No. ____________

In the
Supreme Court of the United States

MINNESOTA MEDICAL UNIVERSITY, LLC
AND PHILIP KEITHAHN,

Petitioners,

v.

HERITAGE CONSTRUCTION COMPANIES, LLC;
JAC & SONS INVESTMENTS,
ANDREW P. CHRISTENSEN; AND
JENNIFER A. CHRISTENSEN,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises from a failed construction project. Petitioners Minnesota Medical University ("MMU") and its Chief Financial Officer, Philip Keithahn, were found liable for negligent misrepresentation based on representations concerning their expectation that "upon closing of the loan, the project would be funded" and that "there would be $7,000,000 of money for construction after the close." A claim for negligent misrepresentation must be based on a misrepresentation of past or existing material fact—not expectations and predictions for the future. The questions presented are as follows:

1. Whether a corporation and its officer, personally, may be found liable for negligent misrepresentation based on representations concerning their expectation that funding would become available in the future.

2. Whether the courts below erred in refusing to grant a new trial based on numerous improper and prejudicial references to MMU's financial condition, where such references constitute "prejudicial error" as a matter of law and where such references were not necessarily involved in determining damages.

PARTIES TO THE PROCEEDING

Petitioners, who were third-party defendants in the district court and Appellants in the court of appeals, are Minnesota Medical University, LLC and Philip Keithahn.

Respondents are Heritage Construction Companies, LLC; JAC & Sons Investments; Andrew P. Christensen; and Jennifer A. Christensen. Respondents were defendants and third-party plaintiffs in the district court and appellees in the court of appeals.

Other parties to the proceedings below included Selective Insurance Company of America, who was the plaintiff in the district court. Selective settled their claims with the Heritage Respondents and were not parties to Petitioners' appeal to the Eighth Circuit.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Minnesota Medical University, LLC states that it has no parent corporations and that no publicly held company owns 10% or more of its stock.

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

PETITION FOR A WRIT OF CERTIORARI

Minnesota Medical University, LLC ("MMU") and Philip Keithahn respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1A-17A) is reported at 165 F.4th 1132. The order of the district court (App., *infra*, 15A-32A) is unreported.

JURISDICTION

The original judgment of the court of appeals was entered on February 2, 2026. The court of appeals' opinion was issued the same day. Petitioners did not seek rehearing *en banc*. On April 21, 2026, Petitioners applied to Justice Kavanaugh, the Circuit Justice for the Eighth Circuit, for an extension of time within which to file a petition for a writ of certiorari up to and including July 2, 2026. This extension was granted on April 27, 2026.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. The Parties.

In 2015, in an effort to increase access to healthcare in rural America, Philip Keithahn co-founded Minnesota Medical University, LLC ("MMU"). (App., *infra*, 55A-59A.) MMU was founded with the intention of developing a new osteopathic medical school in Gaylord, Minnesota. (*Ibid.*) Keithahn served as MMU's Chief Financial Officer. (App., *infra*, 40A.)

In November 2018, MMU hired Respondent Heritage Construction Companies, LLC ("Heritage") to serve as the general contractor for the construction of the MMU project. (*Id.* at 42A-43A.) Respondents Andrew P. Christensen and Jennifer A. Christensen own Heritage.

B. The Financing for the MMU Project.

MMU raised capital to fund construction in two ways: (1) by issuing membership interests to private investors; and (2) by issuing municipal bonds. (App., *infra*, 60A.) MMU's investment bankers advised that the bond funding was to become available in two tranches.

First, immediately upon closing of the bonds, MMU would obtain access to a "precondition limit" of approximately $9 million dollars, which could be used to fund early construction and operating costs. (App., *infra*, 61A-63A.) MMU's investment bankers advised MMU that approximately $7 million of the precondition limit would be available to fund construction after covering other closing costs. (*Id.* at 61A-65A.)

