No. 23-2369

In the
United States Court of Appeals For the Eighth Circuit

Rebecca Smith and Cristine M. Ghanim,
individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

UnitedHealth Group Inc., United Healthcare Services, Inc.,
UnitedHealthcare Insurance Company, United Medical Resources,
United Healthcare Service LLC, and Doe Defendants 1-10,

Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Minnesota
Case No. 22-CV-1658 (NEB/DJF)

PETITION OF PLAINTIFFS-APPELLANTS FOR EN BANC OR PANEL REHEARING

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RULE 35(b)(1) STATEMENT

Appellants respectfully urge the Court to rehear this case *en banc* or for the Panel to rehear this case. The Panel decision presents questions of exceptional importance relating to the standing of participants and beneficiaries to bring claims under the Employee Retirement Income Security Act ("ERISA"), a statute governing all private employee benefit plans. In issuing its decision, the Panel ignored the central argument made by Appellants and decided the case in a manner that conflicts with existing Eighth Circuit precedent, and with decisions of the Supreme Court and other United States Courts of Appeals.

Appellants in this case allege that United failed to pay the health care benefits that were owed under the applicable ERISA plans to Appellants' doctors, and instead took the money and kept it for itself, without the doctors' consent, to apply toward unilaterally asserted and disputed alleged overpayments of prior claims arising out of different plans ("cross-plan offsets") involving different patients. Thus, Appellants allege that they did not receive that to which they were contractually entitled, which multiple Eighth Circuit cases have found to be sufficient Article III injury for purposes of pursuing litigation. *See Peterson on behalf of Patients E, I, K, L, N, P, Q, & R v. UnitedHealth Grp. Inc.*, 913 F.3d 769, 773 n.3 (8th Cir. 2019); *Mitchell v. Blue Cross Blue Shield of North Dakota*, 953 F.3d 529, 536 (8th Cir. 2020); and *Carlsen v. GameStop, Inc*., 833 F.3d 903 (8th Cir. 2016).

Attempting to distinguish two of these cases (*Mitchell* and *Carlsen*), the Panel ignored Supreme Court and Eighth Circuit cases holding that ERISA fiduciaries like United must ignore illegal plan provisions and interpret the plan in a manner consistent with ERISA. *See Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.,* 472 U.S. 559, 568 (1985); *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014); *Eisenrich v. Minneapolis Retail Meat Cutters & Food Handlers Pension Plan*, 574 F.3d 644, 648 (8th Cir. 2009); *Teamsters Local Union 682 v. KCI Constr. Co.*, 384 F.3d 532, 537 (8th Cir. 2004); *CRST Expedited, Inc. v. TransAm Trucking, Inc.*, 960 F.3d 499, 507 (8th Cir. 2020).

The Panel did not even discuss *Peterson* where this Court held that a doctor, who stood in participants' shoes as their authorized representative, had Article III standing to challenge United for the exact same cross-plan offsetting practices that are at issue here. The only difference between this case and *Peterson* is that United added cross-plan offsetting language to plan documents despite this Court's clear statement that cross-plan offsetting likely violates ERISA and the Department of Labor's express statement that it does. The Panel's decision allows United to escape review and dodge liability for its alleged illegal activity by doing what ERISA says it cannot do—put language authorizing illegal acts in plan documents.

Finally, the Panel decided that Appellants did not suffer injury-in-fact because their plan documents authorized cross-plan offsetting. This conflicts with well-

established Eighth Circuit precedent holding that plaintiffs have Article III standing to challenge contract breaches regardless of the merits of the challenge. *Carlsen v. GameStop, Inc*., 833 F.3d 903 (8th Cir. 2016), *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 716 (8th Cir. 2017) (citing cases).

Under clear Supreme Court and Eighth Circuit authority, Appellants have demonstrated injury-in-fact and are entitled to have their day in court.

SUMMARY OF ARGUMENT

An ERISA fiduciary cannot escape liability for failing to pay benefits due by inserting illegal terms into a plan. But the panel here allowed United to do just that. In affirming dismissal of this case based on a purported lack of Article III injury, the Panel ignored controlling law and Appellants' central arguments. The only reason the Panel held Appellants were not injured when they received cross-plan offsets instead of cash was because Appellants' plans purportedly permitted such offsets. In reaching this erroneous conclusion, the Panel ignored Appellants' plausible allegations that the plans' offset-authorizing terms are unenforceable and this Court's prior decision in *Peterson* holding that both patients and their doctors are obviously injured when they receive cross plan offsets instead of cash.

Appellants' injury is identical to the injuries suffered by the plaintiffs in *Peterson*, as well as *Mitchell* and *Gamestop*. In each of those cases, this Court held that the plaintiff suffered Article III injury because what they received from the defendant was different from what they plausibly alleged they were entitled to receive. The same is true here. For purposes of Article III, there is no difference between an injury flowing from a violation of a contract term and the injury caused by enforcement of an illegal contract term. Either way, the plaintiff is impacted by the defendant's misconduct in a personal way and is therefore entitled to have the merits of the claim adjudicated in a federal court.

