No. 20-____

IN THE
Supreme Court of the United States

MARKETGRAPHICS RESEARCH GROUP, INC.,
Petitioner,

v.

DAVID PETER BERGE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Bankruptcy Code exempts from discharge "any debts *** for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). In *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998), the Court held that this provision—commonly known as the "willful and malicious injury" exception—applies "only" to "acts done with the actual intent to cause injury." *Id.* at 61. A "deep circuit split" has since emerged concerning the requirements necessary to fall within the statutory text. Pet. App. 10a.

The questions presented are:

1. Whether the "willful and malicious injury" exception applies only where a debtor has a *subjective* intent to injure (as five circuits hold), or whether it may also be satisfied by conduct that *objectively* has a substantial certainty of causing injury (as three circuits hold)?

2. Whether the "willful and malicious injury" exception establishes a *unitary standard* requiring only "actual intent to cause injury" (as five circuits hold), or whether it establishes a *two-pronged test* requiring both "actual intent to cause injury" and conduct "in conscious disregard of one's duties or without just cause or excuse" (as six circuits hold)?

PARTIES TO THE PROCEEDING

MarketGraphics Research Group, Inc., petitioner on review, was the plaintiff-appellant below.

David Peter Berge, respondent on review, was the defendant-appellee below.

RULE 29.6 DISCLOSURE STATEMENT

MarketGraphics Research Group, Inc., is a corporation. It has no parent entities and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

MarketGraphics Research Group, Inc. v. *Berge (In re Berge)*, Case No. 3:13-bk-07626, Adversary No. 3:13-ap-90400 (Bankr. M.D. Tenn. June 28, 2018)

MarketGraphics Research Group Inc. v. *Berge*, No. 3:14-cv-2027 (M.D. Tenn. Feb. 20, 2015)

MarketGraphics Research Group Inc. v. *Berge*, No. 15-5477 (6th Cir. May 8, 2015)

MarketGraphics Research Group, Inc. v. *Berge*, No. 15-502 (6th Cir. July 13, 2015)

MarketGraphics Research Group, Inc. v. *Berge*, No. 3:16-cv-1191 (M.D. Tenn. March 24, 2017)

MarketGraphics Research Group, Inc. v. *Berge (In re Berge)*, No. 18-6177 (6th Cir. March 27, 2020)

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PETITION FOR A WRIT OF CERTIORARI

MarketGraphics Research Group, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit in this case.

INTRODUCTION

The Bankruptcy Code affords "the 'honest but unfortunate debtor' " an opportunity for a "fresh start." *Grogan* v. *Garner*, 498 U.S. 279, 286-287 (1991) (quoting *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934)). To that end, it provides that insolvent debtors may discharge most of their debts in bankruptcy, but exempts from discharge certain obligations arising from misconduct or fraud. 11 U.S.C. § 523(a). One of those statutory exceptions—

commonly known as the "willful and malicious injury" exception—provides that a debtor may not discharge "any debt * * * for willful and malicious injury by the debtor to another entity or to the property of another entity." *Id.* § 523(a)(6).

This Court last construed the "willful and malicious injury" exception 22 years ago, in *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998). There, the Court held that § 523(a)(6) applies only to "acts done with the actual intent to cause injury." *Id.* at 61. That holding resolved one important question of statutory interpretation that then divided the circuits. But in doing so, it generated two new questions. First, what type of "intent" is necessary to satisfy the "willful and malicious injury" exception? And, second, is "actual intent to cause injury" the sole prerequisite for triggering this exception, or is it one of two separate statutory requirements?

In the intervening two decades, a "deep circuit split" has emerged on both questions. Pet. App. 10a. The circuits are now divided 5-3 as to whether the "willful and malicious injury" exception requires that a debtor *subjectively* intend to cause injury, or whether conduct that *objectively* has a substantial certainty of causing harm is sufficient. In addition, the circuits are split 5-6 on whether the "willful and malicious injury" exception establishes a *unitary standard*, which requires only "actual intent to cause injury," or whether it establishes a *two-pronged test*, which requires both "actual intent to cause injury" and conduct "in conscious disregard of one's duties or without just cause or excuse." These splits are widely acknowledged, deeply entrenched, and fre-

quently outcome-determinative. And nearly every regional circuit has now taken a position on them.

This case presents an ideal opportunity for the Court to step in and resolve the lower courts' pervasive confusion. David Berge filed for bankruptcy after a court ordered him to pay MarketGraphics Research Group, Inc., more than $332,000 in damages for "willfully or knowingly" violating the Tennessee Consumer Protection Act and "willful[ly]" infringing the company's copyrights. MarketGraphics contended that this debt was non-dischargeable under the "willful and malicious injury" exception. But the Sixth Circuit disagreed. After expressly taking a position on both halves of the circuit split, the panel found that Berge fell outside the exception because (1) there was insufficient evidence that he had "subjective intent to injure MarketGraphics," and (2) the trial court did not find that he acted "in conscious disregard of [his] duties or without just cause or excuse." Pet. App. 20a, 23a (citation omitted).

Those holdings rested—in full—on the questions that have split the circuits over the last two decades. Moreover, the Sixth Circuit answered them incorrectly. The Court should seize this chance to resolve the circuits' disagreement, clarify the meaning of its decision in *Geiger*, and afford much-needed uniformity for lower courts, debtors, and victims of serious misconduct seeking redress for their injuries.

Certiorari should be granted.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a-29a) is reported at 953 F.3d 907. The District Court's opinion (Pet. App. 41a-51a) is reported at 245 F. Supp. 3d 973. The Bankruptcy Court's opinions (Pet. App. 30a-40a, 52a-58a, 59a-65a) are available at 2018 WL 3219626, 2016 WL 3049628, and 2014 WL 4929423, respectively. The Sixth Circuit's order denying rehearing (Pet. App. 66a-67a) is unreported.

JURISDICTION

The Sixth Circuit entered judgment on March 27, 2020. Pet. App. 1a. Petitioner timely sought rehearing, which was denied on May 6, 2020. *Id.* at 66a-67a. Pursuant to this Court's order of March 19, 2020, the deadline for filing a petition for certiorari was extended to October 5, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. § 523(a) provides in pertinent part:

> (a) A discharge under section 727, 1141, 1192[,] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt * * *
>
> > (6) for willful and malicious injury by the debtor to another entity or to the property of another entity * * * .

STATEMENT

A. Factual Background

1. MarketGraphics is a Tennessee-based company that conducts market research concerning the construction of new homes. Pet. App. 3a. In some geographic areas, MarketGraphics compiles and

markets its housing reports directly. *Id.* at 111a. In other regions, MarketGraphics works in cooperation with licensees, who generate data for MarketGraphics and, in exchange for flat fees, have the right to market the company's reports for their own profit. *Id.* at 111a-112a.

