No. 20-457

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Bankruptcy Code exempts from discharge 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). This Court has held that section 523(a)(6) requires demonstrating that the debtor had "actual intent to cause injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

The questions presented are:

1. Whether this Court's holding in *Geiger* that section 523(a)(6) requires "actual intent to cause injury" means that the debtor must either subjectively intend to cause injury or at least know that injury is substantially certain to result?

2. Whether section 523(a)(6)'s use of the conjunctive term "and" in "willful and malicious injury" means that the exception from discharge does not apply unless the debtor's conduct is both willful and malicious?

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INTRODUCTION

The federal bankruptcy system is designed "to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018) (quotation marks and brackets omitted). "To that end, the Bankruptcy Code contains broad provisions for the discharge of debts, subject to exceptions." *Id.* Those exceptions are construed narrowly, under the "long-standing principle that exceptions to discharge should be confined to those plainly expressed." *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 275 (2013) (quotation marks omitted).

This case involves one such exception, 11 U.S.C. § 523(a)(6), which exempts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." In *Kawaauhau v. Geiger*, 523 U.S. 57 (1998), this Court unanimously held that section 523(a)(6) applies only to "acts done with the actual intent to cause injury"—not merely to acts "done intentionally" that caused an injury that was "neither desired nor in fact anticipated by the debtor." *Id.* at 61–62. The Court thus concluded that "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Id.* at 64.

Petitioner MarketGraphics Research Group, Inc. asserts (at 2) that since *Geiger*, two circuit splits have emerged over how to apply the Court's holding—first on how to identify "actual intent to cause injury," *Geiger*, 523 U.S. at 61, and second on whether to give independent effect to the term "malicious" in the statutory phrase "willful and malicious injury." But the alleged circuit splits are largely, if not completely

illusory: Although courts have described different tests for applying section 523(a)(6) post-*Geiger*, they have also recognized that the differences are largely "semantic" and "probably don't generate different outcomes." *Jendusa-Nicolai v. Larsen*, 677 F.3d 320, 323–324 (7th Cir. 2012). This Court does not typically grant review to "iron[] out minor linguistic discrepancies among the lower courts [when] those discrepancies are not outcome determinative." Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006). It should not do so here.

This case is also a poor vehicle for review. MarketGraphics did not raise the petition's first question presented in proceedings below, and it concedes (at 33) that the Court "cannot sensibly answer" the second question without considering the first. Moreover, neither question presented has any potential to change the outcome. The courts below recognized that respondent David Berge's conduct was *neither* willful *nor* malicious, making the second question presented regarding whether to apply a unitary or a two-pronged test entirely academic. And any distinction between an objective or subjective test for intent is irrelevant here. MarketGraphics tried to establish Mr. Berge's intent by relying on issue preclusion from the underlying judgment (which it drafted) against him for violations of state consumer protection law and federal copyright law. But no count in that judgment required findings that establish intent even under MarketGraphics's proposed "objective" standard—indeed, the counts allow for liability on the basis of reckless or negligent conduct, which this Court in *Geiger* held does not satisfy section 523(a)(6). *See* 523 U.S. at 64. In addition, the unchallenged factual

findings by the bankruptcy court establish that respondent played a minor role in the businesses run by his father, whose operations were the source of MarketGraphics's injuries. Mr. Berge "was merely a son who worked for his father and believed what his father told him." Pet. App. 58a. He cannot plausibly be said to have "desired" or "anticipated" that MarketGraphics would suffer an injury. *Geiger*, 523 U.S. at 62.

The Court should deny the petition for a writ of certiorari.

STATEMENT

A. Respondent's Father Founds Realysis After Ending His Relationship As A Contractor For Petitioner.

From 1997 to 2012, Donald Berge, the father of respondent David Berge, worked as an independent contractor for petitioner MarketGraphics, which collects and analyzes housing-market data. Pet. App. 3a, 42a. Donald Berge's contract with MarketGraphics required him to gather and provide data on the market in Memphis, Tennessee, and to manage relationships with MarketGraphics's Memphis clients. Pet. App. 3a, 55a. MarketGraphics licensed intellectual property to Donald Berge to facilitate his work. Pet. App. 3a.

Respondent David Berge was not a party to any contract with MarketGraphics, but starting in high school, he helped with his father's work for the company. *Id*. David would "drive the market" in the Memphis area, which involved visiting area subdivisions to analyze market growth and compile data for MarketGraphics reports. Pet. App. 3a, 55a.

In 2012, Donald Berge ended his relationship with MarketGraphics and formed his own company. He founded Realysis, which consisted of three single-member LLCs: Realysis, Realysis of Memphis, and Realysis of Jackson. Pet. App. 3a–4a. Donald Berge was listed as the sole member of Realysis of Jackson, David Berge as the sole member of Realysis of Memphis, and Donald's wife Martha, a teacher, as the sole member of Realysis, but Donald controlled the operation of all three LLCs. Pet. App. 7a.

MarketGraphics sent letters to its Memphis clients apprising them of Donald Berge's retirement and stating that the company would now service their accounts directly. Pet. App. 4a. Realysis of Memphis sent its own letter to those clients, describing the roles that Donald and David Berge had played gathering information for MarketGraphics, and indicating that the newly formed Realysis of Memphis would provide quarterly housing-market reports. *Id.* MarketGraphics responded by sending a letter to Realysis, in which it stated that Donald Berge was bound by non-compete and confidentiality provisions of his contract. *Id.* Notwithstanding the letter, Donald Berge continued to conduct business through Realysis, winning over a significant share of MarketGraphics's Memphis-area customers. *Id.*

Despite his nominal designation as Realysis of Memphis's sole member and president, respondent David Berge's involvement with the company and knowledge of its operations was modest. That was established by his testimony below, which the bankruptcy court found "very credible." Pet. App. 58a; *see* Pet. App. 44a, 50a (district court affirming the bankruptcy court's factual findings). According to David,

his father ran Realysis of Memphis—his own title as company president was "superficial" and intended "to bolster his resume." Pet. App. 56a, 103a. As David put it, he was "so very much in the backseat" for Realysis of Memphis that he "probably wasn't even in the car." Pet. App. 109a.