ARGUMENT

I. The Panel erred in holding Appellants were not injured because of illegal plan terms.

The Panel's holding—that Appellants had not suffered Article III injury because their plans' written terms purport to authorize payment-by-offset—ignores Appellants' central argument. Those plan terms are illegal and unenforceable. As ERISA itself provides, plan fiduciaries must follow plan documents, but ***only*** "insofar as such documents . . . ***are consistent with*** [ERISA]." 29 U.S.C. § 1104(a)(1)(D) (emphasis added). In other words, ERISA trumps any plan terms that violate ERISA. *See, e.g., Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 421 (2014) ("[Section 404(a)(1)(D)] makes clear that the duty of prudence trumps the instructions of a plan document."). *See also Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.,* 472 U.S. 559, 568 (1985) ("[T]rust documents cannot excuse trustees from their duties under ERISA"); *Eisenrich v. Minneapolis Retail Meat Cutters & Food Handlers Pension Plan*, 574 F.3d 644, 648 (8th Cir. 2009) (plan fiduciaries "may not disregard federal law" when interpreting plan terms); *Teamsters Local Union 682 v. KCI Constr. Co.*, 384 F.3d 532, 537 (8th Cir. 2004) ("Courts have 'an absolute 'duty to determine whether a contract violates federal law before enforcing it.'" (quoting *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982)); *CRST Expedited, Inc. v. TransAm Trucking, Inc.*, 960 F.3d 499, 507

(8th Cir. 2020) ("Illegal agreements and those in violation of public policy are commonly held to be entirely void and so not contracts at all.").

What flows directly from this foundational tenet of ERISA is that any plan term that is deemed to violate ERISA is null and void, such that the plan must be read as excluding the illegal term when determining whether the plan was violated.[1] The Panel's opinion conflicts with this controlling Supreme Court and Eighth Circuit precedent by holding that Appellants have not suffered an Article III injury because their plan documents allow for payment of their benefit claims through cross-plan offsets. As the Amended Complaint alleges, United's cross-plan offsetting practice violates ERISA because, as confirmed by the DOL, such offsets, among other things, are "prohibited transactions" under 29 U.S.C. §1106. United is doing what ERISA prohibits—acting in its own interest by using money from self-funded plans

[1] *Doe v. United Behavioral Health*, 523 F. Supp. 3d 1119, 1127 (N.D. Cal. 2021), is the perfect example of how this rule is applied. There, the court granted summary judgment against United and precluded it from applying plan terms that excluded coverage from certain behavioral health treatments in violation of ERISA's mental health parity provision, 29 U.S.C. §1185a, when making benefit determinations. In reaching this decision, the court cited the holdings of "multiple circuit courts"—including the Eighth Circuit decision in *Eisenrich*—"that, in general, plan terms cannot override fiduciary duties," *id.* at 1127, adding that ERISA "explicitly requires a fiduciary to apply a plan's terms, but ***only*** if those terms do not violate ERISA." *Id.* (emphasis in original) (citing *Dudenhoeffer)*. Thus, the court concluded, "United Health cannot hide behind the plan terms, especially where ERISA imposes specific and independent duties on its fiduciaries to otherwise comply with the provisions of ERISA." *Id.* The same is true here.

designated to pay Appellants' health claims to benefit itself at the expense of the self-funded plans or their beneficiaries.[2] For this reason, the Panel erred when it held that Appellants had suffered no Article III injury because plan terms allowed for cross-plan offsets.

II. This case is in conflict with *Peterson,* where this Court found the Plaintiffs had Article III standing.

The Panel also failed to even mention this Court's prior decision in *Peterson on behalf of Patients E, I, K, L, N, P, Q, and R v. UnitedHealth Grp. Inc.*, 913 F.3d 769, 773 n.3 (8th Cir. 2019) ("*Peterson*"), which is almost identical to this case. In *Peterson*, one of the two provider plaintiffs brought ERISA claims challenging United's cross-plan offsets ***solely on behalf of his patients***, and the Court expressly held that because the patients had been injured the provider representative had Article III standing to bring the claims. *Id.* at n.3. Indeed, in rejecting United's argument that the provider's interests were adverse to his patients, this Court pointed out that the provider and his patients shared the same interest in receiving cash rather

[2] *See Peterson v. UnitedHealth Grp., Inc.*, 2017 WL 3994970, at *6-7 (8th Cir. Sept. 7, 2017) (Brief for the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees) (hereafter, "DOL Brief") ("United's practice of cross-plan offsetting violated United's fiduciary duties under ERISA to act exclusively in the plan participants' interests and to provide participants their plan benefits and was self-dealing prohibited by ERISA," and that "these transactions were structured by United to allow United to profit by recouping its own alleged overpayments from its fully insured plans that are funded through its own accounts with payments from self-funded plans that are funded by plan sponsors and their employees.").

than payment through an offset. *Id*. ("Having United pay for the services provided by Dr. Peterson with money rather than an offset would of course be in Dr. Peterson's interest and would also be in the patients' interest . . ."). *Id*. If the provider, standing in the shoes of participants, has Article III standing to challenge United's offsets, then it cannot be that the participants lack Article III standing to bring the lawsuit in their own names.

