No. 22-10710

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL CLOUD,

Plaintiff-Appellee,

v.

THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Texas, No. 3:20-cv-1277

MOTION OF AMERICAN BENEFITS COUNCIL FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

No. 21-10710, *Cloud v. NFL Player Retirement Plan*

The undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b), the American Benefits Council (Council) hereby moves for leave to file a brief as amicus curiae in support of Defendant-Appellant and seeking reversal. In support, the Council states as follows.

1. The Council is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers—over 220 of the world's largest corporations—than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

2. The Council frequently participates as amicus curiae before the Supreme and Circuit Courts, including this one, in cases with potential to significantly affect the administration and sustainability of employee benefit plans under ERISA. This is such a case. Reversal is necessary because the district court's approach to review of the Retirement Board's denial of Plaintiff's request to reclassify his benefits discards the well-settled and deeply rooted principles requiring deferential review of determinations made by a plan administrator who is vested with discretion to interpret and apply plan terms. The district court's decision risks exposing plan

sponsors to conflicting rulings, dramatically increased litigation costs, and practical and actuarial uncertainty.

3. Consistent with Fifth Circuit Rule 29.2, the proposed brief "avoid[s] the repetition of facts or legal arguments contained in the principal brief and … focuses on points … not adequately discussed" therein. Whereas Defendant's brief contains a thorough discussion of the facts and legal arguments regarding the specifics of the benefit-plan determination at issue, the Council's brief focuses on underlying policy points and the broader ramifications of the district court's decision to ERISA plan sponsors and administrators. The Council's brief offers an industry-wide perspective on the issues before this Court.

4. The Council has sought consent for this filing from parties' counsel. Defendant-Appellant consents, Plaintiff-Appellee does not consent.

5. The proposed amicus brief is filed herewith.

6. This motion and the amicus brief are being filed within the time allowed by Rule 29(b), because the Appellant's brief was filed on November 10, 2022.

Wherefore, the American Benefits Council respectfully requests that the motion for leave to file an amicus brief in support of Defendant-Appellant and reversal be granted.

November 17, 2022

Respectfully submitted,

/s/ *Brett E. Legner*

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on November 17, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Brett E. Legner*
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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in the Appellant's opening brief, have an interest in the outcome of this case.

Amicus curiae:
American Benefits Council

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/s/ Brett E. Legner
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STATEMENT OF THE AMICUS CURIAE[1]

Amicus curiae the American Benefits Council (Council) is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers—over 220 of the world's largest corporations—than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

The Council frequently participates as amicus curiae before the Supreme and Circuit Courts, including this one, in cases with potential to significantly affect the administration and sustainability of employee benefit plans under ERISA.[2] This is such a case. Reversal is necessary because the district court's approach to review of the Retirement Board's denial of Plaintiff's request to reclassify his benefits discards the well-settled and deeply rooted principles requiring deferential review of

[1] Defendant's counsel, Groom Law Group, Chartered, is a member of the American Benefits Council. No party's counsel authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae, its members, or its counsel made such a monetary contribution. Amicus curiae has requested leave of this Court to file this brief, and Plaintiff has informed amicus that he opposes the motion for leave.

[2] *See, e.g.*, *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312 (2016); *Amgen v. Harris*, 577 U.S. 1118 (2016); *Dialysis Newco, Inc. v. Community Health Sys. Grp. Health Plans*, 938 F.3d 246 (5th Cir. 2019); *Whitley v. BP, P.L.C.*, 838 F.3d 523 (5th Cir. 2016).

determinations made by a plan administrator who is vested with discretion to interpret and apply plan terms. The district court's decision risks exposing plan sponsors to conflicting rulings, dramatically increased litigation costs, and practical and actuarial uncertainty.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Council submits this brief to help explain the importance of maintaining the well-established standards governing limited and deferential judicial review of benefit determinations by plan administrators vested with discretion to resolve questions regarding eligibility for benefits. In this case, the district court failed to provide the required deference to the determination made by the Retirement Board, as plan administrator, that Plaintiff was not entitled to reclassification to a higher level of benefits. Among other things, the district court allowed Plaintiff to argue that he was entitled to reclassification based on "changed circumstances" and exempt from the "shortly after" requirement based on the Plan's "special rules," even though he did not raise either argument before the Board. Additionally, instead of sticking to the administrative record, the district court permitted extensive discovery, including deposition of two Board members, and held a six-day trial.