The remainder of the bond funds were to then be released after MMU obtained pre-accreditation from the Minnesota Commission on Osteopathic College Accreditation ("COCA"). (App., *infra*, 66A.) COCA is responsible for accrediting osteopathic medical schools in Minnesota, and MMU anticipated receiving pre-accreditation at COCA's April 2019 meeting. (*Id.* at 70A.)

As required for MMU to obtain bond financing, Heritage was asked to obtain a performance bond and a payment bond to secure the project. (App., *infra*, 44A.) Heritage obtained both bonds through Selective Insurance Company of America. (*Id.* at 45A.) In conjunction with obtaining those bonds, Selective required Heritage and its owners, Andrew P. Christensen and Jennifer A. Christensen, to personally guarantee the bond by signing a general agreement of indemnity. (*Id.* at 47A.)

Based on the information he received from MMU's investment bankers—that there would be $7 million of the precondition limit available to fund early construction upon closing of the bonds—Keithahn told Heritage in January and February 2019 that "upon closing of the bond . . . the project would be funded" and that "there would be $7,000,000 of money for construction after the close." (App., *infra*, 50A, 55A.) Heritage testified that these were the only alleged representations upon which they relied. (*Id.* at 53A, 49A.)

Both of these alleged representations were made *before* the bond funding closed in April 2019.

C. MMU Fails to obtain COCA Pre-Accreditation.

Despite MMU's and Keithahn's honest belief that MMU would obtain COCA pre-accreditation, COCA denied MMU's application. (App., *infra*, 67A.) MMU and Keithahn were "shocked." As a result, the remainder of the bond funds above the precondition limit remained restricted.

More problematically, MMU and Keithahn then learned for the first time that MMU did not have access to as much of the precondition limit as its investment bankers had previously advised. (App., *infra*, 67A-68A.) When MMU was unable to bridge the gap with alternative financing, MMU was unable to pay Heritage for ongoing construction and Heritage subsequently terminated the contract and defaulted on its payment obligations to its subcontractors. (*Id.* at 68A-69A, 50A-52A.) Those subcontractors then asserted claims against Heritage's payment bond. (*Id.* at 52A.)

Selective paid approximately $3.1 million on the payment bond. (*Ibid.*)

D. The district court proceedings.

After issuing payments under the payment bond, Selective sued the Heritage Respondents in the United States District Court for the District of Minnesota. (R. Doc. 1.) The district court exercised diversity jurisdiction under 28 U.S.C. § 1332.[1]

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[1] Complete diversity of citizenship existed in the district court because plaintiff Selective is a New Jersey corporation, and the Heritage Respondents and Petitioners MMU/Keithahn, who were defendants and

Heritage then asserted third-party claims against MMU and Keithahn, including for fraud, fraud by omission, negligent misrepresentation, and common law indemnity. (R. Doc. 36 at 5-18.) Selective quickly settled its claims against Heritage.

Petitioners and the Heritage Respondents proceeded to a jury trial on Heritage's third-party claims. Among other things, the Heritage Respondents violated *in limine* orders and repeatedly made improper and prejudicial references to MMU's poor financial condition.

For example, Heritage stated that MMU was "bankrupt," that any verdict against it was "worth nothing," and that, as a result, "Heritage and the Christensens were left out hanging to dry." (App., *infra*, 36A-37A.) And, just minutes before the case was submitted to the jury, Heritage doubled down and said that a damages award against MMU is "not worth the paper it's written on because they have no money." (*Id.* at 76A-77A.) These comments served no purpose aside from persuading the jury to hold Keithahn personally liable to compensate for MMU's inability to pay. Despite Petitioners' request, the district court refused to give a curative instruction concerning these improper and prejudicial comments. (*Id.* at 38A-39A.)

As relevant to this Petition, the jury found Petitioners liable for fraud by omission and negligent misrepresentation.[2] (R. Doc. 169.)

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third-party defendants in the district court, were all either Minnesota corporations or Minnesota residents.

