

No. 25-____

IN THE
Supreme Court of the United States

CAREDX, INC.,

Petitioner,

v.

NATERA, INC.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In Lanham Act false advertising cases, the courts of appeals have split 6-1 over whether a jury may infer consumer deception and reliance upon finding that an advertising campaign is deliberately false.

The First, Second, Sixth, Eighth, Ninth, and D.C. Circuits hold that a jury may draw such an inference. They consider that inference so powerful that it gives rise to a presumption of consumer deception and reliance. Only the Third Circuit—home to a disproportionate number of corporate advertisers—holds the opposite, altogether forbidding a jury from inferring that a deliberately false advertising campaign had its intended effect.

The question presented is:

Whether a jury hearing a false advertising case under the Lanham Act should be barred from inferring consumer deception and reliance upon finding that a defendant conducted a deliberately false advertising campaign.

PARTIES TO THE PROCEEDING

Petitioner CareDx, Inc., was the plaintiff-appellant below. Respondent Natera, Inc., was the defendant-appellee below.

The proceeding below also involved a cross-appeal, in which CareDx, Inc., was the cross-appellee. Natera, Inc., was the cross-appellant.

RULE 29.6 STATEMENT

CareDx, Inc., is a publicly traded corporation. CareDx, Inc., does not have a parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *CareDx, Inc. v. Natera, Inc.*, Nos. 23-2427, 23-2428 (3d Cir.), judgment entered on August 28, 2025; petition for rehearing and rehearing en banc denied October 10, 2025. Case No. 23-2427 is CareDx's appeal. Case No. 23-2428 is Natera's cross-appeal.
- *CareDx, Inc. v. Natera, Inc.*, No. 19-cv-662 (D. Del.), judgment entered on August 7, 2023.

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INTRODUCTION

This petition asks the Court to resolve an acknowledged circuit split over whether a jury may infer consumer deception and reliance upon finding that a defendant conducted a deliberately false advertising campaign.

A jury hearing a false advertising case under the Lanham Act must find consumer deception and reliance before awarding damages. The First, Second, Sixth, Eighth, Ninth, and D.C. Circuits permit a jury to infer consumer deception and reliance upon finding that a defendant has conducted a deliberately false advertising campaign. In fact, once a campaign is shown to be deliberately false, those circuits endorse a presumption of actual consumer deception because of the “powerful inference” that an intentionally false campaign had its intended effect. *E.g., Res. Devs., Inc. v. Statue of Liberty-Ellis Island Found., Inc.*, 926 F.2d 134, 140 (2d Cir. 1991).¹

This commonsense inference has widespread practical value to remedy and deter false advertising campaigns. Proving actual customer deception by a false advertising campaign through surveys or otherwise is “notoriously difficult.” *Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 692 (6th Cir. 2000). This case illustrates why. Natera’s deliberately false advertising campaign targeted organ transplant doctors. That small audience is unlikely to want to admit in front of their patients that they were duped by Natera’s false claims about the

¹ This petition uses the phrase “actual consumer deception” to refer to the consumer deception and reliance needed to award damages. See App.23a & n.35.

performance of its diagnostic product—even if CareDx was willing to try to pull those doctors into the case.

The Third Circuit has adopted the opposite rule to every other court of appeals to consider the question, holding that it is legally *impermissible* for a jury to infer actual consumer deception from a deliberately false advertising campaign. App.26a-27a n.38. And, as then-Judge Alito explained, the decision that set the Third Circuit on its path is both wrong and harmful. See *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms., Inc.*, 19 F.3d 125, 137 (3d Cir. 1994) (*Johnson*) (Alito, J., dissenting). That decision permits the “cynical” advertiser to “deliberately set out to mislead the consuming public” without being held to account for the natural consequence of that effort. *Id.* The Third Circuit’s outlier rule has had an outsized impact for three decades, as it is the home of the nation’s corporate capital, Delaware. The Third Circuit has refused to revisit its rule en banc.

This petition is the perfect vehicle for resolving an important question implicating a recognized circuit split. The petition squarely presents the issue on which the circuits are divided, and it is outcome determinative here. The jury found that Natera’s false advertising was deliberate, concluded that there was actual consumer deception, and awarded damages. The panel below, as well as the district court, recognized the split of authority, and each agreed that CareDx’s evidence might suffice in other courts of appeals. Yet, the Third Circuit zeroed out the damages award because the jury was, in its view, legally prohibited from inferring actual consumer deception based on a deliberately false ad campaign.

This Court should grant the petition and return the critical Third Circuit to the mainstream of false advertising law.

OPINIONS BELOW

The Third Circuit's decision (App.1a-28a) is unpublished but available at 2025 WL 2480117. The district court's order granting Natera's motion for judgment as a matter of law as to damages (App.29a-43a) is unpublished but available at 2023 WL 4561059.

JURISDICTION

The en banc Third Circuit denied a timely filed petition for rehearing on October 10, 2025. App.63a. Justice Alito extended the time to file a petition for writ of certiorari to Saturday, February 7, 2025, making this petition due on Monday, February 9, 2025, under this Court's Rule 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

15 U.S.C. § 1125 is reproduced in the appendix. App.65a.

STATEMENT

1. Petitioner CareDx, Inc., is an innovative transplant diagnostics company. Respondent Natera, Inc., is its major competitor. CareDx and Natera sell competing tests that use DNA to detect whether a patient's body is rejecting a transplanted kidney. App.3a. CareDx's test is called AlloSure. *Id.* Natera's test is called Prospera. *Id.* AlloSure—the first to market—revolutionized transplant care because it allowed for lifesaving, advance notice of transplant rejection based on a simple blood draw. Historically,

patients were forced to rely on invasive biopsies or inaccurate, non-invasive solutions.