Addressing procedural matters, the court determined that the Board improperly delegated certain tasks to advisors, even though the Board retained final authority and issued the benefit-reclassification determination. Substantively, the

court rejected the Board's interpretation of the "changed circumstances" language in the plan, contrary to the decisions of at least three district courts which had upheld the Board's interpretation of that language.

Rather than adhere to well-known standards governing review, the district court ignored the deference owed to the plan administrator, disregarded basic aspects of limited judicial review such as the exhaustion of remedies doctrine, and allowed wide-ranging discovery in an effort to "pull[] back" the curtain "as to the inner workings of Defendant The Bert Bell/Pete Rozelle NFL Player Retirement Plan." Dkt. 255 at 1. The result was an 84-page decision that went far beyond the scope of the administrative record, rested on the court's own extensive fact finding, and second-guessed the Board's exercise of its fiduciary functions. Simply, even though the court's review of the Board's decision is supposed to be "essentially analogous to a review of an administrative agency decision," *Crosby v. Louisiana Health Serv. & Indem. Co.*,647 F.3d 258, 264 (5th Cir. 2011), the district court treated the matter as if it were the initial finder of fact and decision maker.

The district court's unprecedented approach unsettles plan sponsors' expectations and places them at risk of frequent, costly litigation. If the district court's non-deferential and searching review of ERISA benefits decisions were to be tolerated, plan sponsors will face significant pressures to cease creating and

offering benefit plans altogether. As will be discussed, that outcome cannot be reconciled with unmistakable congressional intent.

ARGUMENT

I. Judicial deference to fiduciary benefit determinations is essential to serve the purposes of ERISA.

The Supreme Court has explained that "Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516-17 (2010). Instead, "ERISA represents a 'careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans.'" *Id*. at 517 (quoting *Aetna Health v. Davila*, 542 U.S 200, 215 (2004)). To accomplish these twin goals of protecting employee benefits and encouraging the maintenance of employee benefit plans, "Congress sought 'to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place.'" *Id*. (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (internal brackets omitted). Thus, "ERISA 'induces employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred.'" *Id*. (quoting *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)).

One important way by which these goals are effectuated is through the limited scope of judicial review of benefits determinations by plan administrators who are vested with the discretion to interpret the plan terms. *Id*. (holding that deferential judicial review "protects these interests" underlying ERISA). Relying on principles of trust law, the Supreme Court held that under ERISA, "a deferential standard of review [is] appropriate when a trustee exercises discretionary powers." *Firestone Tire & Rubber Co. Bruch*, 489 U.S. 101, 111 (1989). This flows from the rule that a "trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." *Id*. (citing G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 559 (2d rev. ed. 1980)). This "broad standard of deference" is not subject to limitation or application of ad hoc exceptions, especially because "ERISA law [is] already complicated enough without adding 'special procedural or evidentiary rules' to the mix." *Conkright*, 559 U.S. at 513 (quoting *Met. Life Ins. Co. v. Glenn*, 554 U.S. 105, 116-17 (2008)). An immutable core aspect of this deference is that the district court should not "act[] as a substitute trustee." *Id*. at 515.