Donald Berge ("Donald") entered a licensing agreement with MarketGraphics in 1997. Pet. App. 80a. That agreement gave Donald the exclusive right to collect information and publish reports for MarketGraphics throughout the metropolitan area surrounding Memphis, Tennessee. *Id.* at 80a-82a. In exchange, the agreement provided that any housing information that Donald collected would be the intellectual property of MarketGraphics, and that any reports he helped produce would be copyrighted in the company's name. *Id.* at 88a-89a. The agreement further stated that, when Donald ceased working for MarketGraphics, he could not compete with the company or use its trade secrets, business methods, or copyrights. *Id.* at 90a-91a.

Donald worked for MarketGraphics as a licensee for 15 years. *Id.* at 4a. Throughout that period, Donald was regularly assisted by his son, David Berge ("David"). *Id.* at 95a-96a. Together, Donald and David would "driv[e] the market," collecting housing information using maps copyrighted by MarketGraphics. *Id.* 55a, 96a-98a. MarketGraphics relied on this data to produce marketing reports, which Donald and David in turn sold to the company's customers. *Id.* at 80a-81a, 96a-97a.

2. In 2012, Donald announced that he intended to retire and left MarketGraphics. *Id.* at 113a-114a.

But rather than retiring, Donald and David opened up a competing business, Realysis, which provided "essentially the same services as MarketGraphics" and marketed data that "essentially paralleled the information provided by MarketGraphics." *MarketGraphics Research Grp., Inc.* v. *Berge*, No., 3:13-cv-00001, 2014 WL 2155009, at *1 (M.D. Tenn. May 22, 2014). Realysis was composed of three limited liability companies: Realsyis, Realysis of Memphis, and Realysis of Jackson. Pet. App. 4a.

David was the sole owner and president of Realysis of Memphis. *Id.* at 4a, 55a.[1] David held himself out as the company's president on social media, and allowed his name to be printed on each of the company's invoices. *Id.* at 4a, 101a-103a. He also performed much of the company's work—including "driv[ing] the market" to assemble its marketing data and carrying out "90 percent" of its data entry. *Id.* at 98a-100a. In addition, David reviewed, approved, and signed a letter that Realysis sent to MarketGraphics's Memphis-area customers, in which Realysis advertised its services and stated that it would produce marketing reports for those customers going forward. *Id.* at 4a, 104a-109a.

David testified that, when he engaged in this conduct, he "was aware of the non-compete" between his father and MarketGraphics and knew that Realysis was violating it. *Id.* at 100a-101a. Indeed, Market-

[1] Donald named himself the owner of Realysis of Jackson, while his wife Martha Berge ("Martha") was the sole owner of Realysis. Pet. App. 4a.

Graphics repeatedly informed him and Donald as much. It reminded Donald of his non-compete when he terminated his licensing agreement. *Id.* at 4a, 113a-114a. When MarketGraphics found out that Realysis was poaching its Memphis-area customers, it sent Realysis another letter informing the company that it was in violation of the licensing agreement. *Id.* at 4a. Nonetheless, David admitted that he "consciously disregarded * * * the danger [Realysis] posed to MarketGraphics," and ignored the non-compete agreement because he believed it "wouldn't hold up in court." *Id.* at 100a-101a, 103a-104a.

The Berges' efforts were a success. In less than a year, MarketGraphics lost 75% of its Memphis-are customers to Realysis. *Id.* at 4a. Donald and David had effectively leveraged Donald's licensing agreement into a hostile takeover of MarketGraphics's Memphis-area business.

B. The District Court Judgment

MarketGraphics did not sit idly by while Realysis plundered its clientele and misappropriated its intellectual property. In 2013, it sued Donald, David, Martha, and Realysis in the Middle District of Tennessee. Pet. App. 5a. MarketGraphics alleged that the defendants had infringed its copyrights and trademarks, violated the Tennessee Consumer Protection Act ("TCPA"), and engaged in breach of contract and a number of common-law violations. *Id.*

The district court entered a preliminary injunction ordering the defendants to cease competing with MarketGraphics in the Memphis area. *MarketGraphics*, 2014 WL 2155009, at *1. MarketGraphics then filed a motion for summary judgment. Pet.

App. 5a. None of the defendants responded to that motion, and MarketGraphics submitted a proposed judgment containing a set of proposed findings. *Id.* Shortly before the district court ruled on that motion, Donald and Martha filed for Chapter 7 bankruptcy and obtained stays of the claims against them. *Id.* That left David and Realysis as the only active defendants remaining in the case. *Id.*

In August 2013, the district court entered judgment against David and Realysis ("the District Court judgment"). Pet. App. 69a. Among other findings, the court found that David and Realysis "willfully or knowingly violated the Tennessee Consumer Protection Act," and "willful[ly]" infringed MarketGraphics's copyrights. *Id.* at 69a, 77a. It awarded MarketGraphics damages of $332,314.94, jointly and severally, and permanently enjoined the defendants from competing with MarketGraphics or using its copyrighted materials. *Id.* at 69a-71a.

C. Procedural History

One week later, David filed for Chapter 7 bankruptcy. *Id.* at 54a. MarketGraphics responded by filing an adversary complaint in which it argued that David could not discharge the District Court judgment because it was a "debt * * * for willful and malicious injury." 11 U.S.C. § 523(a)(6).

"The parties then spent the next [six] years litigating how to interpret the phrase 'willful and malicious.' " Pet. App. 6a. Mirroring the widespread division among lower courts, the courts below disagreed on two questions: first, "whether § 523(a)(6)'s willful-and-malicious standard is a unitary or two-

pronged test," and, second, "how to define those respective terms (willful and malicious)." *Id.*

1. The bankruptcy court went first, and it "applied a two-pronged test." *Id.* The court noted that David "conceded" that the District Court judgment collaterally estopped him from disputing that the injury he inflicted was "willful." *Id.* at 54a, 60a. But it reasoned that "an injury must be both willful *and malicious* to be non-dischargeable under 11 U.S.C. § 523(a)(6)." Pet. App. 64a (emphasis added). Because nothing in the District Court's judgment stated that David acted with "malice," the court concluded, the judgment was not preclusive on that question. *Id.*[2]

The bankruptcy court then held a bench trial to determine "whether [David] acted with malice." *Id.* at 54a. After hearing live testimony from David and other witnesses, the court concluded that David did not act with "malicious intent." *Id.* at 58a. In the bankruptcy court's view, David "was merely a son who worked for his father and believed what his father told him." *Id.* The bankruptcy court thus concluded that "not all of the elements of 11 U.S.C. § 523(a)(6) have been proven." *Id.*

2. The district court vacated this judgment and remanded the case. It noted that, in the wake of *Geiger*, a "circuit split" has emerged on whether the phrase "willful and malicious" establishes "one single

[2] MarketGraphics sought permission to file an interlocutory appeal, which the district court and the Sixth Circuit denied. Pet. App. 44a.

test" or two "separate elements." *Id.* at 48a-49a & n.2. Some circuits, like the Fifth Circuit, read *Geiger* to hold that "'willful and malicious' is a 'unitary concept,'" which means simply "'acts done with the actual intent to cause injury.'" *Id.* at 48a (quoting *In re Miller*, 156 F.3d 598, 606 (5th Cir. 1998); *Geiger*, 523 U.S. at 58). Others, like the Ninth Circuit, hold that "'willful' and 'malicious' are separate and distinct elements with different tests." *Id.* at 49a.

