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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

For more than two decades, circuits have struggled to interpret the "willful and malicious injury" exception in light of this Court's guidance in *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998). The circuits acknowledge they are divided. That division has split them into four separate camps over two different, frequently recurring questions. And in the decision below, the Sixth Circuit weighed in on this "deep circuit split," Pet. App. 10a, took a position on both questions, and relied on those positions to deny MarketGraphics relief for David Berge's yearlong campaign to plunder its business and steal its clientele.

Berge makes no serious effort to deny the existence of these splits; instead, he offers a series of increasingly improbable arguments to wave them away. Berge contends that there is no difference between an "objective" approach and a "subjective" one. Opp. 14-18. But as eight circuits have recognized, there is a self-evident and often outcome-determinative distinction between requiring proof of a debtor's *state of mind* and requiring proof of an *objective substantial certainty* of injury. Similarly, Berge argues that all courts agree the terms "willful" and "malicious" impose the same, two-pronged test. Opp. 18-20. But Berge offers nothing to disprove the proposition that six circuits hold that lack of "just cause or excuse" is an element of 11 U.SC. § 523(a)(6), while five hold that it is not.

And once Berge's arguments against the split are rejected, little is left of his case opposing certiorari. Berge offers only the most cursory defense of the Sixth Circuit's position on the merits. *See* Opp. 29-32. And he wrongly claims that MarketGraphics waived a question on which the Sixth Circuit expressly passed below, and that Berge is guaranteed to succeed under a test no court has yet applied to this case.

The case for certiorari is not complicated. The splits are established and intractable. The disarray is highly costly for courts and litigants. *See* Br. of Amicus Curiae Commercial Law League of Am. (CLLA) 3-14. And this case squarely presents an opportunity for this Court to bring the confusion to an end. The writ should be granted, and the judgment below should be reversed.

ARGUMENT

I. THE CIRCUITS ARE SPLIT ON BOTH QUESTIONS PRESENTED.

Berge faces a steep climb in his effort to contest the circuit split. Numerous courts, treatises, and the panel below have all identified a "deep circuit split" on both questions presented. Pet. App. 10a; *see* Pet. 13, 20, 24. Berge pins his hopes on a Seventh Circuit opinion that speculated—based on "[its] research"—that the circuit split "probably" does not "generate different outcomes." *Jendusa-Nicolai* v. *Larsen*, 677 F.3d 320, 322-323 (7th Cir. 2012). But he neglects to mention that the Seventh Circuit later thought better of that hypothesis and joined its sister circuits in taking a side on both halves of the split. *See First Weber Grp., Inc.* v. *Horsfall*, 738 F.3d 767, 775 (7th Cir. 2013) (adopting the "definition of maliciousness" used by "the Second, Sixth, Ninth, and Eleventh Circuits"); *Gerard* v. *Gerard*, 780 F.3d 806, 811 (7th Cir. 2015) (joining the Third and Fifth Circuits in holding that "willfulness is judged by an objective standard").

Thus, if Berge is to show that the circuit split is illusory, he must demonstrate that two decades' worth of legal debate and dozens of opinions have been based on a mirage. Unsurprisingly, he cannot.

1. Berge does not dispute that the circuits are split on whether a "willful and malicious injury" requires subjective intent to injure. *See* Opp. 15-17. He tries to diminish the importance of that disagreement by contending that, in practice, "subjective" and "objective" mean largely the same thing. None of his arguments support that improbable thesis.

Berge first notes that "[c]ourts that apply the 'subjective approach' allow *consideration* of objective *evidence*" to demonstrate subjective intent to injure. Opp. 15 (emphases added). True, but irrelevant. As Berge's cases illustrate, courts applying the subjective approach consider objective evidence only if it establishes "what was actually going through the mind of the debtor at the time he acted." *Carrillo* v. *Su (In re Su)*, 290 F.3d 1140, 1146 n.6 (9th Cir. 2002); *see e.g.*, *Haemonetics Corp.* v. *Dupre (In re Dupre)*, 229 F.3d 1133 (Table), 2000 WL 1160447, at *2 (1st Cir. 2000) (per curiam) (debtor's "willful destruction of evidence" and "untruthful testimony * * * establish[ed] that she knew the illicit source of the funds"); *Ormsby* v. *First Am. Title Co. of Nev. (In re Ormsby)*, 591 F.3d 1199, 1207 (9th Cir. 2010) (because debtor "paid for" products, "he was necessarily aware that his use of [them] * * * had an economic value"). Courts that apply the objective approach, by contrast, deem an "objective substantial certainty of injury" sufficient in and of itself to satisfy § 523(a)(6), *even if* it "cannot establish [the debtor]'s subjective intent." *Red* v. *Baum (In re Red)*, 96 F. App'x 229, 231 (5th Cir. 2004) (per curiam).

