No. 18-304

IN THE

Supreme Court of the United States

KIMBERLY-CLARK CORPORATION, ET AL.,
Petitioners,

v.

JENNIFER DAVIDSON, AN INDIVIDUAL AND 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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a consumer duped by a company's false advertising into purchasing a product has properly alleged standing to seek injunctive relief against the company's continued false advertising, where she alleges an ongoing desire to purchase the same type of product and an impending risk of being injured by the company's false advertising.

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INTRODUCTION

Petitioner Kimberly-Clark Corporation sells multiple brands of moistened wipes that it advertises and labels as "flushable" and "sewer and septic safe"—although they are not. Respondent Jennifer Davidson filed this action under California's consumer protection laws on behalf of herself, a putative class, and the general public, seeking to recover the premium that she and others paid for wipes falsely marketed as flushable and to obtain injunctive relief against Kimberly-Clark's ongoing false advertising of its wipes.

The court of appeals held that Ms. Davidson had standing to pursue damages for the economic injury she suffered by paying a premium for a product that did not live up to its billing. The court also held that Ms. Davidson adequately alleged standing to seek injunctive relief because, absent an injunction preventing Kimberly-Clark from marketing its wipes as "flushable" unless they are actually flushable, she will continue to suffer injury: denial of accurate information to inform her decision whether to purchase Kimberly-Clark's or others' wipes.

Here, Kimberly-Clark does not challenge the court of appeals' decision that Ms. Davidson has stated claims for monetary relief based on Kimberly-Clark's false advertising. Instead, it asks the Court to review the lower court's holding that she alleged sufficient facts to establish an ongoing injury that enables her to seek injunctive relief against Kimberly-Clark's continuing false marketing campaign. The court of appeals' fact-bound conclusion that Ms. Davidson has properly alleged standing to seek injunctive relief in the circumstances of this case does not merit review by this Court.

To begin with, contrary to Kimberly-Clark's assertion, the decision below does not conflict with decisions of other

circuits holding that, on the facts alleged in those cases, particular plaintiffs had failed to allege the possibility of future injury from a defendant's false advertising. In none of the cases Kimberly-Clark cites did the plaintiff allege an ongoing interest in accurate information about the product at issue based on a desire to purchase the defendant's product if and when it in fact possesses the characteristics claimed. That a plaintiff who has *not* alleged a possibility of being misled by a defendant's future advertising suffers no risk of injury and therefore lacks standing to seek injunctive relief does not mean that a plaintiff who *has* alleged an ongoing injury similarly lacks standing.

The decision below is also correct under this Court's standing precedents, which hold that plaintiffs who face a substantial risk of injury from a defendant's ongoing conduct have standing to seek injunctive relief. As the court of appeals explained, Ms. Davidson's specific allegations, if ultimately proved, would establish such a risk. Kimberly-Clark's continuing marketing of "flushable" wipes, against the backdrop of its past false statements, leaves consumers like Ms. Davidson who are interested in buying flushable wipes in a quandary: They have no way of knowing whether Kimberly-Clark is merely repeating the same false claims it has made in the past, or whether the products have been improved to make them genuinely flushable. The injunctive relief Ms. Davidson seeks, which would prevent Kimberly-Clark from claiming that its wipes are flushable and safe for sewers and septic systems unless those statements are true, would redress that injury by allowing Ms. Davidson and other consumers to make their purchasing decisions based on truthful information from Kimberly-Clark.

Kimberly-Clark's suggestion that the decision below allowed Ms. Davidson's claims to proceed without a showing of a "realistic threat of a similar injury recurring," Pet. 3 (quoting Pet. App. 26a n.7), mischaracterizes the holding and ignores the plain text of the opinion: The court expressly held that Ms. Davidson has "shown 'a sufficient likelihood that [s]he will again be wronged in a similar way'" because she would be "unable to rely on Kimberly-Clark's representations of its product in deciding whether or not she should purchase the product in the future." Pet. App. 26a (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 111 (1983)).