The district court concluded that the unitary approach was more "consistent" with *Geiger* and the weight of Sixth Circuit precedent. *Id.* at 48a-49a. Accordingly, it held that the bankruptcy court used "the incorrect standard" when it applied a two-pronged test. *Id.* at 50a. The district court remanded the case with instructions to apply the unitary approach. *Id.* at 50a-51a. The district court described this approach as a subjective one, instructing the bankruptcy court to determine whether "David Berge: (1) willed or desired harm; or (2) believed injury [wa]s substantially certain to occur as a result of his behavior." *Id.* at 51a (brackets and internal quotation marks omitted).

3. Applying the unitary, subjective standard set forth by the district court, the bankruptcy court again ruled for David. It reasoned that neither the finding that David "willfully or knowingly violated the [TCPA]," nor the finding that David "willful[ly]" infringed MarketGraphics's copyrights, established that David "*intended* harm to MarketGraphics or *was substantially certain* that harm would occur." *Id.* at 34a-35a, 37a, 39a-40a (emphases added). The

district court thus dismissed MarketGraphics's adversarial complaint. *Id.* at 40a.

4. The Sixth Circuit granted permission to file a direct appeal and affirmed. *Id.* at 3a, 8a. Like the district court, the Sixth Circuit began by observing that this case implicates a "deep circuit split" on the meaning of "willful and malicious injury." *Id.* at 9a-10a. As the panel explained, that split has two parts. First, there is "disagreement among the circuits" as to whether the statute establishes "a unitary test" or a "two-pronged approach." *Id.* at 9a-10a. Second, circuits disagree as to whether "a debtor acts willfully where his actions were *objectively* substantially certain to cause harm," or whether courts should "utilize[ ] only a *subjective* standard, asking whether the debtor himself was motivated by a desire to inflict injury." *Id.* at 12a (emphases added).

The Sixth Circuit then announced its position on each half of the split. It "explicitly adopt[ed]" the two-pronged standard, claiming that this approach is more consistent with Sixth Circuit precedent and general rules of statutory construction. *Id.* at 10a. Further, it held that a debtor acts "willfully" only if he has "subjective intent to harm," *id.* at 17a—that is, if he "desire[s] to cause consequences of his act, or believe[s] that the consequences are substantially certain to result from it." *Id.* at 12a (citation and ellipsis omitted). In contrast, the court held that an injury is "malicious" if it is "in conscious disregard of one's duties or without just cause or excuse." *Id.* at 13a (citation omitted). The panel emphasized that "[a] creditor must prove both elements"—willfulness

and malice—"before the debt may be exempted from discharge," and that there are cases in which "a debtor may act willfully, but not maliciously," and vice versa. *Id.* at 13a-14a (citing examples).

Having laid out its approach, the Sixth Circuit applied that test to the case at hand. The Sixth Circuit acknowledged that the findings underlying the District Court judgment included a number of highly inculpating facts, including that David was the "sole member and officer or manager of Realysis of Memphis" and the "only" person responsible for serving Realysis's customers in the Memphis area while Realysis was plundering MarketGraphics's business. *Id.* at 18a-19a. These findings, however, did not contain any express determination of "a *subjective* intent on David's part to injure MarketGraphics." *Id.* at 20a (emphasis added). Therefore, the court concluded, they were insufficient to establish a "willful[]" injury. *Id.*

The court then examined whether the District Court judgment itself preclusively established that David satisfied the "willful and malicious injury" exception. The court reasoned that the judgment that David "willfully or knowingly violate[d] the TCPA" was insufficient to establish "willful[ness]" because a "knowing" violation of the TCPA could be established *objectively*—that is, by proof that "a reasonable person, in the circumstance in question, would have known or had reason to know about the act." *Id.* at 22a (citation omitted). Further, it said, this judgment did not satisfy the "malicious[ness]" prong, because the TCPA does not "require the conscious disregard of a duty or lack of just cause or

excuse." *Id.* at 23a. For similar reasons, the panel held that the judgment of "willful" copyright infringement did not suffice to satisfy § 523(a)(6), because willful copyright infringement may be predicated on "merely reckless behavior," and "does not necessarily prove the infringer's *subjective intent* to harm." *Id.* at 25a (emphasis added).

The Sixth Circuit denied rehearing.

REASONS FOR GRANTING THE PETITION

This case centers around two well-established splits of authority over the meaning of the "willful and malicious injury" exception. First: Does a debtor fall within § 523(a)(6) only if he *subjectively* intends to cause injury, or may intent be established *objectively*? Second: Does § 523(a)(6) impose a single, unitary requirement—that a debtor have "actual intent to cause injury"—or does it establish a two-pronged test, under which a debtor must also act "in conscious disregard of his duties or without just cause or excuse"?

As the Sixth Circuit and many other courts and scholars have observed, there is a "deep circuit split" on both questions. Pet. App. 10a; *see, e.g.*, Jill M. Fraley, *Modern Waste Law, Bankruptcy, and Residential Mortgages*, 41 Cardozo L. Rev. 485, 493 (2019) ("the circuits have split into multiple camps over two different aspects of the 'willful and malicious' standard"). These questions arise frequently in the lower courts, and regularly lead to divergent outcomes. And the Sixth Circuit answered both questions incorrectly, relying on its erroneous holdings to deny MarketGraphics recovery for serious and intentional acts of misconduct.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT OVER WHETHER THE "WILLFUL AND MALICIOUS INJURY" EXCEPTION REQUIRES SUBJECTIVE INTENT TO INJURE.

In *Geiger*, this Court held that "the 'willful and malicious injury' exception" is limited to "acts done with the actual intent to cause injury." 523 U.S. at 61. The Court reasoned that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Id.* Further, the Court observed that "the (a)(6) formulation triggers in the lawyer's mind the category 'intentional torts,' " which "generally require that the actor intend 'the *consequences* of an act,' not simply 'the act itself.' " *Id.* at 61-62 (quoting Restatement (Second) of Torts § 8A cmt. a (1964)). And the Court held that earlier precedents construing § 523(a)(6) were generally "in accord with [this] construction," while the sole case that used arguably inconsistent language—*Tinker* v. *Colwell*, 193 U.S. 473 (1904)—was "less than crystalline" and should be limited to its facts. *Geiger*, 523 U.S. at 63.

Geiger made clear that "actual intent to cause injury" is necessary to satisfy § 523(a)(6). But it left open the question of what type of "intent" is sufficient to meet this standard. Must a debtor *subjectively* intend or believe that his conduct will cause injury? Or is it enough that the debtor engages in conduct that *objectively* has a substantial certainty of causing harm?

