No. A-

IN THE

Supreme Court of the United States

KIMBERLY-CLARK CORPORATION; KIMBERLY-CLARK WORLDWIDE, INC.; KIMBERLY-CLARK GLOBAL SALES, LLC,

Applicants / Petitioners,

v.

JENNIFER DAVIDSON, an individual on behalf of herself, the general public and those similarly situated,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and this Court's Rule 13.5, Kimberly-Clark Corporation, Kimberly-Clark Worldwide, Inc., and Kimberly-Clark Global Sales, LLC (collectively, "Kimberly-Clark") respectfully request a 30-day extension of time, to and including September 6, 2018, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.*

The court of appeals entered its judgment on October 20, 2017. *Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103 (9th Cir. 2017). The Ninth Circuit issued an amended opinion and denied Kimberly-Clark's timely petition for rehearing on May 9, 2018. *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018). Copies of the opinion and amended opinion are attached hereto. Unless extended, the time in which to file a petition for a writ of certiorari will expire on August 7, 2018. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. Plaintiff Jennifer Davidson initiated this putative class action alleging that Kimberly-Clark fraudulently marketed certain brands of disposable wipes as "flushable" in violation of California consumer-protection laws. According to Plaintiff, the term "flushable" is understood by a reasonable consumer to mean "suitable for disposal down a toilet," not simply "capable of passing from a toilet to the pipes after

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* Pursuant to Rule 29.6 of the Rules of this Court, undersigned counsel state that Kimberly-Clark Corporation, Kimberly-Clark Worldwide, Inc., and Kimberly-Clark Global Sales, LLC have no parent corporations and that no publicly held company owns 10% or more of their stock.

one flushes." Plaintiff was "concerned" the wipes were not "suitable" for flushing because she remembered hearing stories about wipes causing problems. *Davidson*, 889 F.3d at 961. Plaintiff alleged that as a result of Kimberly-Clark's allegedly misleading marketing, she paid more for the wipes than she otherwise would have, even though the wipes cleared her toilet and plumbing without incident. In addition to monetary relief, Plaintiff sought an injunction barring Kimberly-Clark from using the term "flushable" to describe the wipes.

The district court dismissed Plaintiff's First Amended Complaint with prejudice. Among other things, the district court held that Plaintiff lacked standing to pursue injunctive relief because she could not adequately allege a future injury. Even assuming Plaintiff suffered a retrospective injury when she was allegedly misled into paying more for the wipes than she otherwise would have, she now understood the meaning ascribed to the term "flushable" in Kimberly-Clark's marketing, and so was unlikely to be misled by Kimberly-Clark's use of the term in the future. *Davidson*, 889 F.3d at 963.

The Ninth Circuit reversed. Reasoning that "[k]nowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future," *Davidson*, 889 F.3d at 969, the court concluded that Plaintiff had adequately alleged future injury by averring that she "continues to desire to purchase wipes that are suitable for disposal in a household toilet" but has "no way of determining whether the representation 'flushable' is in fact true," *id.* at 970–71. In doing so, the Ninth Circuit emphasized that "there is no reason prospective injunctive relief must also be premised on a *realistic* threat of a similar injury recurring" so long as there is

"[a] sufficiently concrete prospective injury." *Id.* at 971 n.7.

2. Kimberly-Clark intends to seek this Court's review of the decision below. The Ninth Circuit's decision in this case has created a split of authority among the federal courts of appeals on the question whether a consumer can seek prospective relief based on an allegedly misleading advertisement when the consumer is aware of the allegedly misleading nature of the advertisement. As the Ninth Circuit itself acknowledged, "[s]everal other circuits have considered whether a previously deceived consumer has standing to seek injunctive relief and have held they do not." *Davidson*, 889 F.3d at 969 n.5 (citing *Conrad v. Boiron, Inc.*, 869 F.3d 536 (7th Cir. 2017); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016); *McNair v. Synapse Grp. Inc.*, 672 F.3d 213 (3d Cir. 2012)).

The decision below also deepens a split regarding how concrete an injury must be to establish standing in the wake of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). *Compare In re: Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 626 (3d Cir. 2017), *and Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017), *with Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909 (7th Cir. 2017), *and Dreher v. Experian Info Sols., Inc.*, 856 F.3d 337 (4th Cir. 2017). The Ninth Circuit's conclusion that Plaintiff had standing to pursue injunctive relief because "[i]n some cases" an actionable injury "may" result falls on the latter side of this split. It also significantly dilutes this Court's holding in *Spokeo* and other cases concerning the showing a plaintiff must make to establish standing to seek injunctive relief. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) ("[W]e have repeatedly reiterated that 'threatened injury must

be *certainly impeding* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient.").

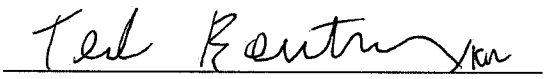
The Ninth Circuit's decision has important, far-reaching implications. Plaintiff seeks an injunction restricting Kimberly-Clark's ability to speak to the public, raising serious First Amendment concerns. And given the nature of Kimberly-Clark's business, such an injunction would have nationwide—and indeed, international—effect.

3. Additional time is necessary to permit counsel to prepare and file a petition that adequately addresses these important issues. An extension of 30 days is warranted because counsel of record was not involved in the prior proceedings in this case and therefore requires additional time to study the record and relevant case law. In addition, counsel of record has numerous preexisting professional responsibilities in July and August, including business meetings outside of the country from July 9 through July 13; a brief in opposition to certiorari currently due on July 23 in *California State Teachers' Retirement System v. Alvarez*, No. 17-1695 (U.S.); an approximately three-week trial beginning on July 30 in *Pico Neighborhood Ass'n v. City of Santa Monica*, No. BC616804 (Cal. Super. Ct.); and a reply brief due on August 17 in *New Prime Inc. v. Oliveira*, No. 17-340 (U.S.). Kimberly-Clark is not aware of any party that would be prejudiced by granting a 30-day extension.

CONCLUSION

Accordingly, Kimberly-Clark respectfully requests that the time to file a petition for a writ of certiorari be extended by 30 days, to and including September 6, 2018.

Respectfully submitted,



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Dated: July 6, 2018