Trying the opposite tack, Berge asserts that courts applying the objective test will not deem an injury willful if the debtor "act[ed] under an honest, but mistaken belief." Opp. 16 (citation omitted). As an initial matter, Berge identifies only one circuit—the Fifth—that has adopted this limit. The other precedents Berge cites are bankruptcy-court cases, which relied on a debtor's good-faith beliefs only as a factor in

assessing malice, not willfulness.[1] In any event, the Fifth Circuit's honest-mistake exception addresses a question distinct from the one presented here: It comes into play when a debtor made a mistake about the underlying "fact[s]," not when he claims to lack a subjective understanding of the "probability of injury." *Miller* v. *J.D. Abrams Inc. (In re Miller)*, 156 F.3d 598, 606 (5th Cir. 1998). Contrary to Berge's suggestion (Opp. 30), that exception would not help him here, since there is no dispute that he understood the relevant facts—namely, the existence of a non-compete agreement and his own efforts to poach MarketGraphics's clients—correctly. Pet. 6-7.

2. Berge also fails to whittle down the split on whether § 523(a)(6) requires a separate showing that the debtor acted without "just cause or excuse."

Berge does not contest that the Fourth, Eighth, and Tenth Circuits have held that § 532(a)(6) requires only proof of intent to injure. Berge cherry-picks a handful of bankruptcy-court decisions that have described "willful" and "malicious" as "separate elements." Opp. 19 & nn.5-6. But he ignores that courts went on to define the elements—as required by circuit precedent, Pet. 26-27—as requiring *only* intent to injure, without demanding any separate showing of lack of just cause or excuse. *See, e.g.*, *DIRECTV, LLC* v. *Coley (In re*

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[1] *See Haliburton Energy Servs., Inc.* v. *McVay (In re McVay)*, 461 B.R. 735, 744 (Bankr. C.D. Ill. 2012) (debtor "acted with a valid justification or excuse" because he lacked "motive or reason to harm"); *Bailey* v. *Amaro (In re Amaro)*, Adv. No. 20-96021, 2020 WL 6929467, at *4-5 (Bankr. N.D. Ill. Sept. 11, 2020) (finding that debtor's "good-faith belief" established absence of "malicious injury").

Coley), 609 B.R. 298, 311 (Bankr. E.D.N.C. 2019) (defining "willful" as requiring "a deliberate or intentional injury" and "malicious" as requiring a "substantial certainty" or "subjective motive to cause harm" (citation omitted)); *Osborne* v. *Stage (In re Stage)*, 321 B.R. 486, 492-493 (B.A.P. 8th Cir. 2005) (same).

Berge also questions (Opp. 18, 21) whether the Third Circuit still adheres to the objective, unitary approach articulated in *Conte* v. *Gautam (In re Conte*), 33 F.3d 303 (3d Cir. 1994). There is no mystery: The Third Circuit has repeatedly applied *Conte*'s holding over the last two decades, *see* Pet. 18 (citing cases), as have bankruptcy courts in that circuit, *see, e.g.*, *Viener* v. *Jacobs (In re Jacobs)*, 381 B.R. 128, 137 (Bankr. E.D. Pa. 2008), *cited in* Opp. 18 n.4 (explaining that *Conte* established "an objective test" requiring only that "the actor purposefully inflicted the injury or acted with substantial certainty that injury would result" (citation omitted)).

Finally, Berge acknowledges that the Fifth Circuit adopted a unitary standard in *In re Miller*, but suggests it subsequently abrogated that approach in *Berry* v. *Vollbracht (In re Vollbracht)*, 276 F. App'x 360 (5th Cir. 2007) (per curiam). That cannot be right. One Fifth Circuit panel lacks the power to overrule another, especially in an unpublished opinion. And numerous cases since *Vollbracht* have held that § 523(a)(6) requires only an objective showing of intent, without demanding any separate element of "sufficient justification." *See, e.g.*, *McClendon* v. *Springfield (In re McClendon)*, 765 F.3d 501, 505 (5th Cir. 2014); *Goaz* v. *Rolex Watch U.S.A., Inc. (In re*

Goaz), 559 F. App'x 377, 380-381 (5th Cir. 2014) (per curiam).