[2] While the jury also found Petitioners liable for common law indemnity, liability for common law indemnity must be based on the existence of an underlying tort. *See, e.g., In re RFC & RESCAP Liquidating Tr.*, 332 F. Supp. 3d 1101, 1128-29 (D. Minn. 2018). Because the only underlying

Before the verdict and after trial, MMU and Keithahn moved for judgment as a matter of law and, alternatively, for a new trial. (App., *infra*, 70A-75A; R. Doc. 184.) With respect to Petitioners' renewed motion for judgment as a matter of law, MMU and Keithahn argued that the evidence at trial was insufficient to establish a negligent misrepresentation because the two representations upon which Heritage relied were, at best, non-actionable "future assurances" or predictions of future events. (R. Doc. 195 at 5-7.) And, with respect to Petitioners' renewed motion for a new trial, MMU and Keithahn argued, among other things, that the district court erred in refusing to properly instruct the jury, that Heritage violated *in limine* rulings, and that Heritage made numerous improper and prejudicial comments concerning MMU's poor financial condition. (*Id.* at 9-22.)

The district court denied both motions. (App., *infra*, 18A-32A.) On the motion for judgment as a matter of law, the district court held that "the representations were not future assurances but were material present facts because they concerned occurrences if and when the bond financing closed and were not ambiguous or unhinged future promises." (*Id.* at 22A.)

However, while the district court denied the new trial request, it found that Heritage "clear[ly]" violated *in limine* rulings and made numerous "inflammatory" and "problematic" statements concerning MMU's ability to satisfy a judgment. (App., *infra*, 28A-29A.) Even though the district court

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torts that supported Heritage's common law indemnity claim were the fraud by omission and negligent misrepresentation verdicts upon which Petitioners now seek review, the validity of the indemnity claim is entirely contingent on this Court's resolution of those claims.

found these violations to be "serious" and "concerning," it concluded that none "were so significant that a new trial is warranted." (*Id.* at 28A-30A.)

E. The Eighth Circuit affirms.

Petitioners appealed to the Eighth Circuit, which exercised jurisdiction under 28 U.S.C. § 1291. (App., infra, 2A) (reported at *Selective Ins. Co. of America v. Heritage Construction Companies, LLC*, 165 F.4th 1132, 1136 (8th Cir. 2026).)

The Eighth Circuit affirmed in all respects. With regard to the district court's denial of Petitioners' motion for judgment as a matter of law, the Eighth Circuit held that "Keithahn's representations, while tied to a future event, related to the existence of committed financing." (App., infra, 6A.) The court of appeals reached this conclusion, even though binding Eighth Circuit precedent has held nearly identical representations to be non-actionable statements of future expectations or predictions. (*Ibid.)* (distinguishing *Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d 436 (8th Cir. 2013).)

In affirming the denial of Petitioners' new trial motion, the Eighth Circuit concluded that "[a]lthough the Heritage Plaintiffs violated some of the district court's *in limine* order and made some inflammatory remarks about MMU's financial condition—even taken together—these violations did not affect the defendants' substantial rights or the jury's verdict." (App., *infra*, 16A-17A.) The Eighth Circuit reached this conclusion even though it offered no analysis and directly contradicted well established, binding Eighth Circuit precedent. *See, e.g., Union Elec. Light & Power Co. v. Snyder Est. Co.*, 65 F.2d 297 (8th Cir. 1933) ("to permit evidence of the wealth of a party litigant, except where position or wealth is necessarily involved in determining the damages sustained, is prejudicial error.”).

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's failure to follow important, well-established, and binding precedent without any meaningful analysis warrants this Court's review. Not only did the court of appeals below depart from its own binding precedent, but its decision runs headlong into the great weight of authority from other circuits.

Because the Eighth Circuit's published decision below departed from its own precedent and directly contradicted the great weight of authority from other circuits, this Court's review is warranted to correct this problematic circuit split.

