

No. 25-959

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**

REPLY BRIEF FOR PETITIONER

Edward R. Reines
JONES DAY
1755 Embarcadero Rd.
Palo Alto, CA 94303

Noel J. Francisco
Counsel of Record
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

Daniel Paul Johnson
JONES DAY
500 Grant St., Ste. 4500
Pittsburgh, PA 15219

Counsel for Petitioner

RULE 29.6 STATEMENT

The statement contained in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

	Page
RULE 29.6 STATEMENT	i
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
I. THE DECISION BELOW CEMENTS A 6-1 CIRCUIT SPLIT WORTHY OF THIS COURT’S REVIEW.....	3
A. The Circuits Have Split 6-1 Over Whether Actual Consumer Deception May Be Inferred From A Deliberately False Advertising Campaign.....	3
B. Resolving The Split Is Important.....	7
II. THIS CASE IS AN IDEAL VEHICLE.....	8
CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Balance Dynamics Corp. v. Schmitt Indus., Inc., 204 F.3d 683 (6th Cir. 2000)</i>	4, 7
<i>Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302 (1st Cir. 2002)</i>	4
<i>Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc., 921 F.2d 467 (3d Cir. 1990)</i>	8
<i>FTC v. Brown & Williamson Tobacco Corp., 778 F.2d 35 (D.C. Cir. 1985)</i>	4
<i>InSinkErator, LLC v. Joneca Co., LLC, 163 F.4th 608 (9th Cir. 2025)</i>	10
<i>Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms. Inc., 19 F.3d 125 (3d Cir. 1994)</i>	1, 5, 6, 7, 10
<i>Mun. Revenue Serv., Inc. v. Xspand, Inc., 700 F. Supp. 2d 692 (M.D. Pa. 2010)</i>	6
<i>My-T Fine Corp. v. Samuels, 69 F.2d 76 (2d Cir. 1934)</i>	4

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Newborn Bros. Co. v. Albion Eng'g Co.</i> , No. 24-1548, 2025 WL 3560164 (3d Cir. Dec. 10, 2025).....	8
<i>Porous Media Corp. v. Pall Corp.</i> , 110 F.3d 1329 (8th Cir. 1997).....	4
<i>Res. Devs., Inc. v. Statue of Liberty-Ellis Island Found., Inc.</i> , 926 F.2d 134 (2d Cir. 1991).....	3, 4, 11
<i>Robinson v. First State Cmty. Action Agency</i> , 920 F.3d 182 (3d Cir. 2019).....	8
<i>U-Haul Int'l, Inc. v. Jartran, Inc.</i> , 793 F.2d 1034 (9th Cir. 1986).....	4, 11
OTHER AUTHORITIES	
Fed. R. Civ. P. 51	8
Restatement (Third) of Unfair Competition (1995).....	7

INTRODUCTION

The Third Circuit alone holds that a jury is not permitted to infer actual consumer deception from a deliberately false advertising campaign. Not only do other circuits permit such an *inference*, they recognize a *presumption* of deception because this inference is so powerful. As those circuits have explained, if a sophisticated corporate advertiser spends millions of dollars targeting its customers with a deliberately false advertising campaign, a jury is entitled to presume—or at least infer—that the deception was successful. In holding otherwise, the panel decision entrenches the Third Circuit’s outlier rule and warrants urgent review, particularly given the importance of the Third Circuit (home to Delaware) to Lanham Act jurisprudence.

Nor is there a realistic possibility that the Third Circuit will reverse course. In *Johnson*, the Third Circuit recognized that the plaintiff’s evidence “show[ed] an intent to mislead,” but held that the district court need not even “consider” that intent as evidence of actual consumer deception. *Johnson & Johnson-Merck Consumer Pharms. Co. v. Rhone-Poulenc Rorer Pharms. Inc.*, 19 F.3d 125, 132 (3d Cir. 1994). Since then, district courts in the Third Circuit have repeatedly and explicitly recognized that *Johnson* meant what it said. But if there were any doubt, it is put to rest by this case: The panel upheld the jury’s findings of Natera’s deliberate falsehoods, yet still held that the jury was legally precluded from inferring actual deception. Relegation of this \$45 million issue to a 239-word footnote in the back of an unpublished opinion—with no discussion of the merits

of the rule—only underscores that Third Circuit law is settled.