3. As a last-ditch effort, Berge asserts that Market-Graphics's position is a "significant outlier" because only two circuits have adopted both an objective and a unitary standard. Opp. 20. But no more than a handful of circuits have agreed on *any* approach—Berge's position, for instance, is favored by only three circuits, and has been rejected in part or in whole by at least six. *See* Pet. 30. The circuits' disagreement on this question is pervasive, and it is time for this Court to step in and resolve it.[2]

II. THE SIXTH CIRCUIT ANSWERED BOTH QUESTIONS INCORRECTLY.

Berge devotes scant attention to defending the Sixth Circuit's position on the merits. A full airing of these issues of course must wait for plenary review, but Berge's cursory arguments reflect the weakness of his position on both splits.

1. Berge does not identify any precedential basis for the subjective standard he advocates. Skipping past a century of this Court's cases, he notes that *Geiger* held that § 523(a)(6) "does not contemplate 'unintentionally inflicted injuries.'" Opp. 29 (quoting *Geiger*,

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[2] Contrary to Berge's suggestion (Opp. 14 & n.1), this Court has not previously had an opportunity to resolve the questions presented. The underlying opinions in *TKC Aerospace Inc.* v. *Muhs (In re Muhs*), 923 F.3d 377 (4th Cir. 2019), and *Metropolitan Health Corp.* v. *Scott*, 564 F. App'x 698 (4th Cir. 2014) (per curiam) did not rest on (or even mention) the distinction between subjective and objective intent. And neither petition sought review of the split between a unitary and two-pronged test.

523 U.S. at 61). But the very question at issue here is what it means for an injury to be "intentional." And as this Court made clear in *McIntyre* v. *Kavanaugh*—a case Berge neither cites nor attempts to reconcile with his view—it is sufficient that an act "necessarily causes injury." 242 U.S. 138, 141 (1916) (citation omitted).

Berge's effort to ground his view in the common law is equally frail. He claims that, at common law, intent may only be "infer[red]" from the fact that injury is substantially certain. Opp. 30 (citation omitted). But that "inference" rule—which is itself more generous than the Sixth Circuit's standard, *see* Pet. App. 22a-23a (declining to "presume intent to injure")—comes from a treatise published *86 years* after § 523(a)(6)'s enactment. Authorities closer in time to the enactment of § 523(a)(6) indicate that substantial certainty was, at the time, considered legally sufficient to establish intent. *See* Pet. 34-35.

2. Berge also fails to identify any legal basis for the requirement that an act be "without just cause or excuse." Berge identifies no precedent supporting that interpretation of § 523(a)(6). Citing Black's Law Dictionary, Berge asserts that "a 'malicious' injury normally is one inflicted without justification." Opp. 32. But Berge draws that definition from the entry for the term "malice." *Id.* When the dictionary defines the term "malicious"—the actual word used in the statute—it gives precisely the meaning we advocate: "[s]ubstantially certain to cause injury." *Malicious*, Black's Law Dictionary (11th ed. 2019).

Berge also suggests that "malicious" must mean something different than "willful" because the statute

separates those words with the conjunction "and." But "the presumption against surplusage does not apply to doublets"; indeed, "[t]he U.S. Code is replete with meaning-reinforcing redundancies," from "null and void" to "free and clear." *Doe* v. *Boland*, 698 F.3d 877, 881 (6th Cir. 2012) (Sutton, J.). And as Berge's own cases indicate, courts can give the term "willful" and "malicious" distinct meanings without inventing an atextual "just cause or excuse" requirement. *See supra* pp. 5-6.

III. THIS CASE PRESENTS A PERFECT VEHICLE TO RESOLVE BOTH SPLITS.

Lacking a viable argument on the split or the merits, Berge is left to argue that this case is a poor vehicle. Here, too, he faces an uphill climb. Berge does not dispute that the Sixth Circuit passed on both questions presented. Opp. 10-11. Nor does he contest that the panel relied on its resolution of those questions as the basis for its decision. Opp. 11-13, 25. That all but settles the vehicle question: A contrary decision from this Court would, at minimum, require vacatur and a remand so that the Sixth Circuit could redo its analysis under the proper test.

Berge attacks this straightforward conclusion on two grounds, but neither has merit.

1. Berge suggests that the first question presented is not properly before the Court because MarketGraphics never argued that § 523(a)(6) imposes an objective rather than subjective standard. Opp. 22. This argument stumbles out of the gate: A question is properly before the Court if it was "pressed *or* passed upon below," *United States* v. *Williams*, 504 U.S. 36, 42-43 (1992) (citation omitted), and as Berge concedes,

the first question presented was passed on by the Sixth Circuit, *see* Opp. 11. It is thus immaterial whether MarketGraphics pressed that argument. *See Williams*, 504 U.S. at 41-43.

