No. _____

IN THE
Supreme Court of the United States

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

Petitioners,

v.

JENNIFER DAVIDSON, AN INDIVIDUAL ON BEHALF OF HERSELF, THE GENERAL PUBLIC, AND THOSE SIMILARLY SITUATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A party who seeks injunctive relief in federal court must first establish that she has standing by showing that she is "immediately in danger of sustaining some direct injury" that is "both real and immediate, not conjectural or hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (internal quotation marks omitted). The Third and Seventh Circuits have held that a consumer who alleges that a product's marketing is misleading cannot make the showing of "real and immediate" future harm necessary to enjoin the speech because she already knows that the marketing is misleading and therefore is unlikely to be deceived by it again. The Ninth Circuit has departed from those decisions, holding that a consumer can establish standing to enjoin such marketing because "[k]nowledge that [an] advertisement or label was false in the past does not equate to knowledge that it will remain false in the future," and therefore the consumer "may suffer" future harm. The question presented is:

Whether a consumer, who after using a product and determining that a representation concerning that product is allegedly misleading, can plausibly allege a "real and immediate threat" that she will be deceived by that same representation in the future so as to establish standing to seek an injunction.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Petitioner Kimberly-Clark Corporation is a publicly held corporation. Kimberly-Clark Corporation does not have a parent corporation and no publicly held corporation owns ten percent (10%) or more of its stock. Petitioners Kimberly-Clark Worldwide, Inc. and Kimberly-Clark Global Sales, LLC are wholly owned subsidiaries of Kimberly-Clark Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Kimberly-Clark Corporation, Kimberly-Clark Worldwide, Inc., and Kimberly-Clark Global Sales, LLC (together, "Kimberly-Clark") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The original opinion of the court of appeals (Pet. App. 34a–60a) is published at 873 F.3d 1103 (9th Cir. 2017). The order denying Kimberly-Clark's petition for rehearing en banc and amending the opinion (Pet. App. 1a–33a) is published at 889 F.3d 956 (9th Cir. 2018). The district court opinion (Pet. App. 61a–83a) is published at 76 F. Supp. 3d 964 (N.D. Cal. 2014).

JURISDICTION

The court of appeals issued its original opinion on October 20, 2017, and issued an amended opinion and order denying rehearing en banc on May 9, 2018. On July 12, 2018, Justice Kennedy extended the time for filing a petition for certiorari to and including September 6, 2018. No. 18A33. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents a straightforward question: When a consumer alleges that she has been deceived by a product's marketing, can she show a sufficient likelihood of actual and imminent future harm to establish standing to seek injunctive relief? Nearly every federal court of appeals to consider this question has answered in the negative; once a consumer is aware of a representation's allegedly misleading

nature, that consumer is unlikely to be deceived by the representation again. The sole exception is the Ninth Circuit, which held in the decision below that such a consumer "may suffer an 'actual and imminent, not conjectural or hypothetical' threat of future harm" because "[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." Pet. App. 20a–21a.

The Ninth Circuit's decision not only creates a circuit split, it also flies in the face of this Court's standing jurisprudence. This Court has long held that a plaintiff has standing to pursue injunctive relief only if there is "a sufficient likelihood that he will again be wronged *in a similar way*." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (emphasis added). But while a consumer asserting a misrepresentation claim suffers past harm when she *relies* on a deceptive representation that she believes to be true, the future harm found by the court below was the exact opposite—the consumer's "*inability to rely on* the validity of the information advertised." Pet. App. 25a (emphasis added).

In any event, such purported harm, even if assumed to be concrete, is not imminent because it will be realized only if either (1) the product changes such that the representation becomes true, yet the consumer declines to purchase the product in the belief that the representation is still false; or (2) the product does not change, yet the consumer repurchases it anyway in the belief that the representation has become true. Such a "speculative chain of possibilities" falls far short of establishing "certainly impending" future harm. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). And the

Ninth Circuit did not hold otherwise, instead asserting that "there is no reason prospective injunctive relief must always be premised on a realistic threat of a similar injury recurring" so long as there is "[a] sufficiently concrete prospective injury." Pet. App. 26a n.7.