Faced with this clear division of authority, Natera seeks to manufacture vehicle problems. None exist. It suggests that CareDx somehow waived this issue by not objecting to the jury instructions. But those instructions are irrelevant. The jury ruled *in favor* of CareDx, and the district court and Third Circuit *reversed*. The only question, then, is whether that reversal was correct. It plainly was not, if—as other circuits hold—the jury was entitled to infer actual deception from Natera’s deliberately false conduct. In any event, the jury *was* instructed that it could draw reasonable inferences. The question presented—whether a jury may infer actual deception from deliberately false advertising—is properly before the Court.

Finally, Natera argues that allowing an inference of consumer deception would not change the outcome. Even if Natera were right, it would not matter. The Court could clarify the rule and remand for its application, as is routine. But Natera is wrong. Its only argument is that marketing campaigns do not influence doctors. But if that factual argument were true, why would Natera deliberately saturate doctors with a multimillion-dollar false advertising campaign in the first place? The question answers itself.

This Court should grant the petition to consider the Third Circuit’s unique tolerance of deliberately false advertising campaigns in the corporate capital of this country. Consumers—like the doctors and transplant patients here—targeted by a corporate advertiser, who deliberately aims to deceive them, deserve better.

I. THE DECISION BELOW CEMENTS A 6-1 CIRCUIT SPLIT WORTHY OF THIS COURT'S REVIEW.

As CareDx has explained, all other circuits that have addressed the issue have concluded that juries may presume that deliberately false advertising has its intended effect. Pet. 10-14. It necessarily follows that, in these circuits, juries may, at minimum, infer actual consumer deception from such deliberately false conduct. The Third Circuit alone, however, forbids both: A jury may neither presume nor infer that a corporation that spends millions of dollars to deceive its customers achieved its goal; that evidence, often dispositive in other circuits, is irrelevant in the Third. The Third Circuit's categorical rule is therefore squarely at odds with its sister circuits.

A. The Circuits Have Split 6-1 Over Whether Actual Consumer Deception May Be Inferred From A Deliberately False Advertising Campaign.

1. Natera barely contests the prevailing view that deliberate falsehoods are strong circumstantial evidence of actual deception. It concedes that "some courts"—really, six circuits (Pet. 10-13)—agree that "the existence of an intentionally false advertising campaign justifies a 'powerful inference' that the campaign had its intended effect. BIO 25 (quoting *Res. Devs., Inc. v. Statue of Liberty-Ellis Island Found., Inc.*, 926 F.2d 134, 140 (2d Cir. 1991)). Those circuits do not require "direct evidence of consumer confusion" because a jury may "infer[] actual consumer deception from the defendant's intentionally deceptive conduct." *Res. Devs.*, 926 F.2d at 140. That inference is so powerful that, in other circuits, it gives rise to a

rebuttable presumption of actual consumer deception. Pet. 10-13. And it reflects the common-law backdrop against which Congress enacted the Lanham Act, where deliberate deception had long been treated as probative of actual consumer confusion. *See, e.g., My-T Fine Corp. v. Samuels*, 69 F.2d 76, 77 (2d Cir. 1934) (L. Hand, J.).