The only difference between this lawsuit and *Peterson* is that United thought it could solve its problems by putting offset-authorizing language (which was missing in *Peterson*) into the plan documents. In doing so, United thumbed its nose at this Court's warning that cross-plan offsetting likely violates multiple provisions of ERISA, *id*. at 776-77, and the Department of Labor's views expressed in its amicus brief that United's cross-plan offsets violate ERISA. By making United's action unreviewable, the Panel ignored this Circuit's well-established rule that in evaluating whether a plan interpretation is reasonable, the Eighth Circuit considers "whether [an] interpretation conflicts with the substantive or procedural requirements of the ERISA statute." *Finley v. Special Agents Mut. Ben. Ass'n, Inc*., 957 F.2d 617, 621 (8th Cir. 1992). As this Court stated in *Peterson*, this Court similarly views with skepticism "interpretations that authorize practices that push the boundaries of what ERISA permits," including cross-plan offsets. 913 F.3d at 777.

The Panel's decision allows United to do what it could not do in *Peterson* and avoid judicial review simply by putting authorizing language in plan documents. But plan documents cannot relieve fiduciaries of liability for engaging in illegal acts. *See, e.g.*, *Solis v. Plan Benefit Servs., Inc.*, 620 F. Supp. 2d 131, 145 (D. Mass. 2009) (finding plan provision purporting to relieve ERISA fiduciary of responsibility for collecting employer contributions void as against public policy); *Kramer v. Smith Barney*, 80 F.3d 1080, 1085 (5th Cir. 1996) (voiding plan term incorporating American Stock Exchange time limit for arbitration because applying the term "would impair [the plaintiff's] substantive rights" under ERISA); *Perelman v. Perelman*, 919 F. Supp. 2d 512, 524 (E.D. Pa. 2013), *aff'd*, 793 F.3d 368 (3d Cir. 2015) (indemnification provision in ERISA plan was "void as against public policy"). Otherwise, fiduciaries like United could avoid ERISA requirements simply by inserting terms that allow such proscribed conduct into the plans, something that ERISA simply does not permit. *See* 29 U.S.C. 1104(a)(1)(D); 29 U.S.C. 1110(a) ("any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy").

Peterson is undistinguishable from this case in all material respects. United cannot reasonably interpret its plans to allow offsets that are illegal under ERISA,

and Appellants have standing to sue over such practices, just as the provider did in *Peterson.*

III. The Panel erred by determining Article III standing based on the merits of Plaintiffs' claims contrary to Eighth Circuit precedent.

The Panel's decision is also inconsistent with Eighth Circuit precedent holding that Article III's requirement for injury-in-fact is unrelated to the merits of a plaintiff's potential cause of action. *Carlsen v. GameStop, Inc*., 833 F.3d 903 (8th Cir. 2016); *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 716 (8th Cir. 2017) (citing cases). Where a plaintiff alleges that he has not received what he has been promised, this Court consistently holds that the claim is enough to give the plaintiff Article III standing, even when the Court, in the same decision, concludes that the claim is invalid. *Id*. The Panel was, therefore, simply wrong in distinguishing *GameStop* on the grounds that "in that case there was a breach of contract."

Here, Plaintiffs alleged that their benefits had not been paid as required by their plans, an allegation that this Court has already held is enough to give a plaintiff Article III standing. *Mitchell v. Blue Cross Blue Shield of North Dakota*, 953 F.3d 529, 536 (8th Cir. 2020). The Panel erroneously distinguished *Mitchell* on the grounds that Appellants "are not entitled to having a payment of approved benefits be made in cash" because of offsetting language in their plans. By doing so, the Panel did what this Circuit says it cannot do; it decided the Appellants' Article III standing based on the merits of their claims, by implicitly rejecting Appellants'

plausible allegations that any terms authorizing cross-plan offsets are illegal, such that United cannot apply them when interpreting the plan and making benefit determinations.

CONCLUSION

For the reasons stated herein, the Eighth Circuit should grant *en banc* rehearing of the Panel decision under Fed. R. App. P. 35, or, alternatively, the Panel should grant rehearing, under Fed R. App. P. 40, and reverse the district court's decision dismissing the First Amended Complaint.

Dated: July 22, 2024

Respectfully submitted by:

/s/ Derek C. Waller

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 35(b)(2)(A) and Fed. R. App. P. 40(b)(1) because this document contains 2,437 words.

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/s/Derek C. Waller
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Dated: July 22, 2024

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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