For example, although the customer letter described above was sent under David's name, Donald wrote it—David merely gave the letter a "look through" for "typos" at his father's instruction. Pet. App. 56a, 108a. Moreover, David was not aware of additional correspondence and marketing materials that were sent out under his name. Pet. App. 53a, 101a–103a. Indeed, his father had created email addresses for the company without David's knowledge—David "didn't have a password or anything" and "didn't know how to access" the company website. Pet. App. 102a.

David was aware that his father had signed a noncompete with MarketGraphics, but he "never read it or signed it" himself, and he was told by his father that his father's attorneys believed the clause was unenforceable as overly broad. Pet. App. 56a, 100a–101a, 107a. As a result, David "kind of disregarded it" because he "trusted what [his] father said" and could "only make decisions based on the information" he had received. Pet. App. 100a.

B. MarketGraphics Obtains An Unopposed Civil Judgment Against David Berge.

In January 2013, MarketGraphics sued Donald, David, Martha, and the three Realysis entities in federal court. *MarketGraphics Research Grp., Inc. v. Berge*, No. 3:13–cv–00001 (M.D. Tenn. Jan. 2, 2013).

Among other counts, the complaint alleged that the defendants had infringed MarketGraphics's copyrights (*e.g.*, by using MarketGraphics's copyrighted maps in gathering data), violated the Tennessee Consumer Protection Act ("TCPA"), and committed various common-law violations. *Id.* After the court issued a preliminary injunction and the defendants answered the complaint and interrogatories, MarketGraphics moved for summary judgment. Pet. App. 5a. The defendants did not respond, and MarketGraphics submitted a proposed judgment. *Id.* Before any judgment was entered, Donald and Martha Berge filed for Chapter 7 bankruptcy. *Id.* As a result, the court stayed the action as to them. *Id.*

In August 2013, the district court entered MarketGraphics's proposed judgment against David Berge and the Realysis entities in the identical form submitted, holding them jointly and severally liable for $332,314.94. Pet. App. 68a–69a. Adopting MarketGraphics's proposed findings, the court found that David and the Realysis entities had "willfully or knowingly violated" the TCPA, resulting in an award of treble damages. Pet. App. 69a. As discussed further below, pp. 26–28, *infra*, proof of a "knowing" violation under the TCPA can be established if a "reasonable person would have known or had reason to know of a falsity or deception" giving rise to liability. Pet App. 21a–22a (quoting Tenn. Code Ann. § 47-18-103(11)). The court also found that the remaining defendants had "willful[ly]" infringed petitioner's copyrights, Pet. App. 77a, which is established if the defendant "knowingly or recklessly copies another's work." Pet. App. 24a. The court made no findings as to David's intent.

C. David Berge Files For Bankruptcy Protection And The Lower Courts Reject MarketGraphics's Attempt To Exempt Its Judgment Debt From Discharge.

1. After entry of the August 2013 judgment, David Berge filed for Chapter 7 bankruptcy in the Bankruptcy Court for the Middle District of Tennessee. Pet. App. 54a. Soon after, MarketGraphics initiated an adversary proceeding, asserting that David's debts were non-dischargeable under 11 U.S.C. § 523(a)(6). *Id*. As discussed, that provision exempts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity."

MarketGraphics moved for summary judgment, asserting that the August 2013 judgment compelled a "willful and malicious injury" finding on the basis of collateral estoppel. Pet. App. 60a. The bankruptcy court denied the motion. Pet. App. 59a–65a. The court concluded that, under Sixth Circuit precedent, section 523(a)(6) requires showing that the debtor's actions were both willful and malicious. Pet. App. 62a. The August 2013 judgment did not satisfy that standard, the court reasoned, because neither the TCPA nor the copyright infringement counts required any finding of malice and no separate findings were made on the issue. Pet. App. 63a–65a.

The adversary action proceeded to a bench trial, at which both David and Donald Berge testified. The bankruptcy court issued findings of fact and conclusions of law, Pet. App. 52a–58a, holding that the judgment debt was subject to discharge because MarketGraphics "failed to show that the debtor acted with the desire to harm [petitioner] or that he believed

injury was substantially certain." Pet. App. 58a. The court found David's testimony "very credible," accepting his statement that he "was merely a son who worked for his father and believed what his father told him." *Id.* As a result, the bankruptcy court found that David had not acted with the requisite intent. *Id.*

2. MarketGraphics appealed to the district court, which affirmed in part and vacated in part. Pet. App. 41a–51a. Surveying Sixth Circuit precedent, the court concluded that the bankruptcy court had erred by "considering 'willful' and 'malicious' as separate elements," and should have instead applied a "single" unitary test that embraces both terms. Pet. App. 48a–49a. For that unitary test to be satisfied, the court explained, "the debtor must (1) will or desire harm, or (2) believe injury is substantially certain to occur as a result of his behavior." Pet. App. 50a.

Although the district court believed that the bankruptcy court had "applied the incorrect standard," it nonetheless affirmed the bankruptcy court's determination that the trial record did not support finding a willful and malicious injury. *Id.* As the district court recounted, the bankruptcy court's findings established that David "did not intend to cause injury as required by" this Court's decision in *Geiger*. *Id.* The district court vacated only with respect to the resolution of "issue preclusion." *Id.* According to the district court, the bankruptcy court had not evaluated whether MarketGraphics was entitled to collateral estoppel based on the August 2013 judgment under the unitary standard. Pet. App. 51a. It thus remanded to let the bankruptcy court decide that issue in "the first instance." *Id.*

3. On remand, the bankruptcy court held that MarketGraphics was not entitled to collateral estoppel under the unitary test for section 523(a)(6). Pet. App. 30a–40a. The court thus denied MarketGraphics's renewed summary judgment motion and again dismissed its adversary complaint. Pet. App. 40a.

Beginning with the TCPA, the bankruptcy court rejected MarketGraphics's argument that a "willful and knowing" violation necessarily meets the section 523(a)(6) standard. The court reasoned that "'willful' under the TCPA means the debtor intended to commit the acts, but 11 U.S.C. § 523(a)(6) requires a finding that the debtor intended his action to bring about the harm suffered." Pet. App. 36a (citing *Tomlin v. Crownover (In re Crownover)*, 417 B.R. 45 (Bankr. E.D. Tenn. 2009)). Because there were no findings regarding Mr. Berge's intent to cause harm in the August 2013 judgment that MarketGraphics had drafted, or even relevant factual allegations in the underlying complaint, MarketGraphics could not rely on issue preclusion based on the TCPA violation.