Natera suggests it is “far from obvious” that six circuits have endorsed a presumption of consumer deception. BIO 14-15. But it quibbles with only one, ignoring the other five. Natera thus notes that *FTC v. Brown & Williamson* involved an FTC enforcement action, but ignores that the D.C. Circuit “look[ed] to Lanham Act cases for guidance” and treated the “evidentiary point[s] at stake” as identical. 778 F.2d 35, 40 n.2 (D.C. Cir. 1985). Natera offers no reason why the inference should operate differently here or in any other context. *See, e.g.,* Brief for Amici Truth in Advertising and Scholars 5-6 (highlighting inferences of consumer deception based on intent in other contexts). And Natera does not even mention the key cases in the other five circuits, all of which *did* involve the Lanham Act. *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 316 (1st Cir. 2002) (applying “well established” Lanham Act presumption); *Res. Devs.*, 926 F.2d at 140 (same “in Lanham Act case[]”); *Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 694 (6th Cir. 2000) (same); *Porous Media Corp. v. Pall Corp.*, 110 F.3d 1329, 1334 (8th Cir. 1997) (same for “claim for deceptive advertising under the Lanham Act”); *U-Haul Int’l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986) (same in Lanham Act “false advertising case”).

2. Unable to refute the majority rule, Natera asserts that *Johnson* somehow left the door open. In Natera's telling, Lanham Act plaintiffs in the Third Circuit find themselves in limbo: They cannot ask a jury to either infer or presume actual deception based on intent (*see* BIO 11 (asserting the district court correctly rejected CareDx's argument)), but supposedly the theory has still not been foreclosed (*see* BIO 16, 33). That position makes no sense, and it cannot be squared with the reasoning and holding of *Johnson* or the uniform understanding of the district courts bound by that decision. Pet. 15-17.

Natera's assertion that *Johnson* did not rule out the powerful inference applied elsewhere (BIO 16) rests on *Johnson*'s statement that it "need not decide whether to adopt the [presumption] *in case of clear and egregious conduct.*" 19 F.3d at 132 (emphasis added). But that reservation concerned only whether a presumption might be allowed in "egregious" circumstances (whatever that means). In the case of non-"egregious" intentionally false advertising (to the extent such a category even exists), *Johnson* squarely rejected the presumption, holding that "intent to mislead" alone need not even be considered. *Id.* at 131-32.

That holding is in direct conflict with the other circuits, which apply the presumption to *all* intentionally false advertising, egregious or not. Pet. 23-24. Regardless, that overlay is illusory. No Third Circuit authority post-*Johnson* has applied it; rather, courts read *Johnson* to foreclose a finding of actual deception based solely on intent, Pet. 16-17 (collecting cases); and as Natera itself concedes, courts within the Third Circuit "believe the presumption is foreclosed,"

BIO 19. *See also, e.g., Mun. Revenue Serv., Inc. v. Xspand, Inc.*, 700 F. Supp. 2d 692, 717 n.45 (M.D. Pa. 2010) (contention that “willfully false advertising” shows “actual consumer deception ... squarely conflicts with the above-cited Third Circuit authority” (including *Johnson*)).

3. If there were any doubt about *Johnson*’s scope, the panel confirmed the Third Circuit’s established rule. 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” 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. App.23a-26a & n.38. But “our Court,” the panel continued, disagrees. App.26a n.38. The district court, too, emphasized the split: “[I]n 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).

That Natera highlights CareDx’s attempt to distinguish *Johnson* below only sharpens the split. CareDx’s petition for rehearing argued that *Johnson* “had previously left open whether [the presumption] might be appropriate *in the case of clear and egregious conduct like Natera’s*.” CA3 Rehr’g Pet. 10-11 (emphasis added). CareDx, moreover, invoked the out-of-circuit authority above to argue that the jury’s inference of actual consumer deception was at least reasonable in light of the overwhelming proof of Natera’s deliberate falsehoods. CA3 Opening Brief for Appellant 44-47, 53-54. *But CareDx lost those arguments.* That rejection reinforces the Third

Circuit's outlier status: A deliberately false advertising campaign is legally presumed to prove actual consumer deception in six circuits, but it cannot even provide the basis for a valid jury inference here.

B. Resolving The Split Is Important.

This Court's review is warranted now. The Third Circuit's outlier rule is wrong—Natera offers *no justification* for a blanket legal prohibition on a commonsense jury inference. That bar has deterred false advertising plaintiffs for three decades. Natera does not contest that the Third Circuit, home to Delaware, the Nation's corporate capital, is a critical forum for these disputes. Pet. 26. As amici explain, “[r]ules allowing inference of success from an intent to deceive about a material fact serve both evidentiary and deterrent functions,” and “dangers ... arise when an advertiser consciously disregards material truth in favor of falsity.” Brief for Amici Truth in Advertising and Scholars 3, 10.