Kimberly-Clark's attempt to portray this case as one of broad constitutional significance is vastly overstated. The case neither threatens the "core of our constitutional structure," Pet. 21, nor the First Amendment. As for Kimberly-Clark's practical concerns, were the Court to grant the petition and hold that Ms. Davidson lacked standing to pursue injunctive relief, her claims for injunctive relief (but not damages) would either be dismissed without prejudice or remanded to the state court—either way allowing her to seek injunctive relief back in the state court where she filed her case. Although standing is essential to a federal court's jurisdiction, review of a fact-bound claim that a lower court erred in finding standing to pursue injunctive relief is a particularly unwarranted use of this Court's resources when the practical consequences would be so minimal.

Finally, this petition arises from an appeal of an order granting a motion to dismiss under Rules 12(b)(1) and 12(b)(6). Thus, the court of appeals' decision resolves neither whether Ms. Davidson will receive injunctive relief nor whether she has established the factual averments on which her standing to seek such relief

depends with the degree of proof necessary at summary judgment or trial. If the issue of what injury suffices to support injunctive relief against a false advertiser otherwise merited this Court's review, it would be better considered after the lower courts had determined the relevant facts and either awarded or withheld injunctive relief based on that determination.

STATEMENT

Factual background

Kimberly-Clark manufactures four types of wipes (Cottonelle, Scott, Huggies, and Kotex) that it markets as "flushable." One of the wipes packages states, for example, that the product is "SEWER AND SEPTIC SAFE*"—although no disclaimer is associated with the asterisk. First Am. Compl. ¶ 21. Another states: "Scott Naturals* Flushable Cleansing Cloths break up after flushing and are sewer and septic system safe. For best results, flush only one or two cleansing cloths at a time." *Id.* ¶ 22. Again, the asterisk does not introduce a disclaimer. *Id.* Kimberly-Clark charges a premium for its "flushable" wipes. *Id.* ¶¶ 26–30.

Like items such as newspapers, small toys, and jewelry, Kimberly-Clark wipes can literally be flushed. They are not, however, "suitable for disposal by flushing down a toilet"—the dictionary (and common-sense) definition of "flushable." *See* Merriam-Webster, http://www.merriam-webster.com/dictionary/flushable, *cited in* First Am. Compl. ¶ 33. And they are not flushable as water quality professionals use the term: to mean that the item "should start to break apart during the flush and completely disperse within 5 minutes." First Am. Compl. ¶ 34. Likewise, they are not flushable under the California Plumbing Code, which makes it unlawful to flush any "thing whatsoever that is capable of causing damage to

the drainage system or public sewer." Cal. Code Regs. tit. 24, § 305.1 (2016).

Rather, wipes labeled "flushable," including those of Kimberly-Clark, have caused significant clogs in sewer systems and at city water treatment facilities. *See* First Am. Compl. ¶¶ 49–51.

Although Kimberly-Clark's "flushable" wipes are more expensive than other wipes, respondent Jennifer Davidson purchased them because the packaging stated that they were flushable. Using them, however, she noticed that they were thick and did not disperse in the toilet bowl, as she had expected flushable wipes would do. She then did some research, which led her to discover that the wipes are not in fact suitable for flushing. The wipes cause widespread problems for consumers and public utilities, clogging home pipes, sewers, and municipal wastewater treatment systems. *Id.* ¶¶ 53–54; *see also id.* ¶¶ 48–51.

Although she stopped using these "flushable" wipes, Ms. Davidson would like to purchase wipes that are suitable for flushing down a toilet. Wipes, after all, are not inherently nonflushable, and the design and construction of Kimberly-Clark's wipes may change over time, allowing Kimberly-Clark to offer "flushable wipes" that can be safely flushed. *Id.* ¶ 57. But as matters now stand, Ms. Davidson has no way to know, prior to purchasing them, whether Kimberly-Clark's continuing marketing of wipes as flushable means that they are now genuinely flushable or whether Kimberly-Clark is continuing its practice of falsely marketing "flushable" wipes.