Circuits have sharply split, 5-3, on the answer. Five circuits hold that subjective intent is invariably required to satisfy § 523(a)(6). Three circuits, in contrast, hold that either a subjective or objective showing of intent suffices to fall within the statute's scope. This split is widely recognized, deeply entrenched, and growing. Furthermore, it is frequently outcome-determinative, driving the determination of whether judgments for serious misconduct may be discharged in bankruptcy. This is one such case: The Sixth Circuit repeatedly relied on the conclusion that David lacked a "subjective intent to injure" to deny MarketGraphics relief. The Court should grant certiorari and resolve this intractable confusion.

A. The Circuits Are Split 5-3 On Whether Subjective Intent Is Required To Satisfy § 523(a)(6).

The split on this question is uncommonly clear.

1. Five circuits—the First, Sixth, Eighth, Ninth, and Tenth Circuits—have explicitly held that subjective intent is required to establish a "willful and malicious injury" under § 523(a)(6). The Ninth Circuit was among the first to announce this approach. In *Carrillo* v. *Su (In re Su)*, 290 F.3d 1140 (9th Cir. 2002), it held that § 523(a)(6) renders a debt non-dischargeable only "when there is either a subjective intent to harm, or a subjective belief that harm is substantially certain." *Id.* at 1144. It reasoned that an "objective substantial certainty of harm," is not sufficient because "the objective standard disregards the particular debtor's state of mind," and "looks very much like the 'reckless disregard' standard used in negligence." *Id.* at 1145; *see Orms-*

by v. *First Am. Title Co. of Nev. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010) (applying subjective approach); *Ditto* v. *McCurdy*, 510 F.3d 1070, 1078 (9th Cir. 2007) (same).

The Eighth Circuit has taken the same tack. In its en banc decision in *Geiger* (which this Court later affirmed on other grounds) the Eighth Circuit held that it "is not enough" that a debtor's conduct "was 'certain or substantially certain to cause physical harm.'" *Geiger* v. *Kawaauhau (In re Geiger)*, 113 F.3d 848, 852 (8th Cir. 1997) (en banc). Rather, it held that § 523(a)(6) requires evidence that the debtor "*believed* that it was substantially certain that [the creditor] would suffer harm." *Id.* at 852-853. The Eighth Circuit has repeatedly reaffirmed this holding in the decades since. *See Blocker* v. *Patch (In re Patch)*, 526 F.3d 1176, 1180-81 (8th Cir. 2008) ("Our *Geiger* opinion makes clear that in this circuit the 'willful' element is a subjective one * * * ."); *Roussel* v. *Clear Sky Props., LLC*, 829 F.3d 1043, 1048 (8th Cir. 2016) ("Willfulness is subjective * * * .").

The First and Tenth Circuits apply the subjective approach, as well. *See Panalis* v. *Moore (In re Moore)*, 357 F.3d 1125, 1129 (10th Cir. 2004) ("the debtor must 'desire to cause the consequences of his act or believe that the consequences are substantially certain to result from it'" (alterations omitted)); *Dewitt* v. *Stewart (In re Stewart)*, 948 F.3d 509, 527 (1st Cir. 2020) ("[W]illfulness requires a showing of intent to injure or at least of intent to do an act which the debtor is substantially certain will lead to the injury in question." (citation omitted)). So too does the Sixth Circuit. In the decision below, it held

that "[t]his Circuit * * * utilizes *only* a subjective standard, asking whether the debtor himself was motivated by a desire to inflict injury," and does not follow the approach of those courts that "utiliz[e] both objective and subjective tests." Pet. App. 12a (emphasis added).

2. Three circuits—the Third, Fifth, and Seventh Circuits—disagree. They hold that intent may be established either subjectively or objectively, and that conduct that objectively has a substantial certainty of causing harm is sufficient to trigger the "willful and malicious injury" exception.

The Fifth Circuit announced this approach a few months after *Geiger* itself. In *Miller* v. *J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598 (5th Cir. 1998), the Fifth Circuit held that "either objective substantial certainty or subjective motive meets the Supreme Court's definition of 'willful * * * injury.'" *Id.* at 603. *Geiger*, it noted, specifically equated a "willful and malicious injury" with "the category 'intentional torts,'" and intentional torts generally "require[] either objective substantial certainty of harm or subjective motive to do harm." *Id.* at 604 (citing Kenneth J. Vandevelde, *A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort*, 19 Hofstra L. Rev. 447, 447 (1990)). The Fifth Circuit has consistently adhered to that rule, applying the objective substantial certainty test in numerous published decisions over the last 20 years. *See,*

e.g., *McClendon* v. *Springfield (In re McClendon)*, 765 F.3d 501, 505 (5th Cir. 2014).[3]

The Third Circuit also follows the objective approach. In *Conte* v. *Gautam (In re Conte)*, 33 F.3d 303 (3d Cir. 1994), it held that "actions are willful and malicious within the meaning of § 523(a)(6) if they either have a purpose of producing injury or have a substantial certainty of producing injury." *Id.* at 307. The court specifically rejected the argument that willfulness "require[s] that the defendant's purpose was to injure"; it is enough, the court explained, that the debtor takes "a deliberate action that is substantially certain to produce harm." *Id.* at 308-309. Courts in the Third Circuit have repeatedly applied the "objective approach" since. *Binney* v. *Binney (In re Binney)*, Adversary No. 14-1503, 2015 WL 1598044, at *3 (Bankr. D.N.J. Apr. 7, 2015); *see, e.g.*, *Link* v. *Mauz (In re Mauz)*, 672 F. App'x 176, 178 (3d Cir. 2017); *McQueen* v. *Macri (In re Macri)*, 642 F. App'x 128, 129 (3d Cir. 2016) (per curiam).

The Seventh Circuit also holds that "willfulness is judged by an objective standard." *Gerard* v. *Gerard*, 780 F.3d 806, 811 (7th Cir. 2015). As it has explained: a willful injury "can be found either if the 'debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury.'" *Id.* (quoting *First Weber Grp., Inc.* v. *Hors-*

[3] *See also Shcolnik* v. *Rapid Settlements, Ltd. (In re Shcolnik)*, 670 F.3d 624, 629 (5th Cir. 2012); *Raspanti* v. *Keaty (In re Keaty)*, 397 F.3d 264, 273 (5th Cir. 2005); *Williams* v. *Int'l Bhd. of Elec. Workers Local 520 (In re Williams)*, 337 F.3d 504, 509 (5th Cir. 2003).

fall, 738 F.3d 767, 774 (7th Cir. 2013)); *see, e.g.*, *Draka* v. *Andrea (In re Andrea)*, 597 B.R. 626, 632 (Bankr. N.D. Ill. 2019) (applying this standard).