The issue is also recurring. CareDx cited numerous recent district-court cases—both inside and outside the Third Circuit—addressing this very question. Pet. 16-17, 26. Natera engages with none of them. And Natera's suggestion that the Third Circuit has not previously had another meaningful opportunity to revisit *Johnson* (BIO 14, 33-34) gets it backward: Binding adverse precedent deters challengers from bringing these costly cases, and this Court should take this opportunity to finally settle a longstanding split.

Indeed, the Third Circuit's rule has outsized influence because actual confusion is “notoriously difficult and expensive to prove.” *Balance Dynamics*, 204 F.3d at 692; *accord* Restatement (Third) of Unfair

Competition § 22 (1995) (“[p]roof of actual deception is rarely available”). Natera concedes that consumer surveys are “expensive”; and other forms of direct evidence may not be available. BIO 30-31. For this reason, the Third Circuit too has emphasized that surveys are “not essential.” *Newborn Bros. Co. v. Albion Eng’g Co.*, No. 24-1548, 2025 WL 3560164, at *2 (3d Cir. Dec. 10, 2025); *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 476 (3d Cir. 1990). Yet the Third Circuit alone refuses to allow an inference from deliberate falsity—the evidentiary tool that the other six circuits have adopted in the absence of direct evidence.

II. THIS CASE IS AN IDEAL VEHICLE.

This case is an ideal vehicle to address the question presented. Both the panel and district judge acknowledged and rejected CareDx’s argument that a jury should be permitted to reasonably infer that deliberate false advertising has its intended effect. App.26a-27a n.38; App.37a-38a. And both acknowledged a split of authority that matters here. App.26a-27a n.38; App.37a-38a.

Natera nevertheless asserts vehicle problems. Its lead objection is the contention that CareDx failed to preserve the question presented by not objecting to the jury instructions. BIO 23 (citing Fed. R. Civ. P. 51(d)(1)(A) and *Robinson v. First State Cmty. Action Agency*, 920 F.3d 182 (3d Cir. 2019)). This fails multiple times over.

Most significantly, it is entirely irrelevant. Here, the jury ruled in CareDx’s favor. Based on the evidence presented, including Natera’s intentionally deceptive advertising, it concluded that CareDx *had*

established actual deception. If a jury is allowed to infer actual deception from that intentionally deceptive conduct, then that conclusion is unassailable—no matter what the jury instructions said. The district court and Third Circuit, however, reversed the jury’s finding on the ground that the jury was *not* entitled to infer actual reliance based on Natera’s intentionally deceptive conduct, in conflict with other circuits. The issue is thus squarely presented.

In any event, Natera’s reliance on the jury instructions fails on its own terms. Natera, for example, asserts that CareDx did not object to a jury instruction stating that actual deception cannot be “presum[ed].” BIO 22. But CareDx does not request a *presumption* now; it asks the Court to decide only the lesser-included question whether juries may *infer* actual consumer deception. To be sure, the two are closely related: The basis for a presumption is that juries may, at minimum, infer that intentionally false advertising is successful. But the critical issue here is narrower: Regardless of whether a presumption applies, is intentionally misleading conduct valid circumstantial evidence from which a jury may infer actual consumer deception? Other circuits say yes, but the Third Circuit says no. This Court should resolve that disagreement.

Natera also points to the jury instruction that “actual” consumer deception was required, suggesting it forecloses CareDx’s requested inference. BIO 23-24. Nonsense. The district court separately instructed the jury to consider “circumstantial evidence” and draw reasonable inferences. CA3 JA712-13, 94:15-95:3 (“[I]t is you, the jury, who decides how much weight to give

evidence, be it direct or circumstantial evidence.”); *see also InSinkErator, LLC v. Joneca Co., LLC*, 163 F.4th 608, 620 (9th Cir. 2025) (“circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence” of consumer reaction). A fact found through a permissible inference is no less an “actual” fact.