In 2019, Natera introduced Prospera and launched a marketing campaign to convert AlloSure users to its new copycat test. App.3a-4a. Natera's campaign sought to persuade doctors and patients to switch from AlloSure to Prospera by claiming that Prospera was proven to be the superior test. *Id.* Indeed, Natera's ads touted a direct comparison between AlloSure and Prospera, claiming that the scientific evidence proved Prospera performed better on the key metrics for such a medical test. App.11a-22a.

Those claims were outright false. The two most important performance measures for diagnostic medical tests like AlloSure and Prospera are sensitivity (missing actual cases of rejection) and specificity (misreporting rejection for healthy organs). App.4a nn.2, 3. Natera falsified the performance of its medical tests, claiming that Prospera was superior on both metrics. And Natera did not have data that could support those claims. App.11a-22a; 39a-41a. Natera also went so far as to falsely claim that its test was sensitive for pediatric patients—without any supporting data that Prospera could even be used for children. App.61a-62a.

To make matters worse, Natera knew its advertisements were false but published them anyway. Natera's executives warned its management that Natera had no proof to support its false superiority claims. *E.g.*, App.14a-15a. Natera's Chief Medical Officer, for instance, wrote that "with the current data," there is "NO EVIDENCE of a difference between" AlloSure and Prospera. App.17a. And other

Natera experts likewise warned that Prospera could not claim superiority based on the literature, including because Natera “couldn’t say Prospera is more sensitive than AlloSure.” App.15a. Still others emphasized that “it’s not accurate to say that it’s highly sensitive across a range of populations and include specifically the children there.” App.22a; *see id.* (Natera’s chief medical officer writing that Natera could “make NO CLAIM about [Prospera] in pediatric age groups and there is NO INDICATION that it works in them. Period.”).

Nevertheless, Natera’s superiority claims permeated its extensive Prospera marketing campaign—which included print brochures, sales decks, sales trainings, physician visits, a website, patient information, a video campaign, and presentations, as well as the distribution of marketing materials at major industry conferences. App.3a n.1. A centerpiece of Natera’s campaign was what it dubbed the “money slide”—a slick graphic that collected Natera’s key, false superiority claims and that was used by Natera’s sales force to convert customers. App.35a.

2. CareDx sued Natera in the District of Delaware for false advertising under the Lanham Act. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 122 (2014); 15 U.S.C. § 1125(a)(1)(B). It also brought claims for false advertising and unfair competition under Delaware law. App.3a. CareDx asked the jury to find that ten advertisements in Natera’s marketing campaign were deliberately false. App.30a. The jury agreed that nine of those ten ads were literally false, and found that Natera “intentionally and willfully” engaged in false

advertising. App.7a. The jury concluded that CareDx was entitled to \$21.2 million in actual damages attributable to Natera’s false advertising, and \$23.7 million in punitive damages—the latter of which were awarded under Delaware law. App.30a-31a.

After trial, Natera moved for judgment as a matter of law as to liability and damages. As to liability, the district court held that the jury reasonably concluded that the “advertising statements challenged by CareDx were literally false.” App.39a. The district court continued to highlight that Natera’s ads claimed, for instance, that Prospera was “more sensitive and specific than current assessment tools,” including AlloSure. *Id.* But, the Court continued, the contemporaneous literature showed that such claims were “unambiguous and false.” App.40a. And the district court nowhere cast doubt on the jury’s finding that Natera deliberately created a false advertising campaign based on fabricated claims of superior performance for its medical test. App.34a-38a.

As to damages, however, the district court granted Natera’s motion for judgment as a matter of law. “Actual[]” consumer deception—i.e., a falsity on which consumers relied—is a prerequisite to obtaining damages in a Lanham Act false advertising case. *E.g.*, *Parkway Baking Co. v. Freihofer Baking Co.*, 255 F.2d 641, 648 (3d Cir. 1958). But, according to the district court, “CareDx adduced at trial no evidence ... that a person was in fact deceived by or relied on Natera’s advertisements.” App.35a. The district court acknowledged that—as CareDx explained—at least “three circuits ... have held that actual deception may be presumed from evidence of deliberate engagement of false advertising.” App.37a But the district court

continued, “[i]n the Third Circuit, evidence of an intent to mislead does not warrant a presumption”—nor even an inference—“of actual deception.” App.38a.

Having highlighted a sharp split of authority, the district court thus zeroed out CareDx’s Lanham Act damages, and it applied the same analysis to similarly zero out CareDx’s compensatory and punitive damages under state law. App.38a-39a, 41a-42a & n.1. In reaching its conclusion, the district court relied on *Johnson*, in which the Third Circuit held that “intent to mislead” consumers is “insufficient” to demonstrate that consumers were actually deceived under the Lanham Act, and so the district court was not required to consider such evidence. 19 F.3d at 131-32.