The adverse consequences of the decision below cannot be overstated. In short, the Ninth Circuit has authorized any consumer who claims to have been deceived by a product's marketing to harness the federal judicial power to seek a de facto nationwide injunction prohibiting speech. And in doing so, it disregarded the "concern about the proper—and properly limited—role of the courts in a democratic society" that underlies this Court's standing jurisprudence. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

1. Kimberly-Clark manufactures a wide array of consumer products which it sells under some of the most recognized names in America, including Huggies diapers, Cottonelle toilet paper, Scott paper towels, and Kleenex tissues. Pet. App. 87a. Of relevance here, Kimberly-Clark manufactures and sells several lines of pre-moistened flushable wipes. Kimberly-Clark markets these wipes as "flushable" because they have satisfied guidelines established by the Association of the Nonwoven Fabrics Industry pertaining to the use of that term, including by passing a battery of tests that measure how the wipes break down in plumbing and sewage systems. Pet. App. 97a–98a.

Respondent Jennifer Davidson purchased Scott Naturals Flushable Moist Wipes in 2013. Pet. App. 103a–04a. After using several wipes, she noticed that they "felt very sturdy and thick, unlike toilet paper,"

and that they "did not break up in the toilet bowl like toilet paper." Pet. App. 104a. Although the wipes did not clog or otherwise damage her home plumbing, Pet. App. 74a, 103a–05a, "she began to become concerned that they were not truly flushable, so she stopped flushing the wipes and stopped using the product altogether." Pet. App. 104a. She has not purchased them since. Pet. App. 105a.

But that is not all. Respondent proceeded to file the instant putative class action alleging claims for common-law fraud and violations of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law. Pet. App. 84a–123a. According to respondent, Kimberly-Clark's use of the term "flushable" in its marketing was deceptive because "[r]easonable consumers understand the word 'flushable' to mean suitable for disposal down a toilet," but "[u]nlike truly flushable products, such as toilet paper, which disperse and disintegrate within seconds or minutes," the wipes take a longer amount of time to break down. Pet. App. 88a. Respondent did not dispute that the wipes comply with industry guidelines for determining whether a product is "flushable," but contended that those guidelines are themselves deceptive because they are based on tests that have "flaws in their design," such that "[t]hese guidelines . . . do not adequately measure the Wipes' suitability for disposal by flushing down the toilet." Pet. App. 97a–98a.

Respondent sought not only damages and restitution, but an injunction prohibiting Kimberly-Clark from marketing any of its wipes as flushable unless they satisfy her criteria for flushability. According to respondent, she "desire[s] to purchase wipes that are suitable for disposal in a household

toilet" and "knows that the design and construction of the Flushable Wipes may change over time," but "as long as Defendants may use the word 'Flushable' to describe non-flushable wipes, then when presented with Defendants' packaging on any given day, [she] continues to have no way of determining whether the representation 'flushable' is in fact true." Pet. App. 105a.

2. The district court granted Kimberly-Clark's motion to dismiss. First, the court held that respondent lacked standing to pursue injunctive relief. The district court explained that "where [a] plaintiff clearly will not purchase the product again, courts have found no risk of future harm and no basis for prospective injunctive relief." Pet. App. 70a. And "[g]iven that [respondent] has concluded that the 'flushable' wipes at issue in this case are not truly 'flushable,' any such product that she would be willing to purchase would necessarily be a product with a different design and construction, not the product at issue here." Pet. App. 69a. In other words, "plaintiff wants to purchase *different* wipes, not the same wipes again." Pet. App. 69a. As a result, "even if Kimberly-Clark removed the 'flushable' label and even if it charged less for the product, plaintiff would still not buy it because she believes it is not flushable." Pet. App. 69a–70a.

The district court held in the alternative that the causal chain by which respondent might suffer any future injury was too attenuated to establish standing. "[T]he threat of future harm alleged in the [First Amended Complaint] is that Kimberly-Clark *might* redesign its product in the future, and that plaintiff *might* not know that the product has been redesigned to be more 'flushable,' and that she *might*

not purchase it." Pet. App. 69a. This, the district court reasoned, is "exactly the type of conjectural or hypothetical injury for which a plaintiff does not have standing." Pet. App. 69a.

