

No. \_\_\_\_\_

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*In The*  
***Supreme Court of the United States***

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MICHAEL CLOUD,

*Petitioner,*

v.

THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN,

*Respondent.*

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**PETITIONER'S UNOPPOSED APPLICATION FOR AN EXTENSION OF  
TIME TO FILE PETITION FOR WRIT OF CERTIORARI**

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*To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:*

In accordance with this United States Supreme Court’s Rules 13.5, 22, 30.2, and 30.3, Petitioner Michael Cloud (“**Cloud**”) respectfully requests the time to file his petition for a writ of certiorari be extended for 60 days, up to and including Tuesday, August 13, 2024. The United States Court of Appeals for the Fifth Circuit (“**Fifth Circuit**”) issued its opinion on October 6, 2023 (*Exhibit A*) and denied *en banc* rehearing on March 15, 2024<sup>1</sup> (*Exhibit B*). Absent an extension of time, the petition would be due on June 14, 2024. The jurisdiction of this Court is based on 28 U.S.C. 1254(1). This request is unopposed, made in good faith and not for the purposes of delay, and is submitted at least ten (10) days prior to the present due date.

### **BACKGROUND**

This case presents important questions regarding the standard of review of a denial of Employee Retirement Income Security Act of 1974 (“**ERISA**”) benefits, including, specifically, whether flagrant procedural violations by an ERISA plan administrator alters the standard of review from an abuse of discretion to *de novo* review. The Circuit Courts are split. The Ninth Circuit, sitting *en banc*, has held that flagrant violations of ERISA procedural requirements do convert the standard to *de novo* review.<sup>2</sup> Other circuits have refrained from altering the standard of review and instead treated procedural violations as factors to be considered in their overall assessment of whether a denial was an abuse of discretion.<sup>3</sup> The Fifth, Seventh, and

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<sup>1</sup> The Fifth Circuit panel withdrew its initial opinion and replaced it. *See Exhibit C*.

<sup>2</sup> *See Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 971 (9th Cir. 2006) (*en banc*).

<sup>3</sup> *See, e.g., McIntyre v. Reliance Std. Life Ins. Co.*, 972 F.3d 955, 963 (8th Cir. 2020).

Tenth Circuits generally require only substantial compliance with ERISA procedures,<sup>4</sup> whereas the Second Circuit has specifically rejected the substantial compliance standard in favor of strict adherence to ERISA’s procedural rules.<sup>5</sup> Below, the Fifth Circuit recognized that flagrant violations heighten the standard of review to *de novo* but failed to consider whether the many procedural violations were flagrant.

Cloud is a retired professional football player. He suffered multiple concussions throughout his career while playing for several different teams in the National Football League (“**NFL**”). Cloud qualified for disability benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan (“**Respondent**” or the “**Plan**”) but was denied the highest level of benefits available to disabled players. Following a two-week bench trial in the United States District Court for the Northern District of Texas, Dallas Division (“**District Court**”), the District Court found that the Plan abused its discretion and did not provide a full and fair review “at nearly every step of the process” and awarded full benefits and back benefits to Cloud. *See Exhibit D* at p. 82. The Plan appealed the District Court’s decision to the Fifth Circuit, which reversed the lower court, finding that Cloud could not establish the necessary “changed circumstances” to be reclassified as eligible for the highest level of benefits. Cloud petitioned for rehearing and *en banc* review, which were denied with 11 Circuit Judges voting against rehearing and five (5) voting in favor of rehearing. Circuit

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<sup>4</sup> See *Lafleur v. La. Health Serv. & Indem. Co.*, 563 F.3d 148, 154 (5th Cir. 2009); *Kough v. Teamsters’ Local 301 Pension Plan*, 437 Fed. App’x. 483 486 (7th Cir. 2011); *LaAsmar v. Phelps Dodge Corp. Life*, 605 F.3d 789, 800 (10th Cir. 2010).

<sup>5</sup> *Halo v. Yale Health Plan*, 819 F.3d 42, 56 (2d Cir. 2016).

Judge Graves authored a dissenting opinion in opposition to the panel's denial of *en banc* rehearing.

### **REASONS FOR GRANTING AN EXTENSION**

In addition to running and operating a small, two-person law firm, Cloud's counsel has or has had the following commitments since the release of the Fifth Circuit's denial of *en banc* review:

- Cloud's counsel served as an arbitrator in a private arbitration administered by DeMars & Associates, Ltd. under Case No. 5-100037 on March 19, 20, 21, and 25, 2024 and issued a reasoned award on May 7, 2024.
- Cloud's counsel served as an arbitrator in a private arbitration administered by the American Arbitration Association under Case No. 01-22-0005-0421 on March 27, 2024 and issued a reasoned award on May 6, 2024.
- Cloud's counsel presented for oral argued before the Second Court of Appeals of the State of Texas (Fort Worth, Texas) in *Texas Woman's University v. Casper* (Cause No. 02-23-00384-CV) on April 2, 2024.
- Cloud's counsel served as an arbitrator in a private arbitration administered by the American Arbitration Association under Case No. 01-23-0002-0470 on April 3, 2024 and issued a reasoned award on April 15, 2024.
- Cloud's counsel was required to and submitted briefing in support of a *Motion to Dismiss* in *Rush Truck Centers of Arkansas, Inc. v. Rich Logistics, LLC, et al.* (Cause No. 60CV-24-768 -- Pulaski County, Arkansas) on April 15, 2024.
- Cloud's counsel was set for trial in *Beaumont Lamar Apartments, LLC v. Wallis Bank, et al* (Cause No. 4:23-CV-00341-O) in the United States District Court for the Northern District of Texas, Fort Worth Division on the Court's four-week docket beginning May 20, 2024. The trial was expected to last three (3) weeks and had extensive pre-hearing briefing and required substantial preparation with more than twenty (20) witnesses. That case only recently settled on April 29, 2024.

- Briefing is due in *Casper v. Texas Woman's University* to the Texas Supreme Court on May 24, 2024.

As such, Cloud's counsel requests additional time to effectively prepare the petition for writ of certiorari on Cloud's behalf. Additionally, this Court's forthcoming opinions in *Relentless v. Department of Commerce* and *Loper Bright Enterprises v. Raimondo* may have a substantial effect on the deference the Court is willing to afford to ERISA plan administrators. Those opinions may not be released until the Court's June term, which would not allow Cloud's counsel to fully incorporate the relevant arguments into his petition for writ of certiorari.

### **CONCLUSION**

In the interest of justice and for good cause shown, Petitioner Michael Cloud respectfully requests that this Court extend the current June 14, 2024 deadline by 60 days until August 13, 2024.

Respectfully submitted on the 14th day of May, 2024.

Respectfully submitted,

/s/ Christian S. Dennie

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**CERTIFICATE OF SERVICE**

A true and correct copy of this *Application* was served on counsel of record for the Bert Bell/Pete Rozelle NFL Player Retirement Plan.

/s/ Christian S. Dennie  
**Christian Dennie**

**CERTIFICATE OF CONFERENCE**

On April 26, 2024, Nolan Knight, counsel for the Bert Bell/Pete Rozelle NFL Player Retirement Plan, confirmed that Respondent is **not** opposed to a sixty (60) day extension of the deadline for Petitioner to file a *Petition for Writ of Certiorari*.

/s/ Christian S. Dennie  
**Christian Dennie**