3. A panel of the Third Circuit affirmed the district court’s judgment. The panel upheld the liability finding, agreeing that the evidence showed that Natera’s advertising was literally false and “demonstrates Natera’s willful conduct.” App.22a; App.25a. But the panel held that CareDx presented no evidence of actual deception to support the awarded damages. Deliberate false advertising, the panel continued, “does not show any consumers were deceived” by the false advertising, echoing the reasoning in *Johnson*. App.25a-26a. The Court thus agreed that CareDx could not receive damages under the Lanham Act. And for the same reasons, the Court held that CareDx’s punitive damages under state law must be set aside. App.27a-28a.

In a lengthy footnote, the panel acknowledged CareDx’s argument that a jury could infer actual deception from Natera’s false advertising campaign

“because Natera would not have knowingly and intentionally engaged in such a campaign if consumers were not actually deceived by the superiority claims.” App.26a-27a n.38. The panel also recognized a split of authority, acknowledging that other courts of appeals infer actual deception from a deliberately false advertising campaign. *Id.* And it allowed that CareDx’s requested inference “might” be reasonable in those circuits. *Id.* The panel nonetheless rejected that inference, and concluded that no evidence in the record “prove[d] actual deception.” *Id.*

The result is this: The panel affirmed the finding that Natera deliberately conducted a false advertising campaign regarding the efficacy of its organ transplant test, but it also affirmed the district court’s decision to set aside CareDx’s \$44.9 million damages award, while six other courts of appeals would have done the opposite.

CareDx petitioned for rehearing en banc and by the panel, on the grounds that the Third Circuit should revisit its out-of-step rule and that the jury should not have been barred from inferring actual consumer deception. Its petition was supported by leading professors that called for the Third Circuit to revisit its outlier position. *See* Third Circuit Case No. 23-2427, Doc. 80 (Brief of Rebecca Tushnet and Alexandra Roberts as Amici Curiae in Support of Rehearing). The Court denied the petition. App.63a.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ because the panel’s decision contradicts the prevailing rule in six other circuits on an important Lanham Act issue: whether

a jury is barred from inferring actual consumer deception from a deliberately false advertising campaign. The issue is outcome determinative and squarely presented, and the Third Circuit has adhered to its outlier view for three decades. This is a recurring issue with significant commercial implications, particularly in light of the large number of corporate advertisers domiciled in the Third Circuit and the documented difficulties of proving consumer deception and reliance by direct evidence.

The Court should grant the petition, resolve the question presented, and adopt the majority rule that protects the marketplace and competitors from deliberate false advertising.

I. THE CIRCUITS HAVE SPLIT 6-1 OVER WHETHER IT IS LEGALLY PERMISSIBLE TO INFER ACTUAL CONSUMER DECEPTION FROM A DELIBERATELY FALSE ADVERTISING CAMPAIGN.

The panel below acknowledged the circuit split over whether actual consumer deception—required to establish damages under the Lanham Act—may be inferred from a deliberately false advertising campaign. App.26a-27a n.38. In published decisions, the First, Second, Sixth, Eighth, Ninth, and D.C. Circuits say yes, endorsing a “powerful inference ... that the defendant has succeeded in confusing the public” once the plaintiff has shown “that a defendant deliberately engaged in a deceptive commercial practice.” *Res. Devs.*, 926 F.2d at 140.

But in the Third Circuit, the answer is no. The Third Circuit has held that deliberate false advertising by corporations does not provide a basis for a finding of actual consumer deception. *Johnson*,

19 F.3d at 132. The unpublished opinion below recognized that this was settled law in the Third Circuit, and the en banc Court's denial of rehearing confirms that it has no interest in reconsidering whether it should join the mainstream of false advertising law.

A. Six Circuits Hold That Deliberately False Advertising Supports A Presumption Of Actual Reliance Based On The Powerful Inference That Advertisements Calculated To Deceive Have Their Intended Effect.

The First, Second, Sixth, Eighth, Ninth, and D.C. Circuits hold that the inference of actual consumer deception from a deliberately false advertising campaign is so strong that it results in a presumption that consumers have, in fact, been deceived. Courts in these circuits necessarily would have upheld the damages award in favor of CareDx.

In *U-Haul Int'l, Inc. v. Jartran*, 793 F.2d 1034 (9th Cir. 1986), for example, a defendant found liable for false advertising argued that "it is inappropriate to presume actual [consumer] deception and reliance from proof of [defendant's] intent to deceive." *Id.* at 1040. The Ninth Circuit rejected that argument, reasoning that the "expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived." *Id.* at 1041. The Ninth Circuit reasoned that the presumption arises from the strength of the inference that intentional falsehoods offered to consumers in attempts to persuade are

likely to, in fact, have their intended effect. *See id.* The court therefore explained, “[h]e who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded.” *Id.* The Ninth Circuit has repeatedly reaffirmed the holding of *U-Haul*: “If [a defendant] intentionally misled consumers, we would presume consumers were in fact deceived.” *William H. Morris Co. v. Grp. W, Inc.*, 66 F.3d 255, 258 (9th Cir. 1995); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997) (“[P]ublication of deliberately false comparative claims gives rise to a presumption of actual deception and reliance.”); *see also, e.g., Eco Elec. Sys., LLC v. Reliaguard, Inc.*, 2022 WL 1157481, at *7 (N.D. Cal. Apr. 19, 2022) (“[F]or false comparative advertising claims, our court of appeals has held that publication of deliberately false comparative claims gives rise to a presumption of actual deception and reliance.”).