Second, the court dismissed respondent's claims for retrospective relief for failure to state a claim under Federal Rules of Civil Procedure 8 and 9(b). Pet. App. 73a–83a. In particular, respondent did "not allege[] facts showing that the representation 'flushable' is false or misleading." Pet. App. 79a. Although respondent cited internet articles and news stories discussing clogs and blockages at wastewater treatment facilities, those sources indicated that these problems often "[we]re caused by consumers who dispose of non-flushable wipes (and other objects not intended to be flushed, such as diapers, rags, towels, hair, cigarette butts, kitty litter, and doggy waste bags) into sewer systems," or else "wipes interacting with non-flushable items (such as debris) in the water treatment system." Pet. App. 80a. And customer complaints in online forums cited by respondent "[we]re not sufficiently detailed to meet the pleading standard" under Rule 9(b). Pet. App. 81a. Consequently, respondent "essentially allege[d] that . . . [the representation that] the wipes are 'flushable' is false because it is not true"—a "circular argument, not an explanation of why the designation is false." Pet. App. 82a.

3. a. The Ninth Circuit reversed, concluding that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase." Pet. App. 52a–53a, 20a. The court noted that other courts have "reason[ed] that

'plaintiffs who are already aware of the deceptive nature of an advertisement are not likely to be misled into buying the relevant product in the future and, therefore, are not capable of being harmed again in the same way.'" Pet. App. 50a, 18a. But while the consumer may not be harmed again in the same way—that is, by overpaying for a product the consumer believed to be something other than what it was—the Ninth Circuit concluded that the possibility of a *different type of harm* could support injunctive relief: "A consumer's inability to rely in the future upon a representation made on a package, even if the consumer knew or continued to believe the same representation was false in the past, is an ongoing injury that may justify an order barring the advertising." Pet. App. 35a; *see also id.* at 2a.

In the court's view, "[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," Pet. App. 53a, 20a, and so a consumer can allege a claim for injunctive relief with, for example, "plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to," or else "plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved." Pet. App. 53a, 21a–22a.

Reviewing respondent's allegations, the court concluded that she "adequately alleged that she faces an imminent or actual threat of future harm." Pet. App. 55a, 24a. Although "it is a close question," the court held that respondent's allegation that she "has

no way of determining whether the representation 'flushable' is in fact true . . . constitutes a threatened injury [that is] certainly impending, thereby establishing Article III standing to assert a claim for injunctive relief." Pet. App. 55a, 57a, 24a, 27a (second alteration in original) (internal quotation marks omitted).

The Ninth Circuit also reversed the district court's dismissal of respondent's claims for retrospective relief. In the court's view, respondent had adequately alleged that the term "flushable" meant "suitable for being flushed," and her assertion that the wipes are not flushable satisfied Rule 9(b) because it was supported by her personal observations about the wipes' construction and their dispersion in her toilet bowl. Pet. App. 41a–45a.

Finally, the court noted that its holding "alleviate[d] the anomalies the opposite conclusion would create"—that is, barring a plaintiff alleging state-law consumer claims in federal court from pursuing injunctive relief that would be available in state court. Pet. App. 53a–54a, 22a. Although the Ninth Circuit disclaimed any reliance on this rationale, it observed that denying respondent standing would be "an unnecessary affront to federal and state comity [and] . . . an unwarranted federal intrusion into California's interests and laws." Pet. App. 54a, 23a (alterations in original) (internal quotation marks omitted).

b. Kimberly-Clark petitioned for rehearing en banc. The Ninth Circuit denied the petition, but the panel amended its opinion in two notable ways.

First, the panel acknowledged for the first time that "[s]everal other circuits have considered whether a previously deceived consumer has standing to seek

injunctive relief and have held that they do not." Pet. App. 21a n.5. But in a footnote, the court concluded that these cases—from three different federal courts of appeals, with no federal circuit court cited on the opposite side of the question—"are factually distinguishable" because "[i]n none of the[m] . . . did the plaintiffs sufficiently allege their intention to repurchase the product at issue." Pet. App. 21a n.5. Because respondent "sufficiently allege[d] that she would purchase truly flushable wipes manufactured by Kimberly-Clark," the Ninth Circuit disregarded this unanimity of appellate authority as irrelevant. Pet. App. 21a–22a.