Next, Natera asserts that CareDx inconsistently characterized *Johnson* below. BIO 16-18. But unsuccessfully attempting to distinguish adverse precedent is not a vehicle problem. In any event, there is no inconsistency in CareDx’s position: CareDx argued that *Johnson* left the door open for cases of “clear and egregious conduct,” and that this case qualifies. CA3 Rehr’g Pet. 10-11. That door was plainly shut by the Third Circuit’s decision below. If the facts of this case, for which the jury awarded substantial punitive damages, do not support a finding that Natera’s conduct was “clear and egregious,” what does? Even so, whether *Johnson* absolutely forecloses the powerful inference of actual deception or allows it in a sufficiently egregious case does not matter: Either way, the Third Circuit stands alone, as no other circuit requires both intentional lies *and* egregiousness. Pet. 22-23; *supra* 5-6.

Natera’s scienter argument fares no better. It asserts that a jury must make an affirmative, separate finding of intent before the inference of actual consumer deception may be applied. BIO 26-27, 30. But it cites no authority for that proposition. And in any event, the jury expressly found that Natera “intentionally and willfully” engaged in false advertising. App.7a. Natera’s complaint that the willfulness instruction included a “should have

known” alternative is beside the point—the jury heard evidence of Natera’s deliberately false advertising and drew the commonsense inference that results.

Finally, Natera asserts that the inference would not matter here, because Natera’s customers are “sophisticated” transplant doctors who, unlike lay consumers, rely on studies, not advertising. BIO 25-26). But this fundamentally misunderstands the doctrine. The powerful inference rests on the rationality of the *advertiser*, not the gullibility of a particular audience. *See, e.g., U-Haul Int’l*, 793 F.2d at 1041. The central insight holds across audiences: Advertisers do not spend substantial resources deliberately targeting customers they expect to ignore the message. Indeed, if, as Natera asserts, doctors are unaffected by advertising, why did Natera deliberately target them with a multimillion-dollar campaign of false advertising? The answer is powerful and commonsense. That is why no circuit allowing the inference has limited it to lay consumers; it applies whenever a defendant has “intentionally set out to deceive the public.” *Res. Devs.*, 926 F.2d at 140.

Natera’s factual assertion is also belied by the record and the jury’s own findings. The jury heard Natera’s witnesses testify that doctors “*do not rely* on advertising materials when selecting transplant-rejection assays” (BIO 28), and *rejected* that testimony as not credible. There was ample reason to do so: Natera’s witnesses testified that the false claims were “key messages.” CA3 JA1204, 584:14-22. CareDx’s witnesses testified that Natera’s false advertising “caused a lot of confusion ... with our customers” including at leading medical institutions. CA3 JA830, 212:5-12. And after Natera’s false advertising

campaign began, specific transplant centers switched to Natera's test. CA3 JA838-839, 220:5-221:3. All of this evidence, on which the jury was entitled to rely, makes clear that the district court and Third Circuit's legal error was dispositive.

At the end of the day, Natera's reliance on jury instructions and factual disputes misses the point. The Third Circuit applied a standard rejected by six other circuits. In those circuits, the jury would be entitled to either presume or infer actual reliance based on Natera's intentional misconduct. And Natera would be entitled to try to rebut that presumption or inference. But in the Third Circuit alone, the jury is foreclosed from even undertaking that analysis. At a minimum, therefore, this Court should grant review, correct the Third Circuit's legal error, and remand for the application of the correct legal standard.

CONCLUSION

This Court should grant the petition.

May 8, 2026

Edward R. Reines
JONES DAY
1755 Embarcadero Rd.
Palo Alto, CA 94303

Respectfully submitted,

Noel J. Francisco
Counsel of Record
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
njfrancisco@jonesday.com

Daniel Paul Johnson
JONES DAY
500 Grant St., Ste. 4500
Pittsburgh, PA 15219

Counsel for Petitioner