The Second Circuit aligns with the Ninth Circuit. In *Resource Developers*, the Court held that “a showing of deliberate or intentional deception on the part of the defendant” sufficed to demonstrate actual consumer deception. 926 F.2d at 139. The Second Circuit agreed “that a powerful inference may be drawn” that “a defendant deliberately engaged in a deceptive commercial practice ... has succeeded in confusing the public.” *Id.* at 140 (discussing *U-Haul Int’l*, 793 F.2d at 1035). Like the Ninth Circuit, the Second Circuit has repeatedly reinforced this rule. *See, e.g., Int’l Code Council, Inc. v. UpCodes Inc.*, 43 F.4th 46, 57 (2d Cir. 2022) (“[T]he defendant’s deliberate deception ... creates a rebuttable presumption of consumer confusion.”); *Merck Eprova AG v. Gnosis S.p.A.*, 760

F.3d 247, 260-61 (2d Cir. 2014) (Where “a plaintiff has met its burden of proving deliberate deception in the context of a two-player market, it is appropriate to utilize a presumption of injury.”); *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1537 (2d Cir. 1992) (“[I]t is well settled that in order for a Lanham Act plaintiff to receive an award of damages the plaintiff must prove either actual consumer confusion or deception resulting from the violation, or that the defendant’s actions were intentionally deceptive thus giving rise to a rebuttable presumption of consumer confusion.” (cleaned up)).

The First, Sixth, and Eighth Circuits have followed suit. In *Cashmere & Camel Hair Mfrs. Institute*, the First Circuit rejected a defendant’s argument that mere intent cannot trigger a presumption of consumer deception. 284 F.3d 302, 314 (1st Cir. 2002). It explained that the “justification for applying the presumption whenever there is evidence of intentional deception is perspicuous,” endorsing *U-Haul’s* common-sense observation that deliberately false advertising campaigns are presumed to have their intended effect. *Id.* at 317. The First Circuit therefore explained that it is “well established that if there is proof that a defendant intentionally set out to deceive or mislead consumers, a presumption arises that customers in fact have been deceived.” *Id.* at 316.

In *Porous Media Corp. v. Pall Corp.*, the Eighth Circuit similarly agreed that a finding that a false advertising defendant “violated the Lanham Act willfully and in bad faith” meant that there was no additional “need to require [the plaintiff] to provide consumer surveys or reaction tests in order to prove entitlement to damages.” 110 F.3d 1329, 1337 (8th

Cir. 1997). Again echoing the reasoning of the other courts of appeals—and citing *U-Haul*, 793 F.2d at 1040-41, *Resource Developers*, 926 F.3d at 140, and *Porous Media*, 110 F.2d at 1337—the Sixth Circuit has also held a presumption of consumer deception to be applicable. *Balance Dynamics*, 204 F.3d at 694.

The D.C. Circuit has also long endorsed the presumption of consumer deception in the context of both the Lanham Act and the Federal Trade Commission Act. Writing for the Court, Judge Bork reasoned that “the vast expenditure of advertising dollars on [tobacco] tar ratings strongly supports public reliance because advertising expenditures presumptively have the effect intended.” *F.T.C. v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42 (D.C. Cir. 1985). And, the D.C. Circuit emphasized, “those who are paying the money and are most familiar with the market believe that consumers are guided by [false claims].” *Id.*

The upshot is clear. Six circuits hold that deception and reliance are such a powerful inference from deliberately false advertising that actual consumer deception is presumed. No additional evidence is needed to support a jury’s damages verdict beyond that presumed inference.

Commentators agree, summarizing that courts overwhelmingly endorse “inferences of actual consumer deception from the defendant’s expenditures of sums for the purpose of influencing consumers.” Maurice E. Stucke, *When A Monopolist Deceives*, 76 Antitrust L.J. 823, 831 (2010) (“[u]nder the Lanham Act, courts ‘routinely presume that literally false [comparative] advertising actually

deceives consumers” (alteration in original)); 4 McCarthy on Trademarks and Unfair Competition § 27:58 (5th ed. Dec. 2025 update) (“[C]ourts have held that in false advertising cases, actual customer deception and resulting injury will be presumed if it is proven that defendant intended to deceive.”); Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 Geo. L.J. 449, 491 (2012) (“An advertiser’s deceptive purpose is strong evidence of deceptive effect, sufficient to excuse a plaintiff from the extra expense of producing extrinsic evidence of it.”); Richard J. Leighton, *Materiality and Puffing in Lanham Act False Advertising Cases: The Proofs, Presumptions, and Pretexts*, 94 Trademark Rep. 585, 599 (2004) (“Where intent to deceive has been shown, a powerful inference may be drawn that the defendant has *succeeded* in confusing the public.” (quotation marks and alterations omitted)); Restatement (Third) of Unfair Competition § 22 (1995) (“Although the actor’s intent does not affect the perceptions of prospective purchasers, it may be appropriate to assume that an actor who intends to cause confusion will be successful in doing so.”).

B. The Third Circuit Is A Consequential And Persistent Outlier.

1. Over a dissent by then-Judge Alito, the Third Circuit diverged from the mainstream in *Johnson*, 19 F.3d 125. The parties in that case were competitors in the market for over-the-counter antacid remedies. The defendant marketed its product as “the strongest antacid there is” in television commercials promoting sales of its antacid tablet. *Id.* at 126. The plaintiff competitor sued, on the basis that defendant’s claim was false and intended to mislead consumers into

believing that the defendant's product was superior. After a five-day bench trial, the district court concluded that the plaintiff failed to meet its burden of proof with respect to damages. *Id.* at 126-27. On appeal, the plaintiff argued that the district court erred when it failed to consider the evidence of the defendant's intent to deceive the public, because there is "a presumption for Lanham Act cases shifting the burden of proof [with respect to consumer confusion] to the defendant when a plaintiff has presented evidence of defendant's intent to deceive the public." *Id.* at 130.