Furthermore, forfeiture applies to claims, not arguments. *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). MarketGraphics claimed below that Berge inflicted willful and malicious injury under § 523(a)(6). MarketGraphics thus remains free to raise any "argument in support of that claim," *id.* at 534, including that a "willful and malicious injury" need not be subjectively intended. MarketGraphics had good reason not to make that argument a focus of its case in the Sixth Circuit: "circuit precedent" had already "adopt[ed] the subjective approach." Pet. App. 12a (citing *Markowitz* v. *Campbell (In re Markowitz)*, 190 F.3d 455, 464 (6th Cir. 1999)).

2. Berge also argues that this case is a poor vehicle because, in his view, he would prevail even under an objective, unitary standard. Opp. 24-29. But "[w]hether the case might yield the same or a different result" under the correct standard is "a matter the court of appeals may consider on remand." *Rodriguez* v. *FDIC*, 140 S. Ct. 713, 718 (2020). It poses no impediment to this Court's resolution of the interpretive questions at stake. *See, e.g.*, *id.*; *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 194 (2007).

Moreover, Berge's confidence about the outcome of those remand proceedings is misplaced. Berge claims that MarketGraphics "*already had* a chance to litigate under a unitary test" in bankruptcy court "and it still lost." Opp. 24. No. The bankruptcy court ruled against MarketGraphics on the basis of a unitary,

subjective test: It held that Berge did not "desire[]" or "believe[]" that his conduct would cause injury. Pet. App. 37a; *see id.* at 58a (same). No court has yet considered how this case should come out under a unitary, *objective* test.

Berge also suggests that, on remand, MarketGraphics would be forced to rely solely "on issue preclusion" to prevail. Opp. 25. Wrong again. The bankruptcy court held an entire trial to determine whether, irrespective of the preclusive effect of the prior judgment, Berge's conduct satisfied § 523(a)(6). Pet. App. 7a, 54a, 94a-114a. Berge relied on those trial findings in the Sixth Circuit. *See* Opp. 25 n.11 (conceding that MarketGraphics made arguments "based on the trial record"). And the Sixth Circuit ruled on them: It held that "[n]othing in *the record of these proceedings* or the proceedings for the underlying judgment" established a willful and malicious injury under its two-pronged, subjective test. Pet. App. 3a (emphasis added).

MarketGraphics thus remains free to argue that the trial record establishes that Berge's conduct was objectively substantially certain to cause injury. And on that issue, Berge has no response. He simply points (Opp. 28) to the bankruptcy court's finding that Berge was "very credible" in testifying that that he "was merely a son who worked for his father and believed what his father told him." Pet. App. 58a. But while the sincerity of Berge's intentions might have been relevant under a subjective inquiry, *id.* (holding that this testimony established an absence of "malicious intent"), it is irrelevant under the objective inquiry. And the evidence adduced at trial—that Berge sought

to poach MarketGraphics's clients in open defiance of a non-compete agreement—makes plain that his conduct satisfies that test. Pet. 23.

The underlying judgment points to the same conclusion. In its judgment against Berge—which Berge does not dispute is entitled to preclusive effect—the district court found that Berge "act[ed] in active concert with" his father; that his business undertakings were "inherently wrongful"; and that his activities did not "implicate any public interest." Pet. App. 75a-76a. The court then awarded MarketGraphics treble damages because Berge "willfully or knowingly violated the Tennessee Consumer Protection Act" (TCPA), *id.* at 69a—a judgment that necessarily rested on the finding that Berge had "actual awareness" of his "falsity or deception." Tenn. Code Ann. § 47-18-103(11). Thus, regardless of whether a *bare* violation of the TCPA automatically triggers § 523(a)(6), *see* Opp. 27 (disputing this point), these findings amply demonstrate that Berge's conduct was of a kind that "necessarily causes injury." *McIntyre*, 242 U.S. at 141-142.

* * *

In the end, the case for certiorari is not complicated. The Sixth Circuit took sides on two "deep circuit split[s]." Pet. App. 10a. Those splits have driven case outcomes, generated confusion, and jacked up litigation costs for decades. *See* CLLA Br. 3-14. And this case presents an opportunity for the Court to at last resolve these closely related questions, and afford much-needed clarity for courts, creditors, and parties appealing to the bankruptcy system for a fresh start.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2020