The bankruptcy court reached the same conclusion as to the copyright infringement count. Pet. App. 37a–40a. The court explained that MarketGraphics was "not entitled to issue preclusion on the issue of dischargeability because the term 'willful or knowing' under the Copyright Act does not equate with a desire to cause the consequences of an act or a belief that the consequences are substantially certain to result from it." Pet. App. 40a. Rather, "a finding of 'willful' copyright infringement" could be "based merely on reckless behavior." Pet. App. 39a (quoting *Barboza v. New Form, Inc.*, 545 F.3d 702, 708 (9th Cir. 2008)).

Finally, the bankruptcy court concluded that MarketGraphics could not establish issue preclusion based on any of the common-law claims, because the August 2013 judgment "set forth no undisputed facts or conclusions of law" on those counts. Pet. App. 40a. As a result, "any reference to these allegations in the [August 2013 judgment] were not essential to [the] judgment." *Id*.

4. The Sixth Circuit allowed a direct appeal and affirmed. Pet. App. 1a–29a.

a. The Sixth Circuit began by addressing the test for a "willful and malicious" injury under 11 U.S.C. § 523(a)(6). The court adopted a two-pronged approach, which treats "willful" and "malicious" as "separate elements for the courts to review," rather than "collaps[ing] the terms" into a unitary test, as some courts have done. Pet. App. 9a–15a. The two-pronged test, the court explained, "more squarely accords with customary rules of statutory interpretation": "The statute itself invokes two concepts—'willful' and 'malicious'—separated by the word 'and,' which ordinarily suggests that both terms must be satisfied to exempt a debt from discharge." Pet. App. 10a. And the Bankruptcy Code elsewhere describes a "willful *or* malicious injury" in the disjunctive. Pet. App. 11a (citing 11 U.S.C. § 1328(a)(4)). The Sixth Circuit further reasoned that a two-pronged test is appropriate because the terms "willful" and "malicious" "have separate meanings, and separate purposes." Pet. App. 11a. "Willful," the court explained, means "actual intent to cause injury." *Id*. By contrast, "malice" means a "conscious disregard of one's duties or without just cause or excuse." Pet. App. 13a.

While concluding that a two-pronged test is more faithful to the statutory text, the Sixth Circuit also recognized that the choice of approach would often not make a difference. Pet. App. 13a–14a. That is so because "in many cases, the same facts that support a finding of willful conduct under § 523(a)(6) will likewise support a finding that the debtor acted with malice." Pet. App. 14a.

As to the willfulness requirement, the Sixth Circuit reiterated circuit precedent on "how to measure [the debtor's] intent" to injure. Pet. App. 11a–12a. Noting that some circuits have articulated different approaches, the court explained that the Sixth Circuit "utilizes only a subjective standard, asking whether the debtor himself was motivated by a desire to inflict injury." Pet. App. 12a. That standard can be met by showing that "the debtor intended to cause harm or knew that harm was a substantially certain consequence of his or her behavior." *Id.* Although the inquiry is subjective, the court recognized that "[a] debtor need not actually admit his intent; intent may be inferred from the circumstances of the injury." *Id.*

b. Having articulated its test, the Sixth Circuit turned to address "whether the bankruptcy court was nevertheless precluded from applying that test" based on the August 2013 judgment. Pet. App. 15a. The court focused on the underlying judgment—rather than the factual record developed in the bankruptcy trial—because MarketGraphics's arguments regarding willfulness were limited to preclusion.

The Sixth Circuit agreed with the bankruptcy court that there was "no clear finding" in the August 2013 judgment that "David desired to cause the consequences of his act or believed that the injuries were

substantially certain to result from it, nor [were] there factual allegations in the underlying complaint to that effect." Pet. App. 18a (quotation marks omitted). In reaching that conclusion, the Sixth Circuit stressed that "[t]he record in the district court litigation was sparse" and "contain[ed] no findings concerning David's intent" beyond the four corners of the judgment. *Id.* Among other gaps, MarketGraphics had offered no evidence that "David participated in the creation and management of Realysis." *Id.* To the contrary, the record showed that, despite operating in David's name, Realysis of Memphis was located in Donald's home and in space that Donald rented, that Donald's computer stored all the data collected by Realysis, and that customers generally called Donald, not David. Pet. App. 19a. The record was also devoid of evidence that David had intended to infringe petitioner's copyrights: Indeed, defendants had maintained that the works were "neither trade secrets nor copyrighted and exists [sic] in the public domain." *Id.* (alteration in original). The Sixth Circuit found those omissions telling, because MarketGraphics had drafted the judgment and was on notice of a possible bankruptcy filing; yet it did not include findings regarding David's intent to cause injury. Pet App. 20a.

As to the legal effect of the 2013 judgment itself, the Sixth Circuit found no basis for issue preclusion. The court noted that treble damages under the TCPA are available for a "willful *or* knowing" violation, which meant that willfulness need not be proven. Pet. App. 21a (emphasis added). And a knowing violation would not satisfy section 523(a)(6), because it can be established based on what "a reasonable person would have known or would have had reason to know." Pet. App. 35a. In addition, the TCPA does not require

proof of "malicious" conduct. Pet. App. 23a–24a. Turning to the copyright count, the Sixth Circuit explained that the finding of "willful" infringement did not satisfy section 523(a)(6), because it "can be predicated upon merely reckless behavior." Pet. App. 25a. Finally, the court concluded that the August 2013 judgment was "too vague to carry preclusive effect" as to the common-law claims since "the district court did not even analyze those claims," and there was no way to tell which were associated with the compensatory-damages award. Pet. App. 26a.

REASONS FOR DENYING THE WRIT

The petition purports to identify (at 2) a "deep circuit split" on both questions presented, but the supposed circuit division is exaggerated and appears to consist primarily of semantic differences that do not affect outcomes. It is thus no coincidence that adopting MarketGraphics' preferred approach to both questions presented would not change the result, because the August 2013 judgment does not represent a "willful and malicious" injury under any conceivable standard. The Court should deny the petition.