Second, the court explained how respondent's particular allegations satisfied this Court's standing jurisprudence. In the court's view, because respondent alleged that "she would purchase truly flushable wipes manufactured by Kimberly-Clark if it were possible," her inability to rely on Kimberly-Clark's "flushable" marketing was sufficiently concrete and imminent. Pet. App. 25a. In doing so, it emphasized that "there is no reason prospective injury must always be premised on a *realistic threat* of a similar injury recurring. A sufficiently concrete prospective injury is sufficient." Pet. App. 26a n.7 (emphasis added).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts With The Decisions Of Every Other Federal Court Of Appeals To Consider This Issue.

Every other circuit court to consider whether a consumer who purports to have been misled by a representation in the past, but who admits knowledge of the representation's alleged falsity after purchase,

nevertheless has standing to pursue injunctive relief has answered in the negative. The Ninth Circuit acknowledged this wall of adverse authority, yet concluded that these cases are distinguishable because "[i]n none of the[m] . . . did the plaintiffs sufficiently allege their intention to repurchase the product at issue as [respondent] does here." Pet. App. 21a n.5. But two of these circuit courts held that such a consumer lacks standing to pursue injunctive relief because he is not likely to be deceived again—a conclusion that has nothing to do with whether the consumer intends to repurchase the product. And while a third court has not directly addressed the issue in a published opinion, it has shown strong indications that it would reach the same conclusion.

A. The Seventh Circuit has twice held that consumers who are aware of the allegedly misleading nature of a representation are unable to show a sufficient likelihood of future harm to establish standing to seek injunctive relief.

In *Conrad v. Boiron, Inc.*, 869 F.3d 536 (7th Cir. 2017), a plaintiff brought a consumer-fraud action against the manufacturer of a homeopathic flu remedy that was, in effect, "nothing more than a placebo." *Id.* at 538. The court concluded that the plaintiff lacked standing to seek an injunction because he "knows about Boiron's refund program [established in a prior settlement] and . . . is fully aware of the fact that [the product] is nothing but sugar water." *Id.* at 542. The court below brushed this case aside, emphasizing the Seventh Circuit's first rationale—the existence of a refund program—and treating its second rationale as dicta. *See* Pet. App. 21a n.5 ("[I]n *Conrad*, the court held that an injunction would not redress the consumer's potential injury because the

injury was already redressed by the merchant's refund program for the deceptive product, and no other injury justifying injunctive relief was pled."). This reading finds no support in the Seventh Circuit's opinion.

In fact, *Camasta v. Joseph A. Bank Clothiers, Inc.*, 761 F.3d 732 (7th Cir. 2014)—which the court below did not cite—confirms the Ninth Circuit's misreading of Seventh Circuit caselaw. In that case, the plaintiff sued a clothing retailer "based on the company's 'sales practice of advertising the normal retail price as a temporary price reduction.'" *Id.* at 735. Unlike in *Conrad*, the retailer had not adopted any program that might redress the plaintiff's future harm. Nevertheless, the court dismissed the claim for prospective relief, concluding that "[s]ince Camasta is now aware of JAB's sales practices, he is not likely to be harmed by the practices in the future." *Id.* at 741.

As in *Camasta* and *Conrad*, respondent here "is now aware of [Kimberly-Clark's] sales practice[]" with respect to the "flushable" label—that is, Kimberly-Clark will label a product as flushable if it meets the guidelines established by the Association of the Nonwoven Fabrics Industry. Although respondent may desire *additional* information to help inform her purchasing decisions, she cannot claim that she will be misled by Kimberly-Clark's use of the term "flushable" in the future. As a result, respondent's claim for injunctive relief would have been dismissed had it been brought in the Seventh Circuit.

B. The Third Circuit is in accord with the Seventh. In *McNair v. Synapse Grp., Inc.*, 672 F.3d 213 (3d Cir. 2012), plaintiffs who had previously subscribed to magazines through Synapse, a marketer of magazine subscriptions, brought consumer-fraud claims

regarding Synapse's automatic-renewal policies. *Id.* at 217–18. In particular, the plaintiffs alleged that the notices Synapse mailed to subscribers before charging them for an automatic subscription renewal were deceptively "designed to appear like a direct mail offer for a new subscription rather than an automatic renewal notice for an existing subscription." *Id.* at 218. As a result, the plaintiffs discarded the notices and were unwittingly charged for new magazine subscriptions. *Id.* at 224. Among other relief, plaintiffs sought to enjoin Synapse's use of the allegedly deceptive notices. *Id.* at 222.