3. This split is widely acknowledged and deeply entrenched. Courts have repeatedly noted the circuits' intractable division on this question. *See, e.g.*, *Margulies* v. *Hough (In re Margulies)*, 566 B.R. 318, 329 (S.D.N.Y. 2017) (noting the "long-standing Circuit split" on this issue), *aff'd,* 721 F. App'x 98 (2d Cir. 2018); *Kane* v. *Stewart Tilghman Fox & Bianchi PA (In re Kane)*, 755 F.3d 1285, 1293 (11th Cir. 2014) (observing that "[o]ur sister circuits have disagreed about whether" to apply "a subjective standard * * * or an objective standard"); Pet. App. 11a-12a (describing split). So has the country's leading bankruptcy treatise, among other scholarly works. *See* 4 Collier on Bankruptcy ¶ 523.12[2] & n.30 (noting the "judicial debate concerning the *scienter* necessary to meet the 'willfulness' requirement in section 523(a)(6)"); Bryan Hoynak, *Filling in the Blank: Defining Breaches of Contract Excepted from Discharge As Willful and Malicious Injuries to Property Under 11 U.S.C. § 523(a)(6)*, 67 Wash. & Lee L. Rev. 693, 712 n.114 (2010) (describing split).

This split also shows no prospect of resolving itself. The Fifth Circuit has been resolute in applying the objective approach for decades, while the Eighth and Ninth Circuits have been equally committed to the subjective standard. Meanwhile, circuits have continued to line up on opposite sides of the split. The First and Sixth Circuits aligned themselves with the subjective approach in just the last few years,

while the Seventh Circuit just as recently joined the objective camp.

B. This Split Is Frequently Outcome-Determinative.

This question, moreover, is of no small practical significance. A standard that turns exclusively on subjective intent or belief is, by definition, more difficult to satisfy that a standard that may be satisfied *either* by subjective intent *or* by an objective substantial certainty of injury. Consequently, as one bankruptcy court observed, "[w]hether the substantial certainty test is an objective or subjective inquiry can determine the outcome of a dischargeability determination." *Ice House Am., LLC* v. *Cardin (In re Cardin)*, Adversary No. 11-5077, 2013 WL 1092118, at *8 (Bankr. E.D. Tenn. Jan. 31, 2013).

This consequence is evident from a brief review of cases on both sides of the circuit split. Courts that apply exclusively a subjective standard have repeatedly overturned lower-court decisions that found a debt non-dischargeable using the objective approach. Take the Ninth Circuit's decision in *Su*. There, the bankruptcy court denied discharge of a $530,000 debt for vehicular assault because "there was, 'by [an] objective standard, a substantial certainty' of harm" when the debtor drove his van into a crowded intersection. 290 F.3d at 1141-42. The Ninth Circuit reversed, explaining that this finding was insufficient to establish a willful and malicious injury "under the subjective framework," because the bankruptcy court "did not consider Su's subjective intent * * * or knowledge." *Id.* at 1145; *see also, e.g.*, *Geiger*, 113 F.3d at 852-853 (reversing $355,040

medical malpractice judgment that a bankruptcy court found non-dischargeable under the objective approach, because "nothing in the record * * * support[ed] a finding that [the debtor] *believed* that it was substantially certain that his patient would suffer harm").

Courts on the other side of the split, in contrast, have repeatedly applied the objective approach to reverse decisions that found judgments dischargeable using only the subjective approach. In *Berry* v. *Vollbracht (In re Vollbracht)*, 276 F. App'x 360 (5th Cir. 2007), for example, the bankruptcy court permitted discharge of a judgment for assault on the ground that the debtor "did not intend the consequences" of his punch to the victim's face. *Id.* at 362 (per curiam). The Fifth Circuit reversed, explaining that the district court erred by "appl[ying] only the subjective test," and that, under the objective approach, the debtor's "haymakers, like most garden-variety punches to the face, [we]re objectively very likely to cause harm." *Id.*; *see also, e.g.*, *Red* v. *Baum (In re Red)*, 96 F. App'x 229, 231 (5th Cir. 2004) (per curiam) (concluding that "the bankruptcy court's finding cannot establish [the debtor's] subjective intent," but nonetheless finding a debt non-dischargeable because "it does demonstrate an objective substantial certainty of injury").

The choice between the subjective standard and the objective standard thus has real bite: It often means the difference between allowing a debtor to discharge his liabilities and ensuring that he must pay up for misconduct. *See Su* v. *Carrillo (In re Su)*, 259 B.R. 909, 913 (B.A.P. 9th Cir. 2001) ("there is a material

difference between the [subjective] and [objective] tests, and this difference affects our decision here"). The Court should not permit a regional variation in approach to determine whether defendants may use the bankruptcy system to escape liability for their misconduct.

C. This Case Is An Ideal Vehicle To Resolve The Split.

This case is an ideal vehicle to resolve this important question. In the decision below, the Sixth Circuit stated that it would "utilize[ ] *only* a subjective standard" in evaluating intent. Pet. App. 12a (emphasis added). It then held that the District Court judgment and the findings underlying it did not establish that David's conduct was "willful," because they did not "reflect a *subjective intent* on David's part to injure MarketGraphics." *Id.* at 20a (emphasis added). Indeed, the Sixth Circuit stated no fewer than ten times that it was denying relief because of the absence of a finding of subjective intent. *See, e.g.*, *id.* at 17a-18a ("agree[ing]" with the bankruptcy court that "evidence [of]" "subjective intent * * * was absent"); *id.* at 19a ("These latter assertions * * * undermine any conclusion supporting a subjective intent to infringe upon MarketGraphics's copyrights."); *id.* at 20a ("MarketGraphics did not include any findings * * * revealing David's subjective intent to injure MarketGraphics."); *id.* ("Neither the state nor federal law at issue required MarketGraphics to prove that David acted with subjective intent to harm the company.").

If an objective standard were required, the judgments below would at minimum need to be vacated—

and the lower courts would very likely reach a different conclusion on remand. The record contains ample evidence that David's conduct was "objectively substantially certain" to cause injury to MarketGraphics. David opened up a business that performed "essentially the same services as MarketGraphics," produced reports "that essentially paralleled the information provided by MarketGraphics," and targeted the same Memphis-area customers that MarketGraphics served. *MarketGraphics*, 2014 WL 2155009, at *1. Furthermore, David approved and signed a letter expressly telling those customers that Realysis rather than MarketGraphics would generate research for them going forward. Pet. App. 4a; *see id.* at 104a-109a. This evidence establishes that it was "substantially certain"—indeed, beyond any plausible doubt—that David's conduct would injure MarketGraphics's business.

