

No. 25-959

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IN THE  
**Supreme Court of the United States**

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CAREDX, INC.,

*Petitioner,*

*v.*

NATERA, INC.,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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**BRIEF OF *AMICI* TRUTH IN  
ADVERTISING, INC. AND SCHOLARS  
IN SUPPORT OF PETITIONER**

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## STATEMENT OF INTEREST OF AMICI CURIAE

Amici are Truth in Advertising, Inc., and scholars whose research and teaching has focused on the Lanham Act, including both false advertising and trademark law. Amici have no direct interest in the outcome of this litigation.<sup>1</sup>

Truth in Advertising, Inc. (TINA.org) is a nonprofit, nonpartisan consumer advocacy organization dedicated to stopping false, deceptive and unfair marketing practices. Barton Beebe is the John M. Desmarais Professor of Intellectual Property Law, NYU Law School; Mark Lemley is the William H Neukom Professor, Stanford Law School; Alexandra J. Roberts is Professor of Law & Media and Faculty Director, Center for Law, Information & Creativity at Northeastern University School of Law; and Rebecca Tushnet is the Frank Stanton Professor of the First Amendment, Harvard Law School.

## SUMMARY OF ARGUMENT

The Third Circuit's opinion suggests that a jury cannot rely on circumstantial evidence, including the defendant's knowledge of falsity and deliberate employment of falsity as the center of an ad campaign, to find actionable harm

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1. Professors' institutional affiliations are listed for informational purposes only. The parties have been provided with timely notice of the filing of this brief. Amici certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no person other than the amici contributed money that was intended to fund the preparation or submission of this brief.

under the Lanham Act’s false advertising provisions. This result is inconsistent with courts’ treatment of other Lanham Act claims and will encourage future false advertisers to try their luck. The issue also implicates the larger question of how harm is assessed in Lanham Act cases, which has generated considerable incoherence in lower courts. Certiorari is warranted to resolve this continuing issue.

## ARGUMENT

### I. Certiorari Is Warranted To Resolve Longstanding Conflicts over Intent in the Lanham Act

The Lanham Act is a “common law statute”: it incorporates many principles of the common law, and it does not define many key terms.<sup>2</sup> Courts have therefore created tests for what constitutes trademark infringement and false advertising under the Lanham Act. Although harm to the plaintiff is an important limiting principle (and Article III requirement), the statute does not specify how harm is to be determined. *Cf.* Restatement (Third) of Unfair Competition § 3 (1995) (stating that a misrepresentation will be “to the likely commercial detriment of” the plaintiff if it is material (i.e., if “it is likely to affect the conduct of prospective purchasers”) and if a reasonable basis exists for believing that the misrepresentation would likely divert trade from the plaintiff or harm its reputation or good will).

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2. Graeme B. Dinwoodie, *The Common Law and Trade Marks in an Age of Statutes*, in *The Common Law of Intellectual Property: Essays in Honour of Professor David Vaver* 331, 331-52 (Catherine W. Ng, Lionel Bently & Giuseppina D’Agostino eds., 2010); Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 *Colum. J.L. & Arts* 187, 197-98 (2004).

As the petition for certiorari indicates, courts generally agree that the test can take into account the dangers that arise when an advertiser consciously disregards material truth in favor of falsity. Thus, if the defendant believes that a false factual claim is important to its sales, then a jury can reasonably infer that it was. The defendant is in the best position to understand what sells its products.

Importantly, the Lanham Act covers both trademark infringement and false advertising. The relevant language for both causes of action does not specify how harm is to be proven. 15 U.S.C. § 1125(a)(1) creates a cause of action for trademark infringement in (A) and false advertising in (B), covering

any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities.

Likewise, 15 U.S.C. § 1114 covers uses of a registered mark “likely to cause confusion, or to cause mistake, or to deceive.”

False advertising under (a)(1)(B) has the additional element of “commercial advertising or promotion” compared to trademark infringement under (a)(1)(A), but no additional proof-of-harm requirement. *See* Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. Penn. L. Rev. 1305, 1312 (2011) (the “nearly identical statutory language ... reinforced the relationship between trademark infringement and other types of false advertising under federal law”).

Courts have often treated false advertising and trademark infringement interchangeably for issues related to remedies and proof.<sup>3</sup> Congress has also provided that the presumption of irreparable harm is the same for both. 15 U.S.C. § 1116.