The Third Circuit concluded that the plaintiffs, who did not have any current magazine subscriptions through Synapse, lacked standing to pursue injunctive relief. Although the plaintiffs alleged that "they are subject to a sufficiently real and immediate threat of future harm" because Synapse "offers compelling deals in which it does not clearly identify itself" and "sends customers advance notifications that are, by design, meant to fool consumers into discarding the notification received," *id.* at 224, the court concluded that "th[is] wholly conjectural future injury [plaintiffs] rely on does not, and cannot, satisfy the constitutional requirement that a plaintiff seeking injunctive relief must demonstrate a likelihood of future harm," *id.* at 225. "Because [plaintiffs] are familiar with Synapse's practices as well as the various names under which it operates, it is a speculative stretch to say they will unwittingly accept a Synapse offer in the future." *Id.* at 225 n.15. And "even if they did" start a new magazine subscription through Synapse, "they would only be harmed if they were again misled by Synapse's subscription renewal techniques, which would require them to ignore their past dealings with Synapse." *Id.* Thus, although the

court could not "definitively say they won't get fooled again, it can hardly be said that [plaintiffs] face a likelihood of future injury when they *might* be fooled into inadvertently accepting a magazine subscription with Synapse and *might* be fooled by its renewal tactics once they accept that offer." *Id.*

The Ninth Circuit attempted to distinguish *McNair* on the ground that the plaintiffs "did not allege that they intended to subscribe to magazines through the marketer again—they alleged only that they 'may, one day, become Synapse . . . customers once more because Synapse's offers are compelling propositions.'" Pet. App. 21a n.5 (quoting *McNair*, 672 F.3d at 224–25). But the same is true here. Nowhere does respondent say with certainty—or even a likelihood—that she would purchase Kimberly-Clark's flushable wipes again. On the contrary, she has purchased flushable wipes only once (and that was five years ago, and she admits that if she knew then that the wipes did not match her understanding of "flushable" (as she does now), she "would not have purchased Defendants' product or, at a very minimum, she would have paid less for the product." Pet. App. 105a. Indeed, the most respondent can allege is that "the design and construction of the Flushable Wipes may change over time," but she will "have no way of determining whether the representation 'flushable' is in fact true" as to that hypothetical redesigned product. Pet. App. 105a.

Under the Third Circuit's caselaw, respondent's allegation of future harm is insufficient to establish standing to pursue injunctive relief. "Whether [respondent] [purchases flushable wipes] or not will be [her] choice, and what that choice may be is a matter of pure speculation at this point." *McNair*, 672

F.3d at 225. Such speculation cannot confer standing to pursue injunctive relief, especially given that "the law accords people the dignity of assuming that they act rationally, in light of the information they possess." *Id.* at 225.

C. The Second Circuit has also found that a consumer lacked standing to bring a claim for prospective relief under state consumer-protection laws. In *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016), the plaintiff had purchased on Amazon a weight-loss supplement that did not disclose that it contained sibutramine, a Schedule IV stimulant that had been withdrawn from the market by the FDA in light of concerns about its cardiovascular risks. *Id.* at 226. The plaintiff alleged that "Amazon continued to sell other weight loss products as containing undisclosed amounts of sibutramine," *id.* at 226, and sought an injunction that would require "measures be put in place to prevent Amazon from unwittingly selling other products containing sibutramine," *id.* at 238.

As the court below emphasized, the Second Circuit's decision turned on the plaintiff's failure to allege that he would purchase on Amazon any particular products containing sibutramine in the future. *Nicosia*, 834 F.3d at 239 (plaintiff "has not shown that he is likely to be subjected to further sales by Amazon of products containing sibutramine" because "Amazon has ceased selling [the supplement] on its website, and [the plaintiff] has failed to allege that he intends to use Amazon in the future to buy *any* products, let alone food or drug products generally or weight loss products in particular"). But that does not indicate that the converse is true—*i.e.*, that a consumer who *did* allege an intent to repurchase the

product *would* have standing, even if he were aware of the allegedly misleading nature of the alleged misrepresentation. Indeed, the plaintiff in *Nicosia* argued on appeal that consumers who had in the past purchased products from Amazon that contained, but failed to disclose that they contained, sibutramine were in fact in danger of making similar purchases in the future because of that failure to disclose. Reply Brief of Appellant at 25–27, *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016) (No. 15-423), 2015 WL 5012361.