The District Court judgment further confirms that David satisfies the objective standard. As the Sixth Circuit acknowledged, a "willful or knowing" violation of the TCPA may be established either by the defendant's "actual awareness" that his conduct was false or deceptive, or by "*objective manifestations* indicat[ing] that a reasonable person would have known or would have had reason to know of the falsity or deception." Pet. App. 21-22a (quoting Tenn. Code Ann. § 47-18-103(11)). The Sixth Circuit deemed this standard insufficient to trigger § 523(a)(6) because it does not require "[s]ubjective intent to injure." *Id.* at 22a. But this requirement mirrors the objective standard almost point-for-point. Accordingly, David's violation of the TCPA—which

served as the basis for nearly half of the damages award against him, *see* Pet. App. 69a—would almost certainly establish willfulness under the objective standard. The resolution of the split would thus likely mean the difference between recovery and discharge of the substantial debt that David owes MarketGraphics for his misconduct.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CIRCUIT SPLIT OVER WHETHER THE "WILLFUL AND MALICIOUS INJURY" EXCEPTION ESTABLISHES A UNITARY STANDARD OR A TWO-PRONGED TEST.

The decision below also implicates a second, closely related circuit split concerning the meaning of § 523(a)(6). In *Geiger*, this Court held that "only acts done with the actual intent to cause injury" fall within "the scope of the 'willful and malicious injury' exception." 523 U.S. at 61. The Court left unstated, however, whether this requirement was a *sufficient* condition to satisfy § 523(a)(6) or merely a *necessary* one.

Circuits have split 5-6 on the answer. *See* Pet. App. 10a (noting the "deep circuit split" on this question); *id.* at 48a-49a & n.2 (same). Five circuits hold that "actual intent to cause injury" is the sole, unitary requirement to invoke § 523(a)(6); they reason both that *Geiger* was interpreting the entirety of the statutory phrase "willful and malicious," and that the terms "willful" and "malicious" are virtually synonymous in this context. Six circuits, by contrast, hold that § 523(a)(6) establishes a two-pronged test, whereby "actual intent to cause injury" is the re-

quirement for willfulness, while a separate showing—in most circuits, acting "in conscious disregard of one's duties, or without just cause or excuse"—is necessary to establish malice.

This split is well-aired and consequential. Furthermore, it served as a second key predicate for the Sixth Circuit's decision below. Particularly given that this second split overlaps substantially with the first one—indeed, one cannot coherently be resolved without also resolving the other—the Court should grant certiorari on both questions and answer them together.

A. Circuits Are Split 5-6 Over Whether The "Willful and Malicious Injury" Exception Establishes A Unitary Standard Or A Two-Pronged Test.

1. Five circuits—the Third, Fourth, Fifth, Eighth, and Tenth Circuits—hold that § 523(a)(6) establishes a unitary standard, requiring only that a debtor engage in conduct "with the actual intent to cause injury."

The Fifth Circuit was among the first to adopt this position, just months after *Geiger*. In *Miller*, it held that the phrase "willful and malicious" is "a unitary concept" that means "'acts done with the actual intent to cause injury.'" 156 F.3d at 606 (quoting *Geiger*, 523 U.S. at 61). The court explained that the term "malicious" imports the legal concept of "implied malice," which means an act "done deliberately and intentionally." *Id.* at 605 (quoting *In re Nance*, 556 F.2d 602, 611 (1st Cir. 1977)). Although "[t]his definition makes the 'implied malice' inquiry quite

close to that of the [*Geiger*] standard for 'willful * * * injury,'" the court acknowledged, *Geiger* "never ma[de] explicit whether it is analyzing solely the 'willful' prong or the 'willful and malicious standard' as a unit." *Id.* And "treatment of the phrase as a collective concept is sensible given the Supreme Court's emphasis on the fact that the word they modify is 'injury.'" *Id.* Subsequent Fifth Circuit panels have repeatedly reaffirmed this construction. *See Keaty*, 397 F.3d at 270; *Williams*, 337 F.3d at 509.

The Third and Fourth Circuits have also read "willful and malicious" as a unitary concept. In *Conte*, the Third Circuit rejected the contention that "'maliciousness' changes the statute's mandate," holding that "a debtor's actions are willful and malicious within the meaning of § 523(a)(6) where those actions were substantially certain to result in injury or where the debtor desired to cause injury." 33 F.3d at 308; *see Mauz*, 672 F. App'x at 178 (applying this unitary standard); *Macri*, 642 F. App'x at 129 (same). The Fourth Circuit has likewise held that § 523(a)(6) requires that the debtor "engaged in * * * conduct with the actual intent to cause injury," without differentiating between the statutory terms or requiring any independent showing of malice. *TKC Aerospace Inc.* v. *Muhs (In re Muhs)*, 923 F.3d 377, 385 (4th Cir. 2019); *see Duncan* v. *Duncan (In re Duncan)*, 448 F.3d 725, 729-730 (4th Cir. 2006) (same).

The Eighth and Tenth Circuits have reached the same conclusion, albeit by a slightly different route. Both courts have separately defined the terms "will-

ful" and "malicious," but have given "malicious" a meaning that is entirely subsumed by the definition of "willful." The Eighth Circuit has held that "willful" means that "the debtor knows that the consequences are certain, or substantially certain, to result from his conduct," while "malicious" means "conduct * * * [that] is certain or almost certain to cause harm." *Sells* v. *Porter (In re Porter)*, 539 F.3d 889, 894 (8th Cir. 2008) (internal quotation marks and ellipsis omitted); *see Roussel*, 829 F.3d at 1047 (same). The Tenth Circuit similarly has defined both "willful" and "malicious" to refer to conduct that the debtor knows "is substantially certain to cause * * * injury." *Moore*, 357 F.3d at 1129 (citation omitted).

2. The First, Second, Sixth, Seventh, Ninth, and Eleventh Circuits take a different approach. They hold that "willful and malicious" establishes a two-pronged test, and that the term "malicious" requires a showing separate and distinct from "willfulness."

The Seventh Circuit is representative. It holds that "[w]illfulness" refers to the "actual intent" standard set forth in *Geiger*—namely, that the "debtor's motive was to inflict the injury, or the debtor's act was substantially certain to result in injury." *Horsfall*, 738 F.3d at 774. In contrast, it reads "maliciousness" to "require[ ] that the debtor acted 'in conscious disregard of [his] duties or without just cause or excuse.'" *Id.* (citation omitted). The Seventh Circuit has specifically held that this two-pronged approach "remains good law" after *Geiger*, *id.* at 775, and that creditors invoking § 523(a)(6) have "the burden of establishing each of

these elements by a preponderance of the evidence," *In re Calvert*, 913 F.3d 697, 701 (7th Cir. 2019).