I. The Purported Circuit Splits Identified By MarketGraphics Are Largely Illusory, And Its Preferred Approach Is An Outlier.

MarketGraphics claims to identify two separate circuit splits on the test for identifying a "willful and malicious injury" under 11 U.S.C. § 523(a)(6): first on the question of whether to employ an "objective" or "subjective" standard, and second on whether willfulness and maliciousness should be evaluated as distinct statutory requirements or collapsed into a unitary standard. MarketGraphics insists (at 2–3) that

these splits are both "deeply entrenched, and frequently outcome-determinative." But review of the cases does not support that assessment.

MarketGraphics also musters scant support for its preferred approach—which would not only collapse the "willfulness" and "maliciousness" requirements into a single standard, but also would allow a bankruptcy court to find a "willful" violation absent subjective intent. By MarketGraphic's own count (at 30), only one circuit (the Fifth) has endorsed its approach in a published, post-*Geiger* decision, and even that circuit has held that an honest mistake precludes a finding of intent under an objective test.

In short, there is no conflict between the circuits on either question presented that warrants this Court's review. That may explain why this Court has denied petitions for certiorari premised on supposed confusion regarding how to apply section 523(a)(6)'s "willful and malicious" injury requirement.[1] It should follow the same course here.

A. The Two Alleged Circuit Splits Identified By Petitioner Involve Primarily Semantic Differences, Not Substantive Ones.

Neither question presented implicates a division of circuit authority that is likely to drive outcomes. Rather, the petition is built on a "pseudo-conflict among circuits." *Jendusa-Nicolai*, 677 F.3d at 322–323.

1. Beginning with the first question, MarketGraphics insists that there is a clear division between circuits that require proof of the debtor's subjective

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[1] *See TKC Aerospace Inc. v. Muhs*, 140 S. Ct. 607 (2019); *Scott v. Metro. Health Corp.*, 574 U.S. 991 (2014).

intent to injure and circuits that employ an "objective" approach, which "does not require subjective desire or knowledge to cause injury." Pet. 34; *see* Pet. 14. Closer review shows that, despite the different labels, the two approaches substantially overlap in practice.

a. Courts that apply the "subjective approach" allow consideration of objective evidence to establish willfulness. In the decision below, for example, the Sixth Circuit emphasized that "[a] debtor need not actually admit his intent; *intent may be inferred from the circumstances of the injury*." Pet. App. 12a (emphasis added).[2] Other circuits that MarketGraphics categorizes as applying a "subjective" test likewise recognize that objective evidence showing that the debtor's conduct was substantially certain to cause injury may serve as compelling circumstantial evidence of subjective intent. *See, e.g.*, *In re Ormsby*, 591 F.3d 1199, 1207 (9th Cir. 2010) (concluding that the debtor "must have known" that injury was substantially certain based on circumstantial evidence); *In re Patch*, 526 F.3d 1176, 1183 (8th Cir. 2008) (evaluating whether the creditor's injuries were "so objectively life threatening" that it must have been "substantially certain" to the debtor that failing to seek medical assistance would result in death); *In re Dupre*, No. 99–2038, 2000 WL 1160447, at *2 (1st Cir. July 3, 2000) (reversing a bankruptcy decision authorizing

[2] An amicus brief filed in support of MarketGraphics acknowledges the role that objective circumstantial evidence may play under the Sixth Circuit's test. *See* CLLA Br. 11. Contrary to the brief's suggestion (*id.*), however, this does not represent an "exception" to the Sixth Circuit's own rule; it merely reflects the uncontroversial point that fact-finders "routinely determine intent from indirect, or 'circumstantial,' evidence." *United States v. Torres*, 894 F.3d 305, 311 (D.C. Cir. 2018).

discharge as clearly erroneous where the only "plausible inference" from the objective evidence was that the debtor knew funds were embezzled).

These decisions show that even in "subjective intent" circuits, courts do not regard objective evidence as out of bounds. To the contrary, courts recognize that "a debtor will have to deal with any direct or circumstantial evidence which would indicate that he must have had a substantially certain belief that his act would injure, notwithstanding any subjective denial of such knowledge." *In re Endicott*, 254 B.R. 471, 477 n.9 (Bankr. D. Idaho 2000).

On the flip side, courts that MarketGraphics associates with an "objective" test recognize that a debtor "who acts under an honest, but mistaken belief ... cannot be said to have intentionally caused injury." *In re McClendon*, 765 F.3d 501, 505 (5th Cir. 2014) (quotation marks omitted). Thus, although MarketGraphics asserts (at 17–18) that the Fifth Circuit applies an "objective substantial certainty test," MarketGraphics neglects to mention the Fifth Circuit's "honest mistake" exception. *See In re McClendon*, 765 F.3d at 504; *Miller v. J.D. Abrams, Inc.*, 156 F.3d 598, 606 (5th Cir. 1998). Courts within the Seventh Circuit have likewise held that when the debtor acts on the basis of a good-faith mistake, the resulting injury is not "willful and malicious." *See, e.g., In re Osvaldo Amaro*, No. AP 20-96021, 2020 WL 6929467, at *5 (Bankr. N.D. Ill. Sept. 11, 2020); *In re McVay*, 461 B.R. 735, 744 (Bankr. C.D. Ill. 2012).[3]

[3] As discussed below, p. 22, *infra*, MarketGraphics is mistaken in arguing that the Third Circuit has adopted an objective test.

The practical upshot is that the difference between a "subjective" and "objective" test for applying section 523(a)(6) appears to be one of emphasis rather than substance. *All* circuits recognize that evidence showing that a debtor's actions were objectively certain to cause harm may support a finding that the debtor intended to cause the injury. And *no* circuit holds that a debtor who honestly failed to appreciate that her conduct was substantially certain to cause harm can be characterized as having an "actual intent to cause injury." *Geiger*, 523 U.S. at 61.

b. The decisions identified by MarketGraphics (at 20–21) do not show that whether a court frames the test as objective or subjective actually drives any discharge decisions. Rather, in those cases, the outcome likely would be the same under either approach.