Subsequent cases in the Second Circuit further indicate that the court is aligned with the Third and Seventh Circuits—and against the Ninth. *See, e.g.*, *Kommer v. Bayer Consumer Health*, 710 F. App'x 43, 44 (2d Cir. 2018) (concluding that plaintiff lacked standing to pursue injunctive relief against allegedly misleading marketing of "Dr. Scholl's Custom Fit Orthotic Inserts" where he "concedes, now [that he] knows of Defendants' [alleged] deception, and false advertising, . . . he is no longer likely to purchase another pair of" the inserts (alterations in original) (internal quotation marks omitted)). And this is certainly how district courts in the Second Circuit have interpreted *Nicosia*. *See, e.g.*, *Davis v. Hain Celestial Grp., Inc.*, 297 F. Supp. 3d 327, 338 (E.D.N.Y. 2018) (citing *Nicosia* and concluding that "[b]ecause a plaintiff in a false advertisement case has necessarily become aware of the alleged misrepresentations, 'there is no danger that they will again be deceived by them'"); *Buonasera v. Honest Co.*, 208 F. Supp. 3d 555, 564–65 (S.D.N.Y. 2016) (citing *Nicosia* in holding that the plaintiff "has not demonstrated a likelihood of future injury, [and] does not have standing to seek injunctive relief" where plaintiff "allege[d] that '[i]f Honest's products were

reformulated such that its representations were truthful, Plaintiff would consider purchasing Honest's products in the future'" (second and third alteration in original)).

II. The Decision Below Conflicts With This Court's Precedent.

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). One of the "irreducible constitutional minimum[s] of standing" is "an injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted).

When a plaintiff seeks prospective relief, he must not only allege a *past* injury in fact, but a "real and immediate threat of *repeated* injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (emphasis added). And importantly, "[p]ast exposure to illegal conduct does not itself show a present case or controversy regarding injunctive relief." *Id.* at 495.

The decision below violates this Court's long-established standing jurisprudence by diluting the injury-in-fact requirement in two important ways.

A. To establish standing to pursue injunctive relief, a plaintiff must allege a future injury that is *similar* to the injury he has already suffered. "Absent a sufficient likelihood that he will again be wronged in a similar way, [a plaintiff] is no more entitled to an injunction than any other citizen." *Lyons*, 461 U.S. at 111; *see also Honig v. Doe*, 484 U.S. 305, 323 (1988) (permitting a claim for injunctive relief to proceed where "[Plaintiff] has demonstrated . . . 'a sufficient

likelihood that he will again be wronged in a similar way'"); *Church v. City of Huntsville*, 30 F.3d 1332, 1338 n.2 (11th Cir. 1994) ("Jurisdictionally, *Honig* and *Lyons* are analogous. . . . The plaintiff's ability to prosecute the action turned solely on the prospects that the defendant would wrong the plaintiff in a similar manner in the future.").

Here, however, respondent is not likely to be harmed again in a similar way to how she was harmed in the past. As the Ninth Circuit explained, respondent claimed that she was injured when she bought Kimberly-Clark's flushable wipes in 2013 because "she was exposed to false information about the product purchased, which caused the product to be sold at a higher price, and . . . she would not have purchased the goods in question absent this misrepresentation." Pet. App. 46a, 13a–14a (internal quotation marks omitted). Indeed, respondent claimed that when she purchased the wipes, she did so because she "[s]a[w] that the wipes had the word 'Flushable' on the front of the package and that the product was more expensive than other wipes that did not have that word," and therefore "she believed that the product had been specially designed to be suitable for flushing down toilets." Pet. App. 104a; *see also id.* (noting that respondent "reviewed both the front and back of the package" and "did not see anything that led her to believe that the wipes were not in fact suitable for flushing," so "she decided to pay the higher price, and purchased the Scott Wipes for a few dollars"). In other words, respondent claims that her past injury was that she *believed* the word "flushable" meant something different than it did, and therefore she bought a product that she otherwise would not have bought or paid a higher price than she otherwise would have paid.