Proceedings below

Ms. Davidson filed suit against Kimberly-Clark in state court for falsely labeling its wipes "flushable." In her class-action complaint, she alleged claims of common-law

fraud and claims under several California statutes: the Consumers Legal Remedies Act (CLRA), the False Advertising Law (FAL), and the Unfair Competition Law (UCL). She sought restitution, damages, and an injunction requiring Kimberly-Clark to stop packaging and advertising wipes as "flushable" when they are not suitable for flushing. Her complaint included details about the wipes' labeling and advertising, and it described in detail why they are not suitable for flushing and are not "sewer and septic system safe" or "flushable," as they are falsely advertised to be.

Kimberly-Clark removed the case to federal court under the Class Action Fairness Act and then moved to dismiss. The district court granted the motion in full. With respect to Ms. Davidson's claims for damages and restitution, the court held that, although she had adequately alleged an economic injury in that she paid a premium as a result of the "flushable" representation, Ms. Davidson had not adequately pleaded reliance because she had not pleaded how she "came to believe" that the wipes were not truly "flushable." After Ms. Davidson amended her complaint to address these points in more detail, the court identified different deficiencies, this time holding that she had not sufficiently pleaded the "falsity" of the misrepresentation and had not adequately pleaded damage to her plumbing (although such damage was not the basis of her claim to have suffered economic injury).

With respect to injunctive relief, the district court granted the motion to dismiss on the ground that Ms. Davidson had not alleged future injury because, in the court's view, she could no longer reasonably believe that Kimberly-Clark's "flushable" wipes are "truly flushable."

The court of appeals reversed. On the damages claims and pleading of fraud, the court held that Ms. Davidson

had adequately pleaded the claims, including the basis for an award of damages. Specifically, the court held that Ms. Davidson had alleged false statements by averring that Kimberly-Clark described its wipes as flushable when they did not have the characteristics of flushable items, and that she had likewise adequately alleged that she had suffered monetary injury by paying a premium for the product in reliance on Kimberly-Clark's false statements. Kimberly-Clark does not challenge those aspects of the court of appeals' decision here.

With respect to injunctive relief—"the primary form of relief available under the UCL to protect consumers from unfair business practices," Pet. App. 23a (quoting *In re Tobacco II*, 46 Cal. 4th 298, 320 (2009))—the court of appeals held that Ms. Davidson had alleged harm sufficient to confer standing. Citing several of this Court's decisions, the court began by explaining the requirements for a plaintiff to establish standing: The court explained that the threat of injury must be "actual or imminent, not conjectural or hypothetical." Pet. App. 16a (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009)). "In other words," the court continued, "the 'threatened injury must be certainly impending to constitute injury in fact' and 'allegations of possible future injury are not sufficient.'" *Id.* (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, (2013)). The court cautioned that past wrongs are "insufficient to support standing." *Id.* (citing *Lyons*, 461 U.S. at 102). And "[w]here standing is premised entirely on the threat of repeated injury, a plaintiff must show 'a sufficient likelihood that he will again be wronged in a similar way.'" *Id.* 17a (quoting *Lyons*, 461 U.S. at 111).

Applying these precedents, the court of appeals held 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," where the consumer can show "an 'actual and imminent, not conjectural or hypothetical' threat of future harm." *Id.* 20a (quoting *Summers*, 555 U.S. at 493). The court explained that "[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 it described scenarios that would pose a threat of future harm. *Id.* 20a–21a.

The court then "turn[ed] [its] attention to whether Ms. Davidson adequately alleged that she faces an imminent or actual threat of future harm caused by [Kimberly-Clark's] allegedly false advertising." *Id.* 24a. On this question, the court held that Ms. Davidson had "adequately alleged" an imminent future injury in pleading her false advertising claim. *Id.* The court explained that she had alleged an informational injury: that "she will be unable to rely on the label 'flushable' when deciding in the future whether to purchase Kimberly-Clark's wipes" and thus would be unable to allocate her resources when shopping for a type of product she desires. *Id.* 26a. And it determined that her injury was actual and imminent because she "continues to desire to purchase wipes that are suitable for disposal in a household toilet"; "would purchase truly flushable wipes manufactured by [Kimberly-Clark] if it were possible"; "regularly visits stores … where [Kimberly-Clark's] 'flushable' wipes are sold"; and "is continually presented with Kimberly-Clark's flushable wipes packaging but has 'no way of determining whether the representation 'flushable' is in fact true.'" *Id.* 5a, 24a, 27a. In sum, the court explained that the relevant future "harm is her inability to rely on the validity of the information advertised on Kimberly-

Clark's wipes despite her desire to purchase truly flushable wipes." *Id.* 25a (alterations in original omitted).