The Third Circuit rejected that argument. The panel *agreed* that the plaintiff's evidence in fact showed an intent to mislead. *Id.* at 131-32. However, the court demanded evidence showing "how consumers *actually do react*." *Id.* at 130 (quoting *Sandoz Pharms. Corp. v. Richardson-Vicks, Inc.*, 902 F.2d 222, 229 (3d Cir. 1990)). But the false advertiser's deliberate deception was apparently not enough for the Third Circuit. *Johnson* continued to hold that "[a]lthough there is evidence of intent to mislead" that "does not ... warrant a presumption shifting the burden of proof" on actual consumer confusion. *Id.* at 132; *see also id.* at 131 (intent to mislead "is insufficient to qualify for the burden shifting presumption"). Applying this principle, the Third Circuit concluded that "the district court's failure to consider [plaintiff's] evidence as to [defendant's] intent was not error." *Id.* at 132.

Although he did not directly address a presumption of consumer deception, Judge Alito dissented. "[A]s the majority recognized," Judge Alito highlighted that the defendant "set out to deceive consumers into

believing” that its product “is the ‘strongest’ at providing relief to humans.” *Id.* at 136-37. And the plaintiff’s survey evidence reinforced the expected finding that consumers interpreted that assertion “just as [defendant] originally intended.” *Id.* at 137. Judge Alito cogently explained that the effect of the majority’s decision means that: “The advertiser may deliberately set out to mislead the public,” including by “pay[ing] considerable sums of money to an advertising agency to create advertisements containing misleading statements that the advertiser hopes will influence consumers,” and still escape liability under the Lanham Act. *Id.* “I cannot believe,” Justice Alito emphasized, “that the Lanham Act was meant to countenance such a result.” *Id.*

For the past three decades, courts in the Third Circuit have reinforced that *Johnson* rejected, as a matter of law, that deliberately false advertising is probative of actual consumer confusion. Indeed, as the district court explained below, other circuits “have held that actual deception may be presumed from evidence of deliberate engagement in false advertising,” but “in the Third Circuit, evidence of an intent to mislead does not warrant a presumption of actual deception.” App.37a-38a. (citing *Johnson*, 19 F.3d at 132). The district judge is far from alone in reaching that conclusion. *See, e.g., Qorvo, Inc. v. Akoustis Techs., Inc.*, 2024 WL 5334087, at *3 (D. Del. Apr. 25, 2024) (“Intent to mislead ‘does not warrant a presumption of actual deception.’”); *TRUSTID, Inc. v. Next Caller, Inc.*, 2022 WL 318299, at *9 (D. Del. Jan. 5, 2022) (“The fact that the jury found Next Caller’s false advertising to be willful is also insufficient to presume actual deception. Although at least one

circuit has recognized such a presumption ... the Third Circuit has not.”), *aff'd*, 2023 WL 2298748 (Fed. Cir. Mar. 1, 2023); *Mun. Revenue Serv., Inc. v. Xspand, Inc.*, 700 F. Supp. 2d 692, 717 n.45 (M.D. Pa. 2010) (a presumption of consumer deception “squarely conflicts with the above-cited Third Circuit authority establishing that plaintiffs must prove actual customer confusion/deception in order to recover money damages”); *Am. Home Prods. Corp. v. Procter & Gamble Co.*, 871 F. Supp. 739, 751-52 (D.N.J. 1994) (“[E]ven if I were to find that plaintiff’s evidence establishes defendants’ intent to mislead, under recent Third Circuit precedent this finding is insufficient.”).

2. The panel’s decision reinforces and recognizes this split of authority. The panel agreed that CareDx’s evidence “demonstrates Natera’s willful conduct,” and it acknowledged CareDx’s argument that “a jury could reasonably infer actual deception from Natera’s false advertising campaign because,” as other courts of appeals would conclude, “Natera would not have knowingly and intentionally engaged in such a campaign” if consumers would not have been deceived by the claims. App.23a-26a & n.38. But “our Court,” the panel explained, “has not adopted this presumption.” *Id.* The panel also acknowledged that CareDx’s inference “might” be reasonable in “other courts of appeals,” but it refused to allow the jury to adopt the inference that serves as the basis for the presumption in other circuits. *Id.* The panel cited no other Court of Appeals that would resolve the issue as it did. Nor did it give any reasoned basis to conclude that the existence of such a campaign legally cannot support a finding of actual deception, when six other

circuits hold that it is more than sufficient and indeed legally presumed.

Moreover, by relegating its lengthy discussion of deliberate deception to the 38th footnote of a non-precedential opinion, the panel reinforced that this issue is now settled law in the Third Circuit. There was no need for further analysis, because the Third Circuit had already resolved the issue, as courts have repeatedly recognized. *Supra* at 16-17. And lest there be any doubt, the en banc Court declined to revisit the Third Circuit's outlier rule, thus confirming the persistence of this established split. App.63a.

II. THE THIRD CIRCUIT'S OUTLIER POSITION IS WRONG.

The First, Second, Sixth, Eighth, Ninth, and D.C. Circuits are correct: Juries should be permitted to infer that a false advertising campaign calculated to deceive consumers has its intended effect.