Respondent's alleged future injury, by contrast, is the exact *opposite* of her past injury: When she sees the word "flushable" on Kimberly-Clark's wipes in the future, respondent claims she will not know *what* to believe about its meaning, and so will not purchase the wipes even though she might otherwise do so. She alleges that "[s]he *would* purchase truly flushable wipes manufactured by Defendants *if it were possible to determine* prior to purchase if the wipes were suitable to be flushed." Pet. App. 105a (emphases added). "But as long as Defendants may use the word 'Flushable' to describe non-flushable wipes, then when presented with Defendants' packaging on any given day, Plaintiff continues to have no way of determining whether the representation 'flushable' is in fact true." *Id.* But all this complaint reduces to is the contention that the wipes' label, including their "flushable" designation, does not convey all the information respondent finds relevant in making a purchasing decision. This is a much different injury from the deception she allegedly suffered in the past.

Of course, respondent conjures this new future injury because there is no doubt that she will not suffer the same or similar injury in the future. Because she is now "familiar with [Kimberly-Clark's] practices," "it is a speculative stretch to say [she] will unwittingly" purchase its flushable wipes in the future. *McNair*, 672 F.3d at 225 n.15; *see also Conrad*, 869 F.3d at 542 (holding that plaintiff does not have standing to request injunctive relief where the plaintiff, "as an individual, knows about [the defendant's] refund program and [is now] fully aware of the fact that Oscillo is nothing but sugar water"). But this Court's standing jurisprudence does not allow plaintiffs to bootstrap a claim for injunctive relief onto an entirely different theory of past harm—

and it does not allow the courts of appeals to sanction such ploys to manufacture jurisdiction, either.

B. Even if respondent's alleged future injuries were "similar" to her past injury under this Court's caselaw, they would not be concrete and imminent. As this Court has explained, "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548. And "[w]hen we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id.* Meanwhile, the "imminence" requirement is designed "to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly impending*." *Lujan*, 504 U.S. at 564 n.2 (internal quotation marks omitted).

Respondent's alleged future injuries fall far short of these standards. As the Ninth Circuit explained, respondent's claimed inability to rely on the "flushable" label may give rise to future harm in two ways. First, respondent may "be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although she would like to." Pet. App. 51a, 19a. But respondent's decision *not* to spend money on a discretionary product could constitute harm (if at all) only if the wipes were somehow reengineered to meet respondent's criteria for flushability—after all, respondent has been emphatic that she does not wish to purchase wipes unless they are "truly" flushable. Pet. App. 103a–05a. Respondent has not alleged, and cannot allege, that it is likely that the wipes will be modified to satisfy her standards in the future, and certainly not that it is "real and imminent," and "certainly impending," that they will.

Second, the Ninth Circuit hypothesized that respondent "might purchase the product in the future, despite the fact that it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved." Pet. App. 53a, 22a. But this is as counterintuitive as it is speculative—especially considering that "the law accords people the dignity of assuming that they act rationally, in light of the information they possess." *McNair*, 672 F.3d at 225. The only way respondent would be harmed under this theory is *if* Kimberly-Clark implemented some change such that respondent could "reasonably . . . assume" that the wipes had been redesigned to meet her definition of "flushable," and *if* Kimberly-Clark failed to fully inform consumers of the nature of this change, and *if* respondent purchased the wipes again (for only the second time in her life, and the first time in five years), and *if* the wipes, however modified, still did not comply with her definition of the term "flushable." This "speculative chain of possibilities" falls far short of establishing that respondent faces "certainly impending" harm. *Clapper*, 568 U.S. at 414; *see also Lujan*, 504 U.S. at 563–64 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."). Indeed, respondent pleaded nothing to suggest that she might purchase the product again, let alone that she is likely to do so.