Under ERISA, plan administrators vested with discretion possess "primary interpretive authority over an ERISA plan." *Id*. at 517. Deferential review of administrators' decisions achieves a number of concrete goals, all of which are undone if the district court "acts as a substitute trustee": (1) "[d]eference promotes

efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation"; (2) deference "promotes predictability, as an employer can rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from *de novo* judicial review"; (3) deference "serves the interest of uniformity, helping to avoid a patchwork of different interpretations of a plan," which could make it "impossible even to determine whether an ERISA plan is solvent . . . if the plan is interpreted to mean different things in different places"; and (4) deference to plan administrators "who have a duty to *all* beneficiaries to preserve limited plan assets" helps avoid the situation where a court conducting a *de novo* review grants "windfalls for particular employees" without the necessary understanding of the overall interests of the plan towards all employees. *Id*. at 517-18, 520. This Court has expressly acknowledged these considerations underlying the need for deference to plan administrators. *See Connecticut Gen. Life Ins. Co. v. Humble Surgical Hosp., L.L.C.*, 878 F3d 478, 484 (5th Cir. 2017).

II. The district court's decision undermines these core principles.

The district court's decision in this case undercuts each of these important purposes by failing to provide appropriate deference to the plan administrator's determination. Rather than engage in deferential review confined to the administrative record to determine whether the Board's decision was "supported by

substantial evidence in the record" to "assure that [its] decision falls somewhere on a continuum of reasonableness,"[3] *Corry v. Liberty Life Assurance Co.*, 499 F.3d 389, 398 (5th Cir. 2007), the district court proceeded as if it were the initial fact-finder, parsing the facts, expanding the record, and substituting its judgment for the Board.

First, the district court's decision encourages costly litigation and discourages efficient resolution of issues at the plan administration level. *See Bunner v. Dearborn Nat'l Life Ins. Co.*, 37 F.4th 267, 272 (5th Cir. 2022) (ERISA's purposes include "promoting resolution of the dispute at the administrative level and facilitating a meaningful dialogue between the plan administrator and the beneficiary"). Similar to the familiar practice of judicial review of administrative decisions, the choice to allocate certain decisions to adjudication by a non-judicial actor—in this case, a plan administrator vested with discretion by the plan documents—evinces a clear intent to avoid litigation and the costs associated with it. *See Crosby*, 647 F.3d at 264 ("our review of an ERISA benefits determination is essentially analogous to a review of an administrative decision").

Indeed, Congress has permitted plan sponsors to vest administrators with the discretion to interpret plan terms, *see, e.g., Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 963 (9th Cir. 2006) (en` banc) (explaining that plan sponsors have

[3] To be upheld, the administrator's decision need only be "on the low end" of the "continuum of reasonableness." *Corry*, 499 F.3d at 398.

discretion to confer discretion on plan administrators and need not use "magic words to conjure up discretion on the part of the plan administrator"); *Goldstein v. Johnson & Johnson*, 251 F.3d 433, 441 (3d Cir. 2001) (ERISA "has nothing to say about how these plans are designed"), and has signaled its intent that interpretation of ERISA be "guided by principles of trust law." *Firestone*, 489 U.S. at 110-11. Because those principles hold that the actions of a trustee vested with discretion should be viewed deferentially, *id*. at 115, Congress thus intended that such decisions not be subject to searching scrutiny in court.

By ignoring the deferential review principle in this case, the district court in effect overrode the plan sponsor's decision to vest the Board with discretion to make benefits determinations and instead treated the Board as if it did not have that authority. This approach is irreconcilable with the fact that "Congress left employers much discretion in designing their plans under ERISA." *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1078-79 (4th Cir. 1989); *see also Abatie*, 458 F.3d at 963.

This case is a stark illustration of the costs of litigation that occur when the court declines to accord deference to the administrator's decision and interpretation and construction of plan terms. Rather than limit the case to review of the administrative record, the court allowed broad discovery, including depositions of two Board members, and then held a six-day trial. The expense and burden imposed upon the Board and its members was immense, and it is borne out of the district

court's decision to cast aside deferential review. If district courts are permitted to subject plan administrators to extensive discovery—even though the plan documents vest interpretative and adjudicative authority in those administrators—the resulting costs and inconvenience will, at minimum, hurt the efficient operation of plans and possibly dissuade employers from offering retirement plans. That is the opposite of Congress' intent. *See Varity*, 516 U.S. at 497 (Congress intended that ERISA would not result in "litigation expenses" that would "discourage employers" from offering plans).