The First, Second, Ninth, and Eleventh Circuits have issued virtually identical constructions of the statute. The Ninth Circuit, for instance, has defined a malicious act as one done "without just cause or excuse," and has stated that lower courts may not "conflate[] the 'willful' and 'malicious' prongs in [their] § 523(a)(6) analysis." *Su*, 290 F.3d at 1146-47 (citation omitted); *see, e.g.*, *Barboza* v. *New Form, Inc. (In re Barboza)*, 545 F.3d 702, 711 (9th Cir. 2008) (similar). The First Circuit has similarly defined "maliciousness" as "wrongful and without just cause or excuse," and emphasized that an injury must be both "willful *and* malicious" to satisfy § 523(a)(6). *In re Levasseur*, 737 F.3d 814, 818 (1st Cir. 2013) (emphasis in original) (citations omitted). The Second and Eleventh Circuit have defined and applied the terms the same way. *See Ball* v. *A.O. Smith Corp.*, 451 F.3d 66, 69-70 (2d Cir. 2006); *Maxfield* v. *Jennings (In re Jennings)*, 670 F.3d 1329, 1334 (11th Cir. 2012) (per curiam).

The Sixth Circuit joined this camp in the decision below. After surveying the split, it "explicitly adopt[ed]" the "two-pronged approach." Pet. App. 10a. Under that test, it explained, "willful" means "actual intent to cause injury," whereas "malicious" means "in conscious disregard of one's duties or without just cause or excuse." *Id.* at 11a, 13a (citations omitted). Accordingly, in the Sixth Circuit, creditors now "must prove *both* elements before the debt may be exempted from discharge," and the

finding that one is satisfied does not necessarily establish the other. *Id.* at 13a-14a (emphasis added).

3. This split is mature and widely recognized. Courts and commentators have time and again noted the circuits' division. *See, e.g.*, *First Am. Title Ins. Co.* v. *Smith (In re Smith)*, Adversary No. 17-02076, 2020 WL 4783895, at *4 (B.A.P. 10th Cir. Aug. 18, 2020) ("a circuit split [has] developed regarding whether this exception to discharge is a unitary standard"); *Brown* v. *Ausley (In re Ausley)*, 507 B.R. 234, 240 (Bankr. W.D. Tenn. 2014) ("[T]he Circuits are split as to whether the 'willful and malicious' requirements are to be addressed separately, or whether the § 523(a)(6) inquiry is an integrated test."); 4 Collier on Bankruptcy ¶ 523.12[2] n.12 (discussing split). And, after the decision below, *every* regional circuit has now taken a side—and they have divided almost perfectly down the middle.

The need for resolution of this split is particularly acute when it is overlaid against the 5-3 split over the meaning of "actual intent." Circuits have not lined up consistently in how they resolve these two issues. Instead, they are all over the map, effectively dividing into six separate camps on the interpretation of the "willful and malicious" exception:

Position Of Each Circuit On The Questions Presented		
	Unitary test	Two-pronged test
Subjective Standard	CA8, CA10	CA1, CA6, CA9
Objective Standard	CA3, CA5	CA7
No position	CA4	CA2, CA11

This degree of division is untenable. Litigants need predictability as to what the "willful and malicious injury" exception requires so that they can draft judgments and propose judicial findings sufficient to trigger the exception if the defendant later files for bankruptcy. *See* Pet. App. 20a (faulting MarketGraphics for failing to "include any findings in the judgment revealing David's subjective intent to injure MarketGraphics"). And because parties cannot always anticipate where the defendant may ultimately file for bankruptcy, it is critical that the rules be consistent throughout the country. *See, e.g.*, *Ball*, 451 F.3d at 68-69 (underlying judgment issued in Fifth Circuit but bankruptcy litigation conducted in Second Circuit). The circuits' disagreements, however, make that impossible: Currently, litigants can only guess as to what rule the bankruptcy forum may apply in interpreting the willful and malicious exception, and their rights to recovery may vary widely depending on the jurisdiction in which the debtor files for bankruptcy.

This case is illustrative. After MarketGraphics filed a proposed judgment against Donald, Martha, and David Berge, the defendants filed for bankruptcy in different circuits. Donald and Martha filed in the Fifth Circuit, which applies a unitary, objective standard. *See In re Berge*, No. 13-13248 (Bankr. N.D. Miss. 2013); *In re Berge*, No. 13-13449 (Bankr. N.D. Miss. 2013). David, in contrast, filed in the Sixth Circuit, which now applies a two-pronged, subjective standard. Had Donald and Martha not obtained a stay of the litigation against them, the exact same judgment would thus have been analyzed under different standards and most likely given different effect solely as a consequence of geography.

B. The Split Is Practically Significant.

This split is not merely of academic importance. In those circuits that apply the two-pronged approach, creditors who seek to invoke § 523(a)(6) must satisfy an additional requirement that creditors elsewhere are not subject to. It follows that these circuits often permit discharge in circumstances where courts on the other side of the split would deem the "willful and malicious injury" exception satisfied.

The case law bears out this conclusion. As the Sixth Circuit observed, there are numerous cases in which courts that apply the two-pronged approach have found that a debtor "act[ed] willfully, but not maliciously." Pet. App. 14a (listing examples). To offer just one example: In *Calvert*, the debtor did not dispute that he acted "willfully" when he intentionally fired workers to prevent them from unionizing. 913 F.3d at 699-700. But the bankruptcy court and the Seventh Circuit found that he did not act "mali-

ciously" because his motive was partly "to save money," and so permitted him to discharge a $400,000 backpay award. *Id.* at 699-700, 702. Had this case arisen in a court on the other side of the split, the outcome would have been the reverse: Those courts do not require a separate and independent showing of malice, and so the conclusion that the debtor acted with actual intent to cause injury would have been sufficient to render the debt non-dischargeable.

Furthermore, even where the two-pronged approach does not result in the denial of relief, it often necessitates costly additional proceedings to determine whether the "malice" prong is satisfied. The Ninth Circuit, for instance, has repeatedly vacated and remanded cases with instructions to make additional findings on malice. *See Barboza*, 545 F.3d at 711-712; *Su*, 290 F.3d at 1147. And, in this case, the bankruptcy court held an entire trial—replete with witness testimony and numerous documents—solely to determine "whether [David] acted with malice." Pet. App. 54a. These sorts of time-consuming proceedings dissipate the recovery that creditors seek through § 523(a)(6) and deter invocation of that provision at all. They are another significant practical cost of the circuits' division.

C. This Case Is An Excellent Vehicle To Resolve This Question.

This case is an excellent vehicle to resolve this split. Both the District Court and the Sixth Circuit expressly noted the split in their respective opinions, and each court picked a different side. *See* Pet. App. 9a-11a (adopting two-pronged approach); *id.* at 48a-

50a (adopting unitary approach). Further, the Sixth Circuit explicitly relied on the two-pronged approach in rejecting MarketGraphics's claim. It held that the TCPA judgment against David did not establish a "willful and malicious" injury for two reasons: first, it held that the judgment did not establish a "willful" injury because the TCPA does not require a "subjective intent to injure," *id.* at 22a; and, second, it held that the judgment did not establish a "malicious" injury because the TCPA does not require "conscious disregard of a duty or lack of just cause or excuse." *Id.* at 23a-24a. Were this Court to reject the two-pronged approach, the second half of the Sixth Circuit's analysis would fall away, and the sole remaining question would be whether the statute imposed a subjective standard or an objective standard.