At bottom, the Ninth Circuit was able to resolve this case as it did—despite the "close question" it presented, Pet. App. 55a, 24a—only by recasting the standard for concreteness and imminence. According to the court, "there is no reason prospective injunctive

relief must always be premised on a *realistic threat* of a similar injury recurring"; rather, "[a] sufficiently concrete prospective injury is sufficient." Pet. App. 26a (emphasis added). But this flies in the face of this Court's long-established caselaw, which has explained that "the injury or threat of injury must be both 'real and immediate,'" *Lyons*, 461 U.S. at 102, and "certainly impending," *Clapper*, 568 U.S. at 401.

The Ninth Circuit's decision allowing respondent's nebulous desire to purchase "truly flushable" wipes from Kimberly-Clark to confer standing to pursue injunctive relief against Kimberly-Clark's "flushable" label "stretch[es]" this Court's precedents "beyond the breaking point." *Lujan*, 504 U.S. at 564 n.2. It should not be permitted to stand.

III. The Decision Below Has Far-Reaching Consequences

The Ninth Circuit's decision also merits review because it will have sweeping, adverse, and nationwide effects that go to the core of our constitutional structure. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). Standing is a core component of the case-or-controversy requirement, "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth*, 422 U.S. at 498; *see also Spokeo*, 136 S. Ct. at 1547 ("The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood."). Therefore, departure from this Court's established standing jurisprudence does not merely affect the

parties. Rather, "[r]elaxation of standing requirements is directly related to the expansion of judicial power." *Clapper*, 568 U.S. at 408–09 (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)).

The concerns underlying this Court's standing jurisprudence are particularly weighty here. "In an era of frequent litigation, class actions, sweeping injunctions with prospective effect, and continuing jurisdiction to enforce judicial remedies, courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). This is especially so where a plaintiff seeks a court order enjoining a party's future speech. While such relief is not categorically improper, it is crucial that courts rigorously enforce the traditional standing criteria before allowing a party to seek an injunction prohibiting speech because "[p]recedent shows that a speech-restricting 'injunction' that is not issued as a remedy for an adjudicated or impending violation of law is also a prior restraint in the condemnatory sense, that is, a prior restraint of the sort prohibited by the First Amendment." *Lawson v. Murray*, 515 U.S. 1110, 1113 (1995) (Scalia, J., concurring). That the speech at issue here is commercial does not make its restraint any less pernicious. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 549 (2011) (noting that "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish," and so "the general rule is that the speaker and the audience, not the government, assess the value of the information presented").

Worse still, respondent seeks what is in effect a nationwide injunction against Kimberly-Clark's use of the term "flushable." Given the realities of the national marketplace—with supply chains, distribution networks, and retail sales that seamlessly cross state lines—it is simply infeasible for Kimberly-Clark to refrain from marketing the wipes as "flushable" in California while maintaining its current practice elsewhere. Once again, while this does not render such relief improper in all circumstances, it does call for careful observation of this Court's standing jurisprudence—and careful review of the lower courts' application of that jurisprudence. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Thomas, J., concurring) (explaining that nationwide injunctions "prevent[] legal questions from percolating through the federal courts, encourag[e] forum shopping, and mak[e] every case a national emergency").

The Ninth Circuit made no mention of these serious concerns counseling against its capacious interpretation of the Constitution's standing requirements. On the contrary, it noted that hewing to those requirements here would create "anomalies" inasmuch as a defendant could "undermine California's consumer protection statutes and defeat injunctive relief simply by removing a case from state court." Pet. App. 22a–23a. But state policy concerns do not, and cannot, justify departure from Article III. After all, "standing in federal court is a question of federal law, not state law," and "States cannot alter th[e] role [of federal courts] simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013). The differences in how a state-law cause of action proceeds in a federal versus

a state forum is simply "the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (allowing a state-law claim to proceed as a class action in federal court even though it could proceed only on an individual basis in state court). In any event, such a result would hardly undermine California's consumer-protection statutes, as the Ninth Circuit asserted, because respondent "still has a claim for damages against [Kimberly-Clark] that appears to meet all Article III requirements," *Lyons*, 461 U.S. at 109—a claim that she is pursuing on a putative class basis.

As this Court has held, "Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 476 (1982). Yet that is precisely how the Ninth Circuit treated it, hypothesizing new, different, and speculative injuries respondent might suffer at some undetermined point in the future simply so that its own power would be coextensive with that of California courts. The Constitution, and this Court's precedent, does not allow such manipulation of federal jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit reversed.

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