFL Plan's many definitions for *changed circumstances*. Here, as part of Cloud's 2016 reclassification application, he offered a 2012 medical exam that showed conditions different from those considered during his 2014 application. The Fifth Circuit held that Cloud couldn't show changed circumstances because this 2012 exam couldn't show changed circumstances between 2014 and 2016. Pet. App. 15a-16a. But one of the NFL Plan's shifting definitions allows for just such a preexisting-but-unevaluated condition: "a change in a Player's condition, such as . . . an impairment that did exist but is different from the one that formed the basis for the original award of . . . benefits." Pet. App. 82a. Thus, were the NFL Plan not arbitrarily moving the target with the goal of denying benefits, it would have found that Cloud showed "changed circumstances" and was entitled to reclassification.

This case is a good vehicle to resolve the issue of what deference is owed to ERISA plan administrators because there is a clear victim and a clear wrongdoer, which will help this Court or the Fifth Circuit set clear rules. And because the NFL Plan has shown itself to be a habitual bad actor, these abuses won't stop until the courts step in and relevels the playing field. With a level field, Cloud and many others like him would undoubtedly prevail and get the benefits they need, deserve, and were promised.

CONCLUSION

Both the district court and Fifth Circuit recognized that the NFL Plan—a fiduciary that must act solely in the best interests of its beneficiaries—

actively works against their interests to wrongfully and arbitrarily deny them the benefits they were promised. It did so yet again here. And it will continue to do so for countless more former players suffering from debilitating brain injuries until someone makes it stop. To make it stop, Amici respectfully request that the Court either grant Cloud's petition or grant, vacate, and remand it.

Respectfully submitted,

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