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3. *See, e.g., Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992) (using survey precedent interchangeably); *Johnson & Johnson \* Merck Consumer Pharm. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 300 (2d Cir. 1992) (same); *Rexall Sundown, Inc. v. Perrigo Co.*, 707 F. Supp. 2d 357, 363 (E.D.N.Y. 2010) (holding that damages should be evaluated the same way for both); *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 627 F. Supp. 2d 384, 479 (D.N.J. 2009) (“Trademark case law applies to the remedies sought in this [false advertising] action: Congress amended the Lanham Act to expressly make all trademark remedies available in false advertising cases, and numerous courts have since applied trademark precedent to false advertising damages claims.” (citation omitted)); 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:193 (4th ed. 2010) (discussing equal applicability of survey precedent and citing cases).

Although the petition justifiably focuses on a split in false advertising law, the greater split involves disparate treatment of claims under 15 U.S.C. § 1125(a)(1)(A) and § 1125(a)(1)(B) without justification in the statute or the theory of consumer deception. Courts have long held that an intent to confuse consumers can justify an inference of successful deception in trademark. Just as with other issues, the same should be true in false advertising for intentional material falsehood—and this specification of what deceptive intent means should apply to trademark as well, as detailed below.

Shortly after the adoption of the Lanham Act, one scholar explained that, once falsity is established, the best practice in false advertising cases is for courts to use the same tools to assess materiality and likely injury that they use in a trademark case:

[T]he courts might readily reason that an advertiser can hardly be expected to expend large sums of money to publicize a representation unless he believes that it will lead to sales of his product. ... In “passing off” cases a judicial willingness has been shown to accept the defendant’s own judgment as to the effectiveness of his simulation. ... [T]here would seem to be no reason, in a false advertising case, why the courts could not say that they “need no more” than the defendant’s “forecast that he is ‘likely’ to succeed” through the use of his chosen misrepresentation.

Gilbert H. Weil, *Protectability of Trademark Values Against False Competitive Advertising*, 44 Calif. L. Rev. 527, 537-38 (1956); cf. *Nabisco, Inc. v. PF Brands, Inc.*, 191

F.3d 208, 224 (2d Cir. 1999) (“Plaintiffs are ordinarily free to make their case through circumstantial evidence that will justify an ultimate inference of injury. ‘[C]ontextual factors’ have long been used to establish infringement.” (alteration in original)), *abrogated on other grounds by Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003).

Indeed, the Third Circuit itself, from which this false advertising decision comes, has held that a trademark defendant’s intent to deceive is probative of the deception’s likely success. *See, e.g., Lontex Corporation v. Nike, Inc.*, 107 F.4th 139, 154 (3d Cir. 2024) (confusion is more likely where “the defendant chose the mark to intentionally confuse consumers”); *A & H Sportswear, Inc. v. Victoria’s Secret Stores, Inc.*, 237 F.3d 198, 226 (3d Cir. 2000) (“purposeful manipulation” favors finding infringement); *Versa Prods. Co. v. Bifold Co.*, 50 F.3d 189, 205 (3d Cir. 1995) (“a defendant’s intent to confuse or deceive consumers as to the product’s source may be highly probative of likelihood of confusion”). This is not the same thing as a simple intent to copy, which might just show the competitive desirability of a copied feature.

In trademark cases, however, courts have been inconsistent about what kind of intent is relevant to inferring damage to the plaintiff. Resolving the proper treatment of intent under the Lanham Act would clear up longstanding confusion in the lower courts, which is important because a court’s view of intent is, according to empirical research, the second most important factor in a trademark infringement case, after the similarity of the marks. Indeed, a finding of bad intent in a trademark case leads to a “nearly un-rebuttable presumption of a likelihood of confusion.” Barton Beebe, *An Empirical Study of the*

*Multifactor Tests for Trademark Infringement*, 94 Calif. L. Rev. 1581, 1628 (2006).<sup>4</sup>

Unfortunately, although this factor is vital, intent is often described differently by different courts, even within circuits. A finding of intent to confuse in one court may be based merely on a showing of intent to copy, or even merely on knowledge of the plaintiff's mark, while in other cases intent to confuse means what it says: intent to confuse consumers. For example, the Second Circuit often infers a successful intent to confuse from intent to copy. *Harlequin Enters. v. Gulf & W. Corp.*, 644 F.2d 946, 949 (2d Cir. 1981) ("Evidence of conscious imitation is pertinent because the law presumes that an intended similarity is likely to cause confusion."). The Fourth Circuit has reasoned similarly. *Osem Food Indus. Ltd. v. Sherwood Foods, Inc.*, 917 F.2d 161, 16 U.S.P.Q.2d 1646, 1649 (4th Cir. 1990) ("Logic requires ... that from such intentional copying arises a presumption that the newcomer is successful and that there is a likelihood of confusion. It would be inconsistent not to require one who tries to deceive customers to prove they have not been deceived."). The Sixth Circuit has also