For example, in *In re Su*, 290 F.3d 1140 (2002), although the Ninth Circuit affirmed vacatur of a bankruptcy decision applying an objective approach, it made clear that on remand the "bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *Id.* at 1146 n.6. Similarly, in *In re Vollbracht*, 276 F. App'x 360 (5th Cir. 2007), the Fifth Circuit recognized that the record did not support the lower courts' judgment under either a subjective or objective approach, since the debtor "obviously intended some harm" and his "intentional punches were [] objectively, substantially certain to cause harm." *Id.* at 362; *see also In re Red*, 96 Fed. App'x 229, 231 (5th Cir. 2005) (relying on an objective test in a case where the debtor intentionally drove into a crowded bar during happy hour, but also noting the debtor's testimony admitting that this

action would inevitably cause catastrophic injuries or death).

2. The alleged circuit split on the second question presented is similarly exaggerated. Contrary to the petition's count, all but one of the circuits to address the question recognize that section 523(a)(6) imposes two requirements—that an injury be both "willful *and* malicious." And the unitary test adopted by the Fifth Circuit is practically indistinguishable from the two-prong test in application.

The petition asserts (at 24–27) that there is a split that pits five "unitary" circuits (the Third, Fourth, Fifth, Eighth, and Tenth), which require only "actual intent to cause injury," against six "two-prong" circuits (the First, Second, Sixth, Seventh, Ninth, and Eleventh), which require both "actual intent to cause injury" (willfulness) and conduct "in conscious disregard of one's duties or without just cause or excuse" (malice). But MarketGraphics's tally of the "unitary" circuits is inflated.

For example, although MarketGraphics puts the Third Circuit in its "unitary" column (at 26), it fails to identify any post-*Geiger* precedential decisions to support its position. In fact, lower courts within the Third Circuit have recently and repeatedly treated the two statutory requirements as distinct.[4]

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[4] *See, e.g., In re Tzabari*, No. 18-15854, 2020 WL 6817651, at *6 (Bankr. E.D. Pa. Nov. 4, 2020) ("'Willful' and 'malicious' are distinct elements."); *In re DiGiovanni*, 446 B.R. 709, 716 (Bankr. E.D. Pa. 2011) ("[T]he natural reading of this phrase suggests that the terms 'willful' and 'malicious' be treated as distinct elements, with separate meanings. Most, but not all, courts have so construed the statute in § 523(a)(6) nondischargeability proceedings."); *In re Jacobs*, 381 B.R. 128, 138 (Bankr. E.D. Pa. 2008)

Similarly, although MarketGraphics categorizes the Fourth Circuit as a "unitary" circuit, lower courts within that circuit read the same published decision cited by the petition (*TKC Aerospace Inc. v. Muhs*, 923 F.3d 377 (4th Cir.), cert. denied 140 S. Ct. 607 (2019)) in the *opposite* manner—*i.e.*, as holding that willfulness and maliciousness are separate elements that must both be proved.[5]

As to the Eighth and Tenth Circuits, MarketGraphics concedes (at 26–27) that those courts *do* define willfulness and maliciousness separately. And contrary to MarketGraphics's assertion (at 27), courts in both circuits treat those the elements as meaningfully distinct.[6]

That leaves the Fifth Circuit. Although that circuit does not formally treat malice as a separate element, it has made clear that "for an injury to be

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(emphasizing the "basic proposition that the statutory term 'willful and malicious' consists of two separate elements").

[5] *See, e.g.*, *In re Coley*, 609 B.R. 298, 311 (Bankr. E.D.N.C. 2019) ("[U]nder *TKC Aerospace* and *Geiger*, this court finds the willfulness element to be satisfied, but not the malice element.").

[6] *See, e.g.*, *In re Stage*, 321 B.R. 486, 492, 496 (B.A.P. 8th Cir. 2005) (noting that "[i]n the Eighth Circuit, the terms 'willful' and 'malicious' are two distinct elements," and reversing grant of summary judgment because prior "judgment … established that [debtor] acted willfully, but not maliciously"); *In re Riehm*, 615 B.R. 850, 858–66 (Bankr. D. Minn. 2020) (stressing that "[a] party attempting to invoke this exception [§ 523(a)(6)] must demonstrate by a preponderance of the evidence the two distinct elements of willfulness and malice"); *In re Smith*, 618 B.R. 901, 911, 912 (B.A.P. 10th Cir. 2020) (concluding that "proof of a 'willful and malicious injury' under § 523(a)(6) requires proof of two distinct elements — the injury must be both 'willful' and 'malicious'" (citation omitted)).

'willful and malicious' it must … not be sufficiently justified under the circumstances to render it not 'willful and malicious.'" *In re Vollbracht*, 276 F. App'x at 362; *see also In re Landrieu*, No. 09-10176, 2010 WL 971790, at *10 (Bankr. E.D. La. Mar. 11, 2010) (same). In other words, the Fifth Circuit's "unitary" test is not satisfied if the court finds that the injury was intentional, or willful, but nevertheless justified, or *not malicious*. The distinction between the Fifth Circuit's unitary test and the various permutations of the two-prong test employed by the other circuits is therefore "merely of academic importance." Pet. 31.[7]

B. A Clear Majority Of The Circuits Reject Petitioner's Standard.

To the extent the circuits' formulations for identifying a "willful and malicious" injury are meaningfully different, the position advanced by MarketGraphics is a significant outlier. MarketGraphics obscures this by counting up the circuits for its two questions presented separately—even as it argues (at 33) that the two questions are inextricably linked. According to

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[7] Contrary to MarketGraphics' argument (at 31–32), *In re Calvert*, 913 F.3d 697 (7th Cir. 2019) does not show a practical distinction between a two-part and a unitary test. In that case, although the debtor had conceded willfulness in a two-prong jurisdiction, the court found the underlying decision insufficient on the malice element because it "lack[ed] specificity *on the issue of [the debtor's] intent*"—the judgment had only established a *prima facie* case of antiunion discrimination, and said nothing further on the debtor's mental state. *Calvert*, 913 F.3d at 700–02 (emphasis added). Although characterized as an issue of malice, it is unlikely that such a judgment could satisfy section 523(a)(6) under any test, since all courts agree that the statute requires proof of "acts done with the actual intent to cause injury." *Miller*, 156 F.3d at 606 (quoting *Geiger*, 523 U.S. at 61).