Second, the district court did not require Plaintiff to exhaust his remedies by raising before the Board his claim that he was entitled to reclassification of benefits due to changed circumstances. *See* Def. Br. 48-49. Instead, at the administrative level, Plaintiff requested the Board to waive the plan requirement that reclassification be supported by "changed circumstances" and argued to the Board that he was eligible for higher benefits by satisfying the Plan's "shortly after" requirement, not that he was exempt from that requirement under the Plan's "special rules." *Id*. at 48-49, 55.

Almost 40 years ago, this Court held that "[t]o preserve the integrity of ERISA, we hold that the doctrine of exhaustion of remedies is applicable to the denial of benefits by Plan trustees." *Denton v. First Nat'l Bank of Waco, Texas*, 765 F.2d 1295, 1297 (5th Cir. 1985). Faithful application of the exhaustion requirement

serves the purposes of ERISA by (1) "uphold[ing] Congress' desire that ERISA trustees be responsible for their actions, not the federal courts;" (2) providing a "sufficiently clear record of administrative action if litigation should ensue;" and (3) "assur[ing] that any judicial review of fiduciary action (or inaction) is made under the arbitrary and capricious standard, not *de novo*." *Id*. at 1300. Thus, "a federal court should not address [an issue raised for the first time in court] because it does not have the opportunity to review the plan administrator's resolution under an arbitrary and capricious standard." *Harris v. Trustmark Nat'l Bank*, 287 Fed. Appx. 283, 288 (5th Cir. 2008).

Third, the district court's failure to apply proper deference to the Board's interpretation and application of the plan provisions upsets the predictability of decision making under the plan. "One of ERISA's main purposes is the promotion of 'predictability' through which ERISA seeks to 'induc[e] employers to offer benefits by assuring a predictable set of liabilities.'" *Riley v. Met. Life Ins. Co.*,744 F.3d 241, 248 (1st Cir. 2014) (quoting *Conkright*, 559 U.S. at 517). But an employer cannot predict liabilities when its plan provisions are subject to different interpretation by different courts.

This is where deference plays an essential role: under that standard of review, the court does not resolve how it would interpret a plan provision in the first instance; rather, it will affirm the administrator's interpretation unless it is "arbitrary or

capricious." *Connecticut Gen. Life. Ins. Co.*, 878 F3d at 484. An interpretation is arbitrary "only if made without a rational connection between the known facts and the decision." *Id*. (internal quotation marks omitted). An administrator's interpretation of plan provisions can have the necessary "rational connection" even if it is not the connection a court examining the provisions in the first instance would have drawn. The result is that courts assiduously applying the deferential standard will not substitute their judgment and read the plan provisions as they see fit. That way, the plan's interpretation will not differ from court-to-court, jurisdiction-to-jurisdiction, case-by-case, or beneficiary-by-beneficiary.

These concerns are not merely speculative or hypothetical. In this case, the district court rejected the Board's interpretation of the plan language regarding what constitutes "changed circumstances" entitling a beneficiary to a reclassification of benefit level. *See* Def. Br. 52. In doing so, the court departed from the decisions of district courts in New York, Georgia, and Maryland holding that the Board's interpretation of the "changed circumstances" language was not an abuse of discretion. *See id*. at 50-51. The result is that the plan language means something different in different parts of the country or as applied to different beneficiaries. This result is directly contrary to the administrator's fiduciary obligation to apply the plan terms consistently to all beneficiaries and to Congress' intention that ERISA provide

a uniform set of regulations governing plan administration. *See Conkright*, 559 U.S. at 520.