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4. Beebe's study found that the outcome of the intent factor correlates very strongly with the outcome of the overall test. Sixty-seven of the 192 preliminary injunction and bench trial opinions found that the intent factor favored the plaintiff. Of these opinions, sixty-five ultimately found in favor of the plaintiff; in the two outlier cases, the court found that the marks weren't similar. Beebe, *supra*, at 1608; Barton Beebe, *Trademark Law: An Open-Source Casebook* 458 (3d ed. 2016). An updated study found results consistent with Beebe's on intent. See Kevin Blum, Ariel Fox, Christina J. Hayes, & James Xu, *Consistency of Confusion? A Fifteen-Year Revisiting of Barton Beebe's Empirical Analysis of Multifactor Tests for Trademark Infringement*, 2010 Stan. Tech. L. Rev. 3, 70-72 (2010).

said this. *Ferrari S.P.A. v. Roberts*, 944 F.2d 1235, 1243 (6th Cir. 1991) (referring to a “presumption of likelihood of confusion that follows from intentional copying”). So has the Fifth. *Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252, 263 (5th Cir. 1980) (intent to copy is alone sufficient to find likely confusion). And the Eleventh. *Bauer Lamp Co. v. Shaffer*, 941 F.2d 1165, 1172 (11th Cir. 1991) (“Intent to copy in itself creates a rebuttable presumption of likelihood of confusion.”).

Other cases have allowed the finder of fact to infer confusion from intentional copying, without a presumption. *E.g.*, *Blue Bell Bio-Med. v. Cin-Bad, Inc.*, 864 F.2d 1253, 1259 (5th Cir. 1989); *Kendall-Jackson Winery Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1052 n.11 (9th Cir. 1998) (“[T]his court stated that proof of intent to cause confusion is entitled to *great weight*, not that it creates a presumption of confusion that shifts the burden of proof to the other party.”) (emphasis in original) (citing *Fuddrucker, Inc. v. Doc’s B.R. Others, Inc.*, 826 F.2d 837, 844-45 (9th Cir. 1987)).

But other cases also say that “intent is largely irrelevant in determining if consumers likely will be confused as to source.” *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 799 F.2d 867, 875 (2d Cir. 1986).

But that is not the end of the variation. As Barton Beebe summarizes, “bad faith intent may be inferred solely from the fact that the parties’ marks are similar and the fact that the defendant had knowledge of the plaintiff’s mark when it adopted its own, similar mark. The data suggest that this circumstantial inference is the leading basis for a finding of bad faith intent.”<sup>5</sup>

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5. Beebe, *supra*, at 1630 (citations omitted).

And yet many cases also, more properly, distinguish knowledge and intentional copying from intent to deceive. *E.g.*, *West Point Mfg. v. Detroit Stamping Co.*, 222 F.2d 581, 586 (6<sup>th</sup> Cir. 1955) (intentional copying to compete does not justify liability); *Zin-Plas Corp. v. Plumbing Quality AGF Co.*, 622 F.Supp. 415, 420 (W.D. Mich. 1985) (intentional copying is not actionable “absent evidence that the copying was done with the intent to derive a benefit from the reputation of another”); *see also* Daryl Lim, *Trademark Confusion Revealed: An Empirical Analysis*, 114 Trademark Reporter 799, 822-23 (2022) (collecting conflicting authorities and arguing for limiting consideration of intent).

In part, this incoherence comes from ignoring the connection between trademark and false advertising law, where it has seemed more obvious that the relevant intent is the intent to disseminate a material falsehood, not merely an intent to compete.

Thus, whatever the resolution is, this Court’s intervention would help address the long-acknowledged “conflict among the courts concerning the proper role of intent in the multifactor analysis.” Beebe, *supra*, at 1631.

## **II. Intentional Falsehood May Be Considered Because Alternative Means of Proof of Harm from False Advertising Are Insufficient and Subject To Similar Criticisms**

Harm is, of course, vital to a Lanham Act violation, as well as to Article III standing. *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014) (“[A] plaintiff suing under § 1125(a) ordinarily must show

economic or reputational injury flowing directly from the deception wrought by the defendant’s advertising; and that that occurs when deception of consumers causes them to withhold trade from the plaintiff.”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (injury in fact is required for Article III standing).<sup>6</sup> The question presented is what a jury may consider as evidence of likely harm.