MarketGraphics's own summary (at 30), the approach it advocates—a "unitary" *and* "objective" test—has received little support.

MarketGraphics identifies (at 25, 30) five circuits that it believes apply a unitary test: the Third, Fourth, Fifth, Eighth, and Tenth Circuits. As discussed, pp. 18–20, *supra*, that number is substantially inflated, since only the Fifth Circuit even purports to apply such a test. But even using MarketGraphics's count, it would not follow that those five circuits favor MarketGraphics's ultimate position, since MarketGraphics does not suggest that reading the malice requirement out of the statute would result in reversal here. Rather, its argument depends, at a minimum, on also adopting a broad interpretation of willfulness that would be satisfied if there is objective evidence that the debtor's actions were substantially certain to cause harm. *See* Pet. 34–38.[8]

MarketGraphics identifies just two circuits that it believes fit both of its criteria: the Third and Fifth Circuits. *See* Pet. 30. But as noted, p. 18, *supra*, the only published Third Circuit opinion that MarketGraphics cites *predates Geiger*, and it did not address the question presented here. *See* Pet. 18 (citing *In re Conte*, 33 F.3d 303 (3d Cir. 1994)). And contrary to MarketGraphics's characterization, courts in the Third Circuit have applied a two-pronged rather than a unitary test in post-*Geiger* decisions. *See* p. 18, *supra*. In addition, courts within the Third Circuit also report that most "bankruptcy courts in th[e] circuit have employed a *subjective* standard." *In re Tzabari*, No. 18-

[8] As discussed below, *see* Part II.B, *infra*, MarketGraphics could not defeat discharge here even with favorable rulings on both questions presented.

15854, 2020 WL 6817651, at *10 n.6 (Bankr. E.D. Pa. Nov. 4, 2020) (emphasis added). MarketGraphics's description of Third Circuit precedent is thus doubly inaccurate: The weight of authority suggests that it is a two-pronged and subjective jurisdiction, not a unitary and objective one.

Only the Fifth Circuit remains as an arguable proponent of MarketGraphics's unitary and objective approach. As discussed, p. 16, *supra*, it is questionable whether the Fifth Circuit goes as far as MarketGraphics advocates, since the Fifth Circuit (1) builds a maliciousness requirement into its "unitary" test, and (2) recognizes that a debtor "who acts under an honest, but mistaken belief cannot be said to have intentionally caused injury," *In re McClendon*, 765 F.3d at 505 (quotation marks and ellipses omitted). But even if the Fifth Circuit follows MarketGraphics's preferred test, it would be an outlier position with insufficient practical significance to justify review.

II. This Case Is A Poor Vehicle To Address Either Question Presented.

This case is a poor vehicle to resolve either question presented. MarketGraphics did not raise the first question presented below, and neither question has any prospect of changing the outcome.

A. MarketGraphics Did Not Raise The First Question Presented Below.

MarketGraphics waived its argument under the first questions presented. Up until its petition for certiorari, MarketGraphics had never argued for an "objective" approach to determining whether an injury is "willful and malicious." To the contrary, in filings below, MarketGraphics affirmatively embraced a

subjective standard.[9] Nor was the issue passed upon by the Sixth Circuit—the court merely referenced circuit precedent on the issue, Pet. App. 12a, which MarketGraphics did not question in merits briefing or in its rehearing petition. Because this is "a court of 'review,' not of 'first view,'" *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2056 (2019) (quotation marks omitted), the Court should not consider this new argument here. *See, e.g.*, *Chaidez v. United States*, 568 U.S. 342, 357 n.16 (2010) (declining to consider argument that was not "adequately raise[d] … in the lower courts"); *Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019) (dismissing petition as improvidently granted in light of waiver).

The second question presented was raised and passed upon below—although MarketGraphics acknowledges that it initially argued *in favor* of a two-part test for showing willfulness and malice, contradicting the position it is taking now.[10]

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[9] *See MarketGraphics Research Grp., Inc. v. Berge*, No. 3:13-ap-90400 (Bankr. M.D. Tenn.), ECF No. 52 at 14 (first summary judgment motion in bankruptcy court), ECF No. 106 at 6–7 (pretrial brief in bankruptcy court), ECF No. 128 at 2 (renewed motion for summary judgment in bankruptcy court), ECF No. 137 at 4 (reply in support of renewed motion for summary judgment in bankruptcy court); *MarketGraphics Research Grp., Inc. v. Berge*, No. 3:16-cv-1191 (M.D. Tenn.), ECF No. 15 at 21–22 (opening brief in district court), ECF No. 20 at 10–11 (reply brief to district court); *MarketGraphics Research Grp., Inc. v. Berge*, No. 18-6177 (6th Cir.), ECF No. 10 at 24–25 (opening brief in Sixth Circuit), ECF No. 14 at 12 (reply brief in Sixth Circuit).

[10] *See, e.g.*, *MarketGraphics Research Grp., Inc. v. Berge*, No. 18-6177 (6th Cir.), ECF No. 23 at 9 n.1 (noting in petition for rehearing that "[t]he parties agreed below that [section 523(a)(6)] imposed a binary test" and that "[t]he question over the nature of

(MarketGraphics reversed course to defend the district court's decision adopting a unitary standard.) But as MarketGraphics argues (at 25), the two questions presented "cannot coherently be resolved" separately. MarketGraphics's failure to raise the argument at issue in Question 1 below should therefore also foreclose review of Question 2.

B. MarketGraphics Cannot Prevail Under Its Preferred Test.

1. This Court's resolution of whether section 523(a)(6) imposes a two-prong or unitary test would not impact whether respondent's debt is dischargeable. That is known definitively here, because MarketGraphics *already had* a chance to litigate under a unitary test and it still lost.