A. The Eighth Circuit panel below departed from its own well-established, binding precedent.

It is axiomatic that a misrepresentation claim must be based on a "false representation of past or existing material fact." *See, e.g., Zutz v. Case Corp.*, 422 F.3d 764, 770-71 (8th Cir. 2005); *see also Freitas*, 703 F.3d at 439 (affirming dismissal of fraudulent misrepresentation claim because it is "akin to representations as to expectations and predictions for the future").

In *Freitas*, 703 F.3d at 439, the Eighth Circuit affirmed dismissal of a misrepresentation claim based on nearly identical representations as those at issue in this case. There, the Freitas's alleged that Wells Fargo employees represented to them that their mortgage "*would* be modified *upon* receipt of requested documentation." *Id.* at 438. In reliance on that representation, the Freitas's stopped making mortgage payments which resulted in foreclosure. *Id.*

In affirming dismissal of the Freitas's misrepresentation claim, the Eighth Circuit held that the employees' statements were "akin to representations as to expectations and predictions for the future [which] are insufficient to authorize a recovery for fraudulent misrepresentation." *Id.* at 439.

Just like Wells Fargo's representation that a mortgage "*would* be modified *upon* receipt of requested documentation," Keithahn's representations that "*upon* closing of the loan, the project *would* be funded" and that "there *would* be $7,000,000 of money for construction *after* the close" are akin to expectations and predictions for the future. Both statements reflect Keithahn's expectation that MMU would have access to $7 million in funding if and when MMU closed on the bond transaction. It was undisputed at trial that the bonds had not yet closed when Keithahn allegedly made these statements, and there was always a possibility that MMU would not ultimately close on that bond transaction.

Despite the fact that these representations are nearly identical, the Eighth Circuit panel below held that this is "not a *Freitas* case." (App., *infra*, 6A.) Instead, it observed that "[r]epresentations of present facts susceptible of knowledge at that time, even when tied to the occurrence of a future event, are actionable under a negligent misrepresentation claim," that "Keithahn's representations, while tied to a future event, related to the existence of committed financing," and that "unlike in *Freitas*, where the representations were conditioned on future discretionary actions, here the conditional language, addressing only the timing of disbursement, did not convert the statements into conjectural promises." (*Ibid.*)

In holding that Keithahn's conditional statement is an actionable misrepresentation because the terms of the financing arrangement were ascertainable and addressed "only the timing of disbursement," the Eighth Circuit erroneously distinguished this case from *Freitas*. Just as the representations in *Freitas* hinged on a discretionary future action (submission of requested documentation), so too did Keithahn's representations (closing of the bond).

Because Keithahn's statements were no different than those in *Freitas*, the Eighth Circuit improperly departed from its own binding precedent which warrants review from this Court.

B. The Eighth Circuit's departure from the "cardinal" prior-panel rule warrants review.

In the Eighth Circuit, "it is a cardinal rule . . . that one panel is bound by the decision of a prior panel." *Mader v. United States*, 654 F.3d 794, 800 (8th Cir. 2011) (en banc) (quoting *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002)). Equally important is that "only the court en banc may overrule . . . prior panel opinions." *United States v. Riza*, 267 F.3d 757, 760 (8th Cir. 2001).

Despite this "cardinal" rule, the Eighth Circuit panel below effectively overruled prior panel precedent when it erroneously distinguished this case from the binding decision in *Freitas*. The purpose of the prior panel rule is to ensure predictability in the law, which is a fundamental principle of the justice system. The Eighth Circuit's failure to abide by its own precedent risks unpredictable and problematic results, which so far departed from the accepted and usual course of judicial proceedings that it warrants further review from this Court. *See* S. Ct. R. 10(a).

C. The Eighth Circuit's decision creates a circuit split on when a representation concerning future events constitutes an actionable misrepresentation.

Even more problematic, in reaching this conclusion, the Eighth Circuit has now created a circuit split on the issue of whether a representation concerning an expectation or prediction of future events constitutes an actionable misrepresentation. The near universal weight of authority from other federal circuits holds that promises of future results are *not* actionable even when they are premised on presently ascertainable facts.