Rules allowing inference of success from an intent to deceive about a material fact serve both evidentiary and deterrent functions. *Versa*, 50 F.3d at 207. This inferential logic is even more persuasive for the statutory tort of false advertising than it is for trademark because of false advertising’s materiality requirement: A false advertising plaintiff must prove that the challenged claim is one that is likely to affect consumers. *See, e.g., Select Comfort Corp. v. Baxter*, 996 F.3d 925, 939 (8th Cir. 2021) (actionable misrepresentations must be “types of statements reasonable persons would recognize as likely to influence a purchasing decision”); *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (listing elements of a false advertising claim, including materiality, defined as a misrepresentation “likely to influence the purchasing decision”).

Intentional marketing of a *material* claim known to be false is thus—definitionally—at least probative evidence that the falsity was likely to succeed, upon which a finder of fact can rely.

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6. For similar statutory and Article III reasons, this should also be true of trademark law, and historically this was the case, but modern courts have generally disregarded the harm requirement. *See* Tushnet, *supra*, at 1352; *see also* Note, Trademark Injury in Law and Fact: A Standing Defense to Modern Infringement, 135 Harv. L. Rev. 667 (2021).

The Third Circuit opinion below does not explain what more evidence it would have required, leaving future victims of false advertising without guidance. The courts will license deception if circumstantial evidence such as intentional material misrepresentations are disregarded. *See, e.g., U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986) (“It is not easy to establish actual consumer deception through direct evidence. 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. He who has attempted to deceive should not complain when required to bear the burden of rebutting a presumption that he succeeded.”); *see also InSinkErator, LLC v. Joneca Co., LLC*, 163 F.4th 608, 620 (9th Cir. 2025) (“Joneca ... argues that we should require direct evidence showing how consumers would likely react to the alleged deception—like surveys and consumer declarations—to show that a deception is material. Joneca does not adequately address the baseline proposition that circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”) (cleaned up).

Litigation is already expensive, and will get more expensive if circumstantial evidence of deceptiveness such as centrality to an ad campaign and intentional deception are treated as insufficient. Certainly such evidence is circumstantial, but the additional evidence of causation apparently sought by the court below is also highly contestable and no more generally reliable than evidence of intent.

The two types of evidence that courts typically consider evidence of actual impact on consumers in Lanham Act

cases are statements from individual consumers or from surveys. *See, e.g., IQ Prod. Co. v. Pennzoil Prod. Co.*, 305 F.3d 368, 375 (5th Cir. 2002) (listing these as the possibilities); *PPX Enters. v. Audiofidelity Enters.*, 818 F.2d 266, 271 (2d Cir. 1987) (“Actual consumer confusion often is demonstrated through the use of direct evidence, e.g., testimony from members of the buying public, as well as through circumstantial evidence, e.g., consumer surveys or consumer reaction tests.”). But neither individual consumer accounts nor surveys are foolproof, and neither should be required in a false advertising case.

Individual consumer testimony may be unavailable or unreliable for various reasons. The liability standard is likely deception among a *substantial* number of *reasonable* consumers—and therefore, while courts often accept individual accounts as probative, they also often say that anecdotes are insufficient to prove liability, given their lack of representativeness. *See, e.g., Florida Virtual School v. K12, Inc.*, 2026 WL 127063 (11th Cir. Jan. 15, 2026) (discounting individual consumers’ testimony because of their idiosyncrasies compared to reasonable consumers); *Conopco, Inc. v. May Dept. Stores Co.*, 46 F.3d 1556, 1563-64 (Fed. Cir. 1994) (rejecting confused consumer’s testimony because there was no evidence that her beliefs were generally held). Where the parties operate in a large market, there will always be a few confused consumers among millions, so the plaintiff’s hand-picked consumers’ accounts may not be probative of *likely* confusion among a substantial number of reasonable consumers. *See, e.g., Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1150 (10th Cir. 2013) (discounting “isolated” and “anecdotal” consumer evidence); *Star Indus., Inc. v. Bacardi & Co.*, 412 F.3d 373, 383 (2d Cir. 2005) (anecdotal

evidence “extremely weak”); *Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, 78 F.3d 1111, 1120 (6th Cir. 1996) (discounting “minimal” and “isolated” consumer accounts).

Where the products are expensive and specialized, customers may fear disrupting otherwise working relationships by participating in litigation between two suppliers, each of whom might be important to the customer. *Cf. Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 692 (6th Cir. 2000) (discussing risks of litigation involvement to customer relationships). With cheaper consumer products, courts recognize that affected consumers are unlikely to complain. *See, e.g., Balance Dynamics Corp. v. Schmitt Indus., Inc.*, 204 F.3d 683, 693-94 (6th Cir. 2000) (citing, in a false advertising case, the trademark case *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993), which held that proof of actual confusion can be difficult to obtain and thus is not required).