1. The majority rule reflects the common law origins of the Lanham Act. When Congress passed the Lanham Act in 1946, it was understood to be "generally declarative of existing law, incorporating the principle features of [the] common law." Restatement (Third) of Unfair Competition § 9, cmt. e; *accord Vidal v. Elster*, 602 U.S. 286, 304 (2024). The Act thus sought "to codify and unify the common law of unfair competition," and "[t]here is no suggestion that Congress intended to depart" from "contemporary precedents." *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 861 n.2 (1982) (White, J., concurring). The concept of unfair competition at common law encompassed false advertising. *Lexmark*, 572 U.S. at 131.

False advertising law at the time of the Lanham Act's passage reflected an "old and venerated" "presumption of consumer confusion upon a showing of deliberate or intentional deception." *Res. Devs.*, 926 F.2d at 139. Roughly a decade before the Lanham Act was passed, for instance, the Second Circuit applied and explained the presumption in *My-T Fine Corp. v. Samuels*, 69 F.2d 76 (2d Cir. 1934). In that case, the defendants copied the plaintiff's food packaging and plaintiff brought an action for a preliminary injunction to bar defendants' use of the copied product. Even though there was no evidence of consumer confusion, the court shifted the burden to the defendants to prove the absence of confusion because the evidence showed "defendants' intent to deceive." *Id.* at 77 ("were it not for the evidence of the defendants' intent to deceive and so to secure the plaintiff's customers, we should scarcely feel justified in interfering [consumer confusion]... such an intent raises a presumption that customers will be deceived").

My-T Fine Corp. reflected the prevailing common-law rule: In case after case before the enactment of the Lanham Act, courts linked deliberate deception with the causal consequence of actual deception. *See, e.g., Capewell Horse Nail Co. v. Green*, 188 F. 20, 24 (2d Cir. 1911) ("If it is apparent that he is undertaking closely to approach to a well-known mark, it is generally a pretty safe assumption that he thinks the differences are not sufficiently great to prevent confusion."); *O. & W. Thum Co. v. Dickinson*, 245 F. 609, 622 (6th Cir. 1917) ("placing these goods on the market ... imports an intent to have them mistaken for and confused with plaintiff's product.... It results that plaintiff is entitled to relief"); *Wesson v. Galef*, 286

F. 621, 625 (S.D.N.Y. 1922) (“Since I am satisfied that the makers of these revolvers tried to [deceive], I do not see that I need weigh too nicely the probabilities of their success” because deliberate deception “relieves the injured party from the need of showing that the imitator was successful”); *cf. Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U.S. 537, 549 (1891) (“Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conduct with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff’s—would, in a proper case, constitute ground for relief.”). Passage of the Lanham Act by no means displaced the established rule.

2. It is no surprise that the majority rule is consistent with the common-law origins of the Lanham Act because it flows naturally from common sense: “The expenditure by a competitor of substantial funds in an effort to deceive customers and influence their purchasing decisions justifies the existence of a presumption that consumers are, in fact, being deceived.” *U-Haul*, 793 F.2d at 1041; *accord* Restatement (Third) of Unfair Competition § 22 (“it may be appropriate to assume that an actor who intends to cause confusion will be successful in doing so. Proof of an intent to confuse may thus create an inference that confusion is likely.”). It is a “powerful inference” that an intentionally false campaign had its intended effect. *Res. Devs.*, 926 F.2d at 140.

The mainstream rule also recognizes the practical difficulties in proving consumer deception. *See Klass, supra*, at 491 (“An advertiser’s deceptive purpose is strong evidence of deceptive effect, sufficient to excuse a plaintiff from the extra expense of producing

extrinsic evidence of it.”). Actual confusion is “notoriously difficult and expensive to prove.” *Balance Dynamics*, 204 F.3d at 692; *Cashmere & Camel*, 284 F.3d at 314 (highlighting the “burden of presenting this evidence”); Restatement (Third) of Unfair Competition § 22 (explaining that “[p]roof of actual deception is rarely available.”). Consumer surveys, for instance, are expensive and imperfect. See *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 164-65 (2023) (Sotomayor, J., concurring). An inference of confusion “provides a cheap and effective way to identify advertising that is likely to deceive.” *Klass, supra*, at 490. And “[r]equiring additional extrinsic evidence of deceptive effect would be redundant and wasteful.” *Id.*; see also Brief of Rebecca Tushnet and Alexandra Roberts as Amici Curiae in Support of Rehearing 6-9.

But even if “provable in theory, such proof often requires a plaintiff solicit its own customers” and “Plaintiffs are justifiably hesitant to alienate or upset their customers in this way.” *Balance Dynamics*, 204 F.3d at 692; see also *Cashmere & Camel*, 284 F.3d at 314. The organ transplant doctors targeted by Natera’s ads, for instance, are unlikely to want to publicly admit that they were tricked by Natera’s false claims about its diagnostic test. The result is that, were inferences impermissible to establish actual confusion,

[T]he rational business decision is for a plaintiff to embark on a campaign of damage control and forego a demonstration of injury in the marketplace or actual confusion of their customers. Such a plaintiff should not be required to give up compensation for its

damage control expenses when the defendant's wrongful action necessitated those expenses in the first place.

Balance Dynamics, 204 F.3d at 692.

In short, the Third Circuit's rule is not only a rejection of common sense, but it serves as a practical matter to disincentivize plaintiffs from recovering damages caused by a deliberately false advertising campaign.