For example, the Fifth Circuit has held that a misstatement concerning qualification for a future loan modification is not actionable even when the terms of the loan modification process are presently ascertainable. *See Pennell v. Wells Fargo Bank, N.A.*, 507 Fed. Appx. 335, 338-339 (5th Cir. 2013). There, a Wells Fargo employee represented to the appellant that Wells Fargo would "reinstate the loan *if* the Pennells paid" their mortgage arrears. *Id.* at 339 (emphasis in original). When Wells Fargo did not live up to this promise, the Pennells sued for misrepresentation. Even though Wells Fargo had an existing loan modification process that was ascertainable at the time and did not support the employees' representation, the Fifth Circuit explained that this statement is a "future promise" and "thus cannot support a negligent misrepresentation claim." *Ibid.*

And, in *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8 (2d Cir. 2000), the Second Circuit affirmed dismissal of a negligent misrepresentation claim when the misrepresentation was based on an incorrect calculation of future energy output involving presently ascertainable information. There, the parties entered into an agreement to develop multiple hydroelectric power plants. *Id.* at 11. To persuade investors to finance the project, cross-appellee Stetson-Harza prepared an analysis that included an "assessment of the energy to be generated by each project[.]" *Id.* at 12. Each of the power plant projects were "financial disasters." *Ibid.*

The primary reason for the "disastrous" results was a "disparity" between Stetson-Harza's assessment of predicted energy output and actual output. *Id.* at 13. These disparities resulted from improper calculations of *existing* metrics. *Ibid.*

Even though these incorrect assessments were based on existing metrics, the Second Circuit affirmed summary judgment dismissal of a negligent misrepresentation claim because "the energy output predictions were mere promises of future output as opposed to present representations of existing fact." *Id.* at 21. It reasoned that these types of predictions are "just the sort of representations about future events that cannot support a claim for negligent misrepresentation." *Ibid.*

In contrast, by concluding that Petitioners made actionable misrepresentations because the terms of their financing arrangement were "ascertainable at that time," the Eighth Circuit has departed from entrenched precedent of multiple other federal courts of appeals holding that future promises are not actionable even when partially premised on presently ascertainable facts. This Court's review is warranted to reconcile these disparate and problematic standards. *See* S. Ct. R. 10(a).

D. The Eighth Circuit compounded its error when it absolved Heritage of the consequences of its recurring and prejudicial comments about MMU's financial condition.

The Eighth Circuit panel below compounded these errors when it held that Heritage's repeated and improper comments concerning MMU's poor financial condition was not prejudicial error warranting a new trial. (App., *infra*, 13A-16A.)

Again, the Eighth Circuit has long held that commentary concerning a litigant's financial condition "is prejudicial error" and warrants a new trial unless it is "necessarily involved in determining the damages sustained." *Union Elec. Light & Power Co. v. Snyder Est. Co.*, 65 F.2d 297, 303 (8th Cir. 1933). In fact, injection of improper financial-condition evidence is "so utterly repugnant to a fair trial" that it "has been almost universally held that the receipt of such evidence *constitutes* prejudicial error sufficient to *require* reversal." *Halladay v. Verschoor*, 381 F.2d 100, 112 (8th Cir. 1967) (emphasis added). This is particularly true where, as here, the "prejudicial effect" has not "been cured by an admonition or instruction to the jury to disregard it." *Ibid.*

Despite the binding nature of *Union Electric* and *Halladay*, and recognizing that such comments were "inflammatory" and "problematic," the Eighth Circuit dismissed the resulting prejudice outright and concluded that such comments "are neither prejudicial nor injurious." As with its refusal to reverse the district court's denial of Petitioners' motion for judgment as a matter of law, the Eighth

Circuit's refusal to grant a new trial wholly departed from previous Eighth Circuit precedent in violation of the prior panel rule and warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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