Recall that in the first appeal in this case, the district court embraced the unitary test that MarketGraphics now defends, concluding that the bankruptcy court should "apply one single test for whether an injury was 'willful and malicious' rather than considering 'willful and malicious' as separate elements." Pet. App. 48a. But far from suggesting that the choice of test could make a difference here, the district court "affirmed" the bankruptcy court's holding, concluding that its factual findings regarding David Berge's limited involvement in his father's business activities precluded a finding of a willful and malicious injury under the unitary standard. Pet. App. 50a. The district court remanded only to allow reconsideration of MarketGraphics's issue preclusion argument under the unitary standard. Pet. App. 50a–51a. The

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the test arose only when the District Court interjected it sua sponte").

bankruptcy court then conducted that review, and MarketGraphics again lost. Pet. App. 30a–40a.

Seeking to clarify its precedent, the Sixth Circuit held that the bankruptcy court had been right the first time, because section 523(a)(6) imposes a two-part test—an injury must be both willful and malicious. Pet. App. 9a–15a. But the court did not suggest that the outcome turned on this choice. To the contrary, the Sixth Circuit concluded that the August 2013 judgment did not establish that MarketGraphics's injury was *either* willful *or* malicious, demonstrating that MarketGraphics cannot prevail under either a unitary or a two-prong test. Pet. App. 18a–26a.

Notably, MarketGraphics never suggests that the Sixth Circuit's use of a two-part test was outcome-determinative on its own; rather, MarketGraphics argues only (at 33) that adopting a unitary test would allow it to overcome the Sixth Circuit's ruling on malice and turn the focus to its use of a subjective test for willfulness. But as discussed below, any purported distinction between a subjective and an objective test for willfulness also made no difference here.

2. The Sixth Circuit's decision makes clear that MarketGraphics cannot show that David Berge engaged in "willful" conduct under either an objective or subjective standard. There is no reason for this Court to review an issue that cannot affect the outcome.

a. Analysis here is simplified by MarketGraphics's strategic decision below to rely on issue preclusion in attempting to satisfy section 523(a)(6) under a unitary standard.[11] And because "[t]he

[11] MarketGraphics argued based on the trial record that David Berge's conduct qualified as malicious, to the extent a separate

record" in the underlying litigation was so "sparse," Pet. App. 18a, preclusion turns on what was actually and necessarily decided in the August 2013 judgment itself.

The candidates for preclusion are limited. The Sixth Circuit concluded that preclusion could not apply based on MarketGraphics's common-law claims, because "the underlying judgment is too vague to carry preclusive effect" and "the district court did not even analyze those claims." Pet. App. 26a. MarketGraphics does not appear to challenge that highly fact-bound determination, which has nothing to do with the choice of an objective or a subjective test. That leaves only the judgment for willful copyright infringement and a "willful or knowing" TCPA violation. Pet. App. 20a. But those judgments do not establish a "willful or malicious" injury under section 523(a)(6), even employing MarketGraphics's preferred approach, because neither violation requires showing an objective substantial certainty of injury.

Start with the claim for willful copyright infringement, which the Sixth Circuit explained can be established when a defendant "knowingly *or recklessly* copies another's work." Pet. App. 24a (emphasis added) (citing *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 584–85 (6th Cir. 2007)). The Sixth Circuit reasoned that because "recklessness can satisfy the willfulness requirement" it means that "a copyright-infringement judgment does not always prove subjective intent to harm." Pet. App. 24a. Although the Sixth Circuit framed the point in terms of

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malice requirement exists. It also made a judicial estoppel argument, which it has not renewed here.

subjective intent, the same reasoning also precludes a finding of willfulness under an objective standard. That is because, as MarketGraphics *concedes* (at 35), merely reckless behavior does *not* satisfy its "objective substantial certainty" test.

MarketGraphics's preclusion theory based on the TCPA violation likewise falls short. MarketGraphics contends (at 23–24) that the standard for a "willful or knowing" TCPA violation "mirrors the objective standard almost point-for-point," but that is incorrect. As the Sixth Circuit observed, "[p]roving 'knowing' conduct under the TCPA … merely requires showing that a reasonable person, in the circumstance in question, would have known *or had reason to know about the act*." Pet. App. 22a (emphasis added).[12] "A reason to know" standard sounds in recklessness or even negligence. *Cf. Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 770 (2011) ("[A] negligent defendant is one who should have known of a similar risk but, in fact, did not."). It does not satisfy the much more demanding "substantial certainty" requirement that MarketGraphics defends. *See* Pet. 30.

Moreover, as the bankruptcy court noted, "courts have interpreted the 'willful' requirement" for a TCPA violation as requiring "nothing more than intentional" *conduct*, meaning only that "the debtor intended to commit the acts" without regard to whether the debtor also "intended his actions to bring about the harm suffered." Pet. App. 35a–36a. *See, e.g.*, *In re Crownover*,

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[12] *See* Tenn. Code Ann. § 47-18-103(11) ("knowingly" in the TCPA means "actual awareness of the falsity or deception, but actual awareness may be inferred where objective manifestations indicate that a reasonable person would have known or would have had reason to know of the falsity or deception").

417 B.R. at 58 (holding that a willful TCPA violation did not preclusively establish willfulness under section 523(a)(6), because willfulness under the TCPA only requires intent to commit acts constituting the violation). There can be no question that a finding of "willfulness" under this state-law standard does not satisfy section 523(a)(6). *See Geiger*, 523 U.S. at 61 (explaining that 11 U.S.C. § 523(a)(6) contemplates "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury").

b. Stepping outside its preclusion arguments, MarketGraphics also contends (at 23) that "[t]he record contains ample evidence that David's conduct was 'objectively substantially certain'" to cause injury. MarketGraphics did not make this argument to the Sixth Circuit, which is reason enough to reject it. *See* pp. 22–24, *supra*. In addition, MarketGraphics's argument is irreconcilable with the bankruptcy court's unchallenged factual findings, which accepted David Berge's "very credible" testimony. Pet App. 58a. That testimony established that David's father formed and ran the business, and was responsible for correspondence and marketing materials sent out under David's name—much of which David did not know about until after the fact. Pet. App. 53a, 56a, 101a–103a. The Sixth Circuit likewise recognized that the record from the underlying litigation contained "no indication that … David participated in the creation or Management of Realysis" or "knew that Realysis of Memphis was created in his name." Pet. App. 18a.