3. At least one commentator has suggested that the Third Circuit's decision in *Johnson* might leave the door open to a presumption of consumer deception if an "intent to mislead" is coupled with conduct of a sufficiently "egregious nature." 4 McCarthy § 27:58 (discussing the Third Circuit's outlier position in *Johnson*). That suggestion does nothing to redeem the Third Circuit's out-of-step rule. For one, the caveat is illusory: No Third Circuit decision has applied it over the decades. *TRUSTID*, 2022 WL 318299, at *9. And the panel rejected it here. App.26a n.38 ("our court has not adopted this presumption"). Indeed, if the egregiousness of the defendant's conduct mattered to the presumption, this would have been the perfect case to apply it. The evidence below showed—and the district court agreed—that Natera deliberately marketed known falsehoods about the efficacy of a life-or-death diagnostic test to pediatric populations. App.21a-22a. If that is not sufficiently blameworthy to trigger the application of a presumption of actual consumer deception in the Third Circuit (or at least to permit an inference of consumer deception), then nothing is.

For another, even if the Third Circuit had truly left the door open to an inference of consumer deception in a sufficiently egregious case, that would not resolve the split: No other circuit has required an abstract level of additional egregious conduct as a prerequisite to the presumption of actual consumer deception. *See, e.g., Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH*, 843 F.3d 48, 67 (2d Cir. 2016) (“intent to deceive” is “sufficient to give rise to a presumption of consumer confusion”); *Cashmere & Camel*, 284 F.3d at 316 (“[I]f there is proof that a defendant intentionally set out to deceive or mislead consumers, a presumption arises that customers in fact have been deceived.”); *Southland*, 108 F.3d at 1146 (“[F]or false comparative advertising claims, this circuit has held that [p]ublication of deliberately false comparative claims gives rise to a presumption of actual deception and reliance” (internal quotation marks omitted)); *Porous Media*, 110 F.3d at 1333 (“[T]he jury [may] assume actual deception ... upon a finding that the defendant acted deliberately to deceive.”).² Nor would doing so make any sense:

² To be clear, older Second Circuit decisions have mentioned the “egregious nature” of a defendant’s “deliberate” false advertising. *Johnson & Johnson-Merck Consumer Pharms. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 298-99 (2d Cir. 1992). The better reading of that precedent is that deliberate false advertising is, “in this regard,” egregious—not that a separate showing of special severity is required. *Id.*; *see Merck Eprova*, 760 F.3d at 256, 259 (focusing on the deceiver’s intent and explaining that a “deliberate intent to deceive the purchasing public” is “egregious”). Modern precedent does not require an additional showing of egregiousness. *See Church & Dwight*, 843 F.3d at 67-68 (analyzing the intent of the deceiver, not the special

Subtle deliberate falsehoods may be just as effective and pernicious—if not more so—than blatant and offensive ones.

4. The Third Circuit’s rule is also incompatible with the application of similar inferences in other areas of the law. In the context of trademark cases and product packaging trade dress cases, for instance, the courts (including the Third Circuit) have recognized that the intent of an infringer is “highly probative of likelihood of confusion.” *Versa Prods. Co. v. Bifold Co. (Mfg.)*, 50 F.3d 189, 205 (3d Cir. 1995) (“[W]hat we have held is that a defendant’s intent to confuse or deceive consumers as to the product’s source may be highly probative of likelihood of confusion.”); *Freedom Card, Inc. v. JPMorgan Chase & Co.*, 432 F.3d 463, 473 (3d Cir. 2005) (“[T]he defendant’s intent to confuse or deceive consumers can be very probative of the likelihood of confusion.”); *see also, e.g., Adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 758 (9th Cir. 2018) (“When one party knowingly adopts a mark similar to another’s, reviewing courts presume that the defendant will accomplish its purpose, and that the public will be deceived.”); *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Rsch.*, 527 F.3d 1045, 1055 (10th Cir. 2008) (“Evidence that the alleged infringer chose a mark with the intent to copy, rather than randomly or by accident, typically supports an inference of likelihood of confusion.”); *Blue Bell Bio-Med. v. Cin-Bad, Inc.*, 864 F.2d 1253, 1259 (5th Cir. 1989) (“[I]f a trademark or trade dress ‘was adopted [by the defendant] with the intent of deriving

severity of the conduct, in holding the evidence “sufficient to support a presumption of consumer confusion”).

benefit from the reputation of [the plaintiff,] that fact alone may be sufficient to justify the inference that there is confusing similarity [between the products].”); *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1188-89 (6th Cir. 1988) (“[I]f the mark was chosen with the intent of deriving benefit from the reputation of [plaintiff’s mark], that fact alone ‘may be sufficient to justify the inference that there is confusing similarity.’”); *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1542 (11th Cir. 1986) (“Kraft’s intent in adopting the Polar Bear trade dress is a critical factor because a finding that Kraft adopted the trade dress with the intent of deriving benefit from the reputation of Isaly’s Klondike may alone be enough to justify the inference that there is confusing similarity.”). Indeed, the logic of this inference, too, is that deliberate action to confuse is likely to have the intended result. See *A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 232 (3d Cir. 2000). The Third Circuit has never explained why it allows one inference but not the other.

In short, the Third Circuit’s rule is out-of-step not just with other circuits, but also with the common law origins of the Lanham Act, common sense, and related doctrines.