Fourth, the district court's decision to allow discovery and conduct a trial, rather than limiting its review to the administrative record, resulted in *de novo* fact finding by a court that did not have a fiduciary duty to apply benefits determinations equally across all beneficiaries or to preserve plan assets for the entire class of beneficiaries. As in this case, this approach results in a windfall to one particular litigant in a decision removed from the fiduciary's authority. Such a decision further encourages would-be claimants to seek to resolve their claims in court rather than at the administrative level. *See Conkright*, 559 U.S. at 517-18, 520.

Fifth, the expansive discovery permitted by the district court cannot be squared with the courts' obligation to "monitor discovery closely" when reviewing a benefits determination by an ERISA plan administrator because the administrator "is permitted to exercise broad discretion" and the courts are not entitled to "move toward a costly system in which Article III courts conduct wholesale reevaluations of ERISA claims." *Crosby*, 647 F.3d at 264. Thus, "consideration of evidence outside of the administrative record is inappropriate when a coverage determination is reviewed for abuse of discretion" because "to the extent possible, the administration of ERISA plans should be left to plan fiduciaries, not federal courts." *Helton v. AT&T, Inc.*, 709 F.3d 343, 352 (4th Cir. 2013). Indeed, this Court has

explained that it is impermissible to "engage in full review of the motivations behind every plan administrator's discretionary decisions," but that is precisely what the district court purported to do when it sought to "pull back the curtain." *Hagen v. Aetna Ins. Co.*, 808 F.3d 1022, 1026 (5th Cir. 2015).

III. The district court's determination that the Board could not delegate to advisors certain responsibilities is not consistent with ERISA.

The district court found that the Board's decision to delegate to advisors the responsibility to review the facts of the case, the medical records, and the administrative record was improper. Dkt. 255 at 55-58. But in recognition of the common-sense reality that the operation of large, complex retirement plans would be impossible if plan fiduciaries could not seek assistance from third-party service providers, ERISA expressly authorizes plan fiduciaries to delegate plan-related responsibilities to others if permitted by the plan design. 29 U.S.C. § 1105(c)(1)-(2).

Further, the district court's analysis disregarded the basic proposition in this Circuit that "as long as a company or plan maintains control of the ultimate decision on benefits, it can rely on experienced agents to assist in the determination." *Atkins v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 694 F.3d 557, 568 (5th Cir. 2012). ERISA vests broad discretion in plan fiduciaries to delegate tasks to third-parties if permitted by the plan design, and the Board's use of advisors to review medical files and offer opinions on the files is well within what the statute contemplates. And

because the Board itself retained final decision making authority, its "decision will still be reviewed under an abuse of discretion standard." *Atkins*, 694 F.3d at 568.[4]

Thus, it was within the Board's discretion to enlist the assistance of the advisors and to delegate tasks to them. The district court's parsing of tasks and speculation about what the advisors did or did not do, *see* Dkt. 255 at 55-58, is exactly the type of second-guessing and judicial fact finding that is not permitted on administrative record review of benefits decisions. *See Firestone*, 489 U.S. at 111.

CONCLUSION

For the foregoing reasons, amicus curiae American Benefits Council requests that this Court reverse the judgment of the district court.

November 17, 2022

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[4] In fact, other courts have held that a fiduciary may delegate final decision making to a third party and even then the delegate's decision is reviewed deferentially because that decision is considered to be made by the agent of the fiduciary. *See, e.g., Geddes v. United Staffing Alliance Employee Medical Plan*, 469 F.3d 919, 927 (10th Cir. 2006); *Connor v. Sedgwick Claim Mgmt. Servs., Inc.*, 796 F. Supp. 2d 568, 578-79 (D.N.J. 2011).

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2022, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ *Brett E. Legner*
Brett E. Legner

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) because it contains 3,313 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f).

This brief complies with the typeface and typestyle requirements of Rule 32(a) and Fifth Circuit Rule 32.1 because it has been prepared using Microsoft Office Word and is set in 14-point Times New Roman font.

November 17, 2022

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