Even if consumers are willing and able to testify, consumer researchers agree that they are not accurate reporters of their own reasons for decision—especially after the fact, when there is a natural human impulse to justify the decisions we have already made, known as choice-supportive bias or post-purchase rationalization.<sup>7</sup> *See* Shari Seidman Diamond, *Control Foundations:*

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7. *See, e.g.,* Adam N. Hornsby & Bradley C. Love, *How Decisions and the Desire for Coherency Shape Subjective Preferences Over Time*, *Cognition* (July 2020), <https://www.sciencedirect.com/science/article/pii/S0010027720300639?via%3Dihub>; Veronica Juarez Ramos, *Analyzing the Role of Cognitive Biases in the Decision-Making Process* 52 (2018).

*Rationales and Approaches*, in *Trademark and Deceptive Advertising Surveys: Law, Science, and Design*, 201, 211 (Shari Seidman Diamond & Jerre Baily Swann, eds. 2022) (explaining that “why” answers are unreliable; “[a]lthough people are often able to justify their positions when asked to explain their actions, such post-hoc explanations can only imperfectly capture the reasoning that actually produced their answers”) (footnote omitted).

Surveys, which can substitute for direct consumer testimony, offer additional problems, as this Court has noted in recent cases. *United States Patent & Trademark Office v. Booking.com B. V.*, 591 U.S. 549, 561 n.6 (2020) (explaining that “[s]urveys can be helpful evidence of consumer perception but require care in their design and interpretation” and endorsing use of “any other source of evidence bearing on how consumers perceive a term’s meaning”); *see also Jack Daniel’s Properties, Inc. v. VIP Products LLC*, 599 U.S. 140, 163-65 (2023) (Sotomayor, J., concurring) (explaining some concerns with surveys, including their artificiality and distance from actual consumer experience).

Surveys are expensive, putting them out of the reach of smaller businesses.<sup>8</sup> And even when they are present, courts often characterize them as imperfect and biased. *See, e.g., Indianapolis Colts, Inc. v. Metro. Balt.*

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8. Robert C. Bird, *The Impact of the Moseley Decision on Trademark Dilution Law*, 26 J. Pub. Pol’y & Marketing 102, 104 (2007) (noting that surveys could cost as much as \$100,000 to administer in 2007); *cf. Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 951 (3d Cir. 1993) (noting, in the course of holding that literal falsity obviates the need for a survey, that obtaining surveys is a “time consuming and expensive task”).

*Football Club Ltd. P'ship*, 34 F.3d 410, 416 (7th Cir. 1994) (disparaging the “survey researcher’s black arts”). As one court reasoned,

[P]utting together and executing a survey is an expensive and dubious proposition. ... Further, just as ... anecdotal evidence of confusion is “frequently discounted as unclear or insubstantial,” the same is true for surveys. The expense that a survey entails will go all for nothing if the court will not accept its methodology. ... Because it would have been difficult, cost-preclusive, and risky for [the plaintiff] to have obtained evidence of actual confusion, I cannot weigh the lack of this evidence too heavily against him.

*Facenda v. N.F.L. Films, Inc.*, 488 F. Supp. 2d 491, 513 (E.D. Pa. 2007) (citation omitted), *aff'd in part*, 542 F.3d 1007 (3d Cir. 2008). The bottom line is this: To the extent that the Third Circuit’s opinion assumed that there is in fact regularly direct evidence of harm from false advertising available, it was mistaken.<sup>9</sup>

None of this is to say that survey or consumer testimony evidence of impact on consumers—the mechanism by which harm to plaintiffs occurs in trademark infringement and false advertising—is inadmissible. Rather, it is to highlight that *all* harm evidence can be imperfect and

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9. See Jennifer L. Mnookin, *Idealizing Science and Demonizing Experts: An Intellectual History of Expert Evidence*, 52 *Vill. L. Rev.* 763, 767 (2007) (explaining that imagined ideal evidence from experts leads courts to ignore the real potential of evidence, which is inevitably imperfect).

requires inference. As such, it does not make sense to reject reliance on other forms of evidence of harm, including reasonable inferences made from knowledge of falsity and the centrality of a claim to an ad campaign.

### CONCLUSION

For the foregoing reasons, this Court should grant certiorari and allow juries to use circumstantial evidence and common sense to find that materially false claims caused harm.

Respectfully submitted,

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