III. THE QUESTION PRESENTED IS IMPORTANT AND THIS CASE IS AN EXCELLENT VEHICLE.

This case presents an ideal opportunity to resolve a split of authority and return the Third Circuit to the legal mainstream of false advertising law that applies to the rest of corporate America.

First, the issue is important and recurring. The interaction between the intent of the false advertising

defendant and actual consumer deception frequently arises in Lanham Act false advertising disputes. See, e.g., *Kopp Dev., Inc. v. Metrasens, Inc.*, 2025 WL 371303, at *13 (N.D. Ohio Feb. 3, 2025); *Qorvo*, 2024 WL 5334087, at *3; *Grp. One Ltd. v. GTE GmbH*, 625 F. Supp. 3d 28, 78 (E.D.N.Y. 2022); *TRUSTID, Inc.*, 2022 WL 318299, at *9; *Upper Deck Co. v. Panini Am., Inc.*, 469 F. Supp. 3d 963, 976 (S.D. Cal. 2020); *MillerCoors, LLC v. Anheuser-Busch Cos., LLC*, 385 F. Supp. 3d 730, 745 (W.D. Wis. 2019); *Sream, Inc. v. Davie Food Mart*, 2018 WL 7253305, at *2 (S.D. Fla. Aug. 16, 2018); *Spruce Env't Techs., Inc. v. Festa Radon Techs., Co.*, 248 F. Supp. 3d 316, 320 (D. Mass. 2017); *Lieb v. Korangy Publ'g, Inc.*, 2016 WL 8711195, at *7 (E.D.N.Y. Sept. 30, 2016).

The Third Circuit in particular is a critical forum for such disputes, given that so many companies are incorporated in Delaware. Yet, the Third Circuit has adopted a rule that is favorable to false advertisers compared to its sister circuits. Again, *Johnson* wrongfully protects the “cynical” advertiser who “may deliberately set out to mislead the consuming public” and who “may pay considerable sums of money to ... influence consumers,” 19 F.3d at 137 (Alito, J., dissenting), yet who is not presumed to have met with any success.

In addition to allowing plaintiffs to recover for false advertising injuries, the Lanham Act “recognize[s] and incorporate[s] our extralegal norms of truth telling and fair dealing.” *Klass, supra*, at 496; see also *Johnson*, 19 F.3d at 137 (Alito, J., dissenting). After all, one of the primary aims of the Lanham Act is to combat the “deleterious effects of false advertising,” which can “discredit the product of an industry,

destroy the confidence of consumers and impair a communal or trade good will.” *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767-68 n.4 (1992) (Stevens, J., concurring) (quoting Handler, *Unfair Competition*, 21 Iowa L. Rev. 175, 193 (1936)). The majority rule places advertisers on notice that they will be held accountable for the intended consequences of their actions, and it gives them “a new reason not to make unsubstantiated claims and therefore gives the public a new reason to trust advertisements.” Klass, *supra*, at 494.

Second, this case cleanly tees up the question presented. The question presented asks whether consumer deception and reliance may be inferred from a deliberately false advertising campaign. Both the panel and district judge expressly acknowledged and rejected CareDx’s argument that a jury should be permitted to reasonably infer that deliberate false advertising has its intended effect. App.24a-27a & n.38; App.37a-38a. Both acknowledged a split of authority on whether that inference is permitted. App.26a-27a n.38; App.37a-38a. And both acknowledged that the split of authority was outcome determinative. App.26a-27a n.38; App.37a-38a. Indeed, the advertisements here were targeted to convert doctors from CareDx’s AlloSure to Natera’s Prospera in a market led by these two players. The question presented, then, is clearly preserved and squarely offered for this Court’s decision.

To be sure, the panel noted that CareDx argued for the *inference* of actual consumer deception; it did not request the application of a *presumption* of actual consumer deception in the face of entrenched Third Circuit precedent to the contrary. App.26a-27a n.38.

That position simply reflected the settled nature of the question under binding Third Circuit precedent. And the panel's refusal to even permit a jury inference makes the Third Circuit's departure from the mainstream even more severe. The circuit split here is thus a legal chasm. And CareDx's request for an inference is inextricably intertwined with the presumption applied by the other courts of appeals. Indeed, the reasons for each of a presumption and inference "encompass[] the other"; the strong inference recognized in the majority of circuits—and debated by the parties below—is based on the inference that CareDx requested. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 537 (1992). This Court has frequently considered issues that would assist with resolving the question presented, even when not raised by the Parties. *See, e.g., Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173 & n.1 (2009) (addressing burden-shifting question under Age Discrimination in Employment Act in service of resolving the direct-evidence question presented); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 56 (2006) (addressing statutory-interpretation question to assist with deciding the Constitutional question presented). Here, in contrast, CareDx *did* invoke the presumption of consumer deception below, while respecting Third Circuit precedent to the contrary and arguing for the inference that forms the basis of the presumption applied by all other courts of appeals to have addressed the issue.

Third, further percolation is unwarranted. The Third Circuit has adhered to its rule for three decades, and the panel's unpublished opinion and en banc denial signals that its rule is settled. The six circuits

to have already addressed this question present this Court with fully developed reasoning that is unlikely to change. The time to address the question presented is now.

CONCLUSION

This Court should grant the petition. Should the Court resolve the question presented as CareDx requests, remand to the Third Circuit would be warranted for further consideration of related issues, including the award of punitive damages in CareDx's favor.

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