Given this record, there is no basis to conclude that David Berge's *own* conduct was objectively substantially certain to cause harm to MarketGraphics, as opposed to being merely reckless or negligent. At worst,

he operated under an "honest, but mistaken belief" that his father's business activities were lawful, and he thus "cannot be said to have intentionally caused injury." *In re McClendon*, 765 at 505 (quotation marks omitted).

III. The Sixth Circuit's Decision Is Correct.

MarketGraphics previews (at 34–38) its merits arguments for the two questions presented, but those arguments provide no basis to grant review. In fact, the Sixth Circuit's decision finds ample support from all the relevant considerations: this Court's precedent, the statute's text and context, "the long-standing principle that 'exceptions to discharge should be confined to those plainly expressed,'" *Bullock*, 569 U.S. at 275 (quoting *Geiger*, 523 U.S. at 62), and the Bankruptcy Code's purpose of affording a "fresh start to the honest but unfortunate debtor," *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (citation and quotation marks omitted).

1. The Sixth Circuit's subjective standard for intent accords with *Geiger* and the background principles of tort law informing that decision. *Geiger* held that section 523(a)(6) requires demonstrating "actual intent to cause injury," and does not contemplate "unintentionally inflicted injuries." 523 U.S. at 61. In reaching that conclusion, the Court analogized section 523(a)(6) to "the category 'intentional torts,' as distinguished from negligent or reckless torts," particularly as set forth in the Second Restatement of Torts. 523 U.S. at 61–62. The Second Restatement defines the "intent" necessary for an intentional tort as either a debtor's "desir[ing] to bring about [the] intended" consequences, or when "the [debtor] knows that the consequences are certain, or substantially certain, to

result from his act, and still goes ahead." Restatement (Second) of Torts § 8A (1965). The standard is subjective: The debtor must *intend* injury or *know* it will almost certainly be caused.

The common-law principles that MarketGraphics invokes (at 34–35) do not support its position. The general rule it references merely allowed courts to "rely[] on circumstantial evidence" to "infer that the actor's state of mind was the same as a reasonable person's state of mind would have been" *if* the factfinder is "*unwilling* to credit the statement 'I didn't mean to do it.'" W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 8 (5th ed. 1984) (emphasis added). In other words, a factfinder may look to indirect evidence of intent if the direct evidence is not credible (or perhaps is simply unavailable). The decision below applying a "subjective" approach specifically approved this use of circumstantial evidence. Pet. App. 12a.

To the extent MarketGraphics advocates for a standard that would require *automatically* crediting objective evidence (at 34), it goes well beyond the common law and even the circuits that it claims are on its side of the purported split. As discussed above, although the Fifth Circuit applies what it describes as an "objective" test, the circuit recognizes that a debtor "who acts under an honest, but mistaken belief ... cannot be said to have intentionally caused injury." *In re McClendon*, 765 F.3d at 505. If MarketGraphics would also recognize an "honest mistake" exception to the objective test, it is not clear that its approach differs meaningfully from the decision below. *See* pp. 20–22, *supra*. But if MarketGraphics would treat evidence of an honest mistake as legally irrelevant, then

its approach becomes indistinguishable from the kind of recklessness or negligence standard that this Court rejected in *Geiger*, 523 U.S. at 61–62.

2. The Sixth Circuit's two-pronged test flows directly from the statute's plain text. Section 523(a)(6) requires a "willful *and* malicious injury." Congress chose "and," not "or"—and when "and" is used as a conjunction joining two concepts, it normally means "not one or the other, but both." *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930); 1A Norman J. Singer, Statutes and Statutory Construction § 21.14 at 177–79 (7th ed. 2009) ("Statutory phrases separated by the word 'and' are usually interpreted in the conjunctive."). Congress understood the difference between these conjunctions and used them accordingly. Whereas section 523(a)(6) employs "and," a number of its statutory neighbors are written in the disjunctive.[13] Section 1328(a)(4) in Chapter 13 of the Bankruptcy Code likewise speaks of non-dischargeable debts for a "willful

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[13] *See, e.g.*, 11 U.S.C. § 523(a)(4) (debt "for fraud *or* defalcation while acting in a fiduciary capacity, embezzlement, *or* larceny" (emphasis added)); *id.* § 523(a)(9) (debt "for death *or* personal injury caused by the debtor's operation of a motor vehicle, vessel, *or* aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, *or* another substance" (emphasis added)); *id.* § 523(a)(11) (debt "provided in any final judgment, unreviewable order, *or* consent order *or* decree entered in any court of the United States *or* of any State, issued by a Federal depository institutions regulatory agency, *or* contained in any settlement agreement entered into by the debtor, arising from any act of fraud *or* defalcation while acting in a fiduciary capacity committed with respect to any depository institution *or* insured credit union" (emphasis added)); *id.* § 523(a)(12) (debt "for malicious *or* reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution" (emphasis added)).

or malicious injury." 11 U.S.C. § 1328(a)(4) (emphasis added). MarketGraphics's reading of the statute ignores these carefully chosen textual differences.

MarketGraphics's interpretation would also conflate two terms, "willful" and "malicious," that traditionally have distinct meanings. A "willful" injury usually means one inflicted intentionally, whereas a "malicious" injury normally is one inflicted without justification. *Compare* "Willful," Black's Law Dictionary (11th ed. 2019) (first definition) ("Voluntary and intentional, *but not necessarily malicious*." (emphasis added)) *with* "Malice," *id.* ("The intent, *without justification or excuse*, to commit a wrongful act." (emphasis added)). The unitary test that MarketGraphics proposes, which focuses only on intent to cause injury (Pet. 36–37), effectively writes "malicious" out of the statute—seemingly precluding discharge of a debt incurred for an injury committed intentionally, but with justification, as in the case of self-defense. *See, e.g., In re Riehm*, 615 B.R. 850, 861–62 (D. Minn. 2020) (stating that "a claim of self-defense amounts to an admission by the debtor that the injury was willfully caused," while also recognizing that "acts properly taken in self-defense can constitute a justifiable excuse and negate malice").

In short, text, statutory structure, and governing legal principles all support the Sixth Circuit's reading of section 523(a)(6), and there is no reason for this Court to revisit the issue.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted.

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