Indeed, this case is a particularly attractive vehicle because it enables the Court to resolve both questions jointly. These questions involve the construction of the same statutory text and revolve around the interpretation of the same passages in *Geiger*. This Court cannot sensibly answer one question without also effectively resolving the other, as both require the court to define the terms "willful" and "malicious," and to determine what type of intent each provision demands. Granting certiorari of these questions together would thus ensure that the Court answers these recurring and interrelated questions in a consistent and coherent manner.

III. THE SIXTH CIRCUIT RESOLVED BOTH QUESTIONS INCORRECTLY.

The intractable division among the lower courts is sufficient reason to grant certiorari. But this Court's review is also warranted because, on the merits, the Sixth Circuit answered both questions incorrectly.

1. Section 523(a)(6) is best read not to require subjective intent to injure. *See* 4 Collier on Bankruptcy ¶ 523.12[2]. *Geiger* looked to two principal considerations in construing the phrase "willful and malicious injury": the common-law backdrop and prior cases interpreting this provision. *See* 523 U.S. at 61-63. Both point toward the conclusion that an objective substantial certainty of injury is sufficient to trigger § 523(a)(6).

At common law, it has long been established that "intent" does not require subjective desire or knowledge to cause injury. Rather, as a leading tort treatise explains, "where a reasonable man in the defendant's position would believe that a particular result was substantially certain to follow, he will be dealt with by the jury, or even by the court, as though he had intended it." William L. Prosser, Handbook of the Law on Torts § 8, at 32 (4th ed. 1971) ("Prosser on Torts"). This principle was established by the time the "willful and malicious" exception was first enacted in 1898. *See, e.g.*, *Claflin* v. *Commonwealth Ins. Co.*, 110 U.S. 81, 95 (1884) ("the law presumes every man to intend the natural consequences of his acts"). It follows that Congress imported that common-law standard into § 523(a)(6) when it used the formulation "willful and malicious injury," language that "triggers in the lawyer's mind

the category 'intentional torts.'" *Geiger*, 523 U.S. at 61.

Indeed, this Court read the "willful and malicious injury" exception consistent with that common-law backdrop in *McIntyre* v. *Kavanaugh*, 242 U.S. 138 (1916)—a case that *Geiger* described as "in accord with [its] construction." 523 U.S. at 63. There, the Court explained that § 523(a)(6) may be triggered by a "wrongful" act "that *necessarily* causes injury and is done intentionally." *McIntyre*, 242 U.S. at 141-142 (emphasis added). That formulation mirrors, in substance, the objective approach applied by many lower courts. And, having been issued close in time to § 523(a)(6)'s enactment, it refutes the contention that this provision was drafted and originally understood as requiring subjective intent to cause injury.

Some lower courts have resisted an objective test on the ground that it resembles the recklessness and negligence standards this Court rejected in *Geiger*. *See, e.g.*, *Su*, 290 F.3d at 1145-46. That concern is unfounded. The mental states of recklessness and negligence refer to circumstances in which a person's conduct poses a *risk* of injury. Engaging in conduct that poses "a risk, short of substantial certainty," has never been treated as "the equivalent of intent." Prosser on Torts § 8, at 32. In contrast, engaging in conduct that poses an objective substantial certainty of injury has long been deemed a form of intent, *see id.*, and courts undermine rather than vindicate congressional intent by eliding this important distinction.

2. Section 523(a)(6) is also best interpreted as establishing a unitary standard rather than a two-

pronged test. That is the most straightforward reading of this Court's decision in *Geiger*. The Court there repeatedly stated that it was construing "the scope of the 'willful and malicious injury' exception" as a whole when it held that the statute required "actual intent to case injury." *Geiger*, 523 U.S. at 61; *see id.* at 63 (referring to "the current statutory instruction that, to be nondischargeable, the judgment debt must be 'for willful and malicious *injury*' "). The Court nowhere indicated that it was construing only a portion of the statute, or that the provision contained a second, hidden requirement that it failed to mention.

Further, the logic of *Geiger* tugs against the suggestion that § 523(a)(6) requires a showing that the debtor acted "in conscious disregard of his duties or without just cause or excuse." That requirement finds no footing in tort law: An action may be deemed an "intentional tort" regardless of whether it was carried out with bad motives. *See, e.g.*, Restatement (Second) of Torts § 44 cmt. a (1965) ("[t]he actor's motives * * * are immaterial" in determining whether a person committed the tort of false imprisonment). In addition, this standard appears to be drawn from a passage of *Tinker* in which the Court cited an English opinion that defined the term "malice" as "without just cause or excuse." 193 U.S. at 485-486 (citation omitted); *see Miller*, 156 F.3d at 605 ("The origin of the 'just cause or excuse' standard is *Tinker* * * * ."). But *Geiger* specifically repudiated *Tinker* and its reasoning and confined the decision largely to its facts. *Geiger*, 523 U.S. at 63. Given that "the roots of the 'just cause or excuse' standard

* * * have now been cut off," there is little basis for circuits to continue employing that approach. *Miller*, 156 F.3d at 605.

The text of § 523(a)(6) also provides no support for the Sixth Circuit's reading. The ordinary meaning of the term "malicious" is "[s]ubstantially certain to cause injury." Black's Law Dictionary (11th ed. 2019). That this definition largely overlaps with the meaning of the term "willful" is no surprise: "Doublets and triplets abound in legalese," and the canon against superfluity is at its weakest when interpreting paired phrases like willful and malicious that have a long legal pedigree. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 177 (2012); *see, e.g.*, *United States* v. *Coffin*, 25 F. Cas. 485, 487 & n.2 (C.C.D. Mass. 1833) (interpreting statute using the phrase "[w]ilful and malicious"). Courts should not strain, as the Sixth Circuit did, to assign different meanings to two nearby words where their ordinary definitions do not support such a distinction.

Finally, the "without just cause or excuse" standard is highly problematic in practice. Lower courts have long struggled to assign a clear and administrable meaning to this phrase. *See GMAC Inc.* v. *Coley (In re Coley)*, 433 B.R. 476, 499-500 (Bankr. E.D. Pa. 2010) (describing the "differing standards for malice" that various courts apply in "this unsettled area of the law"). That confusion stems, in part, from the illogic at the heart of the two-pronged test. If a judgment has been entered against the debtor for willfully violating the law, how can his conduct ever be deemed with "just cause or excuse"? And how is a

creditor supposed to prove the negative that no such cause or excuse exists? In practice, this second prong has thus functioned largely as a trap for the unwary, ensnaring parties in time-consuming litigation about a question that is rarely addressed in the underlying state-court proceedings. *See supra* pp. 31-32. Rather than imposing this difficult and unnecessary inquiry on courts and parties, it is far better to hold—consistent with *Geiger*—that "actual intent to cause injury" is sufficient to trigger the "willful and malicious injury" exception.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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