Kimberly-Clark's petition for rehearing en banc was denied, with no judge requesting a vote. Pet. App. 2a.

REASONS FOR DENYING THE PETITION

I. The decision below does not create a conflict among the circuits.

When considering whether a plaintiff has standing to seek injunctive relief, the federal courts of appeals apply the same precedents applied in this case, state the same principles, and reach consistent conclusions. No decision cited in the petition suggests otherwise.

Kimberly-Clark begins with, but offers little discussion of, *Conrad v. Boiron, Inc.*, 869 F.3d 536 (7th Cir. 2017). That case was the second brought by purchasers of an allegedly bogus flu remedy. In the first case, the defendant in a class-action settlement agreed to "revise its labels to make them accurate" and to allow dissatisfied customers to request refunds within 14 days. *Id.* at 538. Later, a class member who had opted out of that settlement filed his own class action, seeking both damages and injunctive relief. The district court denied class certification and, later, dismissed the individual case as moot because the defendant had deposited compensatory funds with the district court under Rule 67.

On appeal, after affirming the order denying class certification, the Seventh Circuit rejected the use of Rule 67 to force acceptance of a settlement proposal—the basis on which the district court had held the individual claim moot. Turning to the claim for injunctive relief, the court stated that it agreed with the district court that the lack of redressability defeated standing. *Id.* at 542. The court made clear, however, that its holding was not a blanket

statement with respect to injunctive relief in false advertising cases, but was specific to the facts there—where the plaintiff had only an individual claim, not a class claim; knew about the defendant's alleged deception ("he is fully aware of the fact that [the product] is nothing but sugar water"); and knew about the refund program put into place by the earlier settlement. *Id.* Critically, the court did not address a scenario like that here, where the plaintiff specifically alleged ongoing uncertainty over whether to purchase the product in the absence of an injunction requiring truthful advertising.

Not only is the opinion clear that its holding as to standing to seek injunctive relief is fact-specific, it also makes clear that the Seventh Circuit holds open the possibility that a plaintiff may have standing to seek injunctive relief in some instances: "where class treatment was still a possibility and the record did not unequivocally foreclose the possibility of injunctive relief for the putative class plaintiff." *Id.* (citing *Laurens v. Volvo Cars of N. Am.*, 868 F.3d 622 (7th Cir. 2017); *see Laurens*, 868 F.3d at 625 (stating with respect to injunctive relief in a deceptive advertising case that "it is premature for us to say whether [plaintiffs] do or do not have standing for this part of the case")).

The opinions in *Conrad* and *Laurens* contradict Kimberly-Clark's assertion that the Seventh Circuit has adopted the holding that "customers who are aware of the allegedly misleading nature of a representation are unable to show sufficient likelihood of future harm to establish standing to seek injunctive relief." Pet. 10. Kimberly-Clark doubles down, however, citing *Camasta v. Joseph A. Bank Clothiers, Inc.*, 61 F.3d 732 (7th Cir. 2014). That case likewise does not reject the possibility that a plaintiff can seek injunctive relief in a false advertising case.

There, the plaintiff bought six shirts believing they were on sale, when in fact the store had advertised the normal price as if it were a temporary price reduction. *Id.* at 735. After affirming dismissal of his damages claims, the court of appeals turned to the request for injunctive relief. The court explained that, to be eligible for injunctive relief under the relevant state deceptive practices act, a plaintiff must show a likelihood of suffering damages in the future. *Id.* at 740. Yet the plaintiff's claim was "based solely in the conjecture that because [the defendant] harmed him in the past, [it is] likely to harm him in the future." *Id.*

In *Camasta*, the possibility of future injury depended on whether the defendant would in the future falsely advertise a product that the plaintiff was interested in purchasing as being on sale, when it was not on sale—something that the plaintiff did not allege and that in the circumstances of that case was genuinely speculative. Thus, "[w]ithout more than the speculative claim that he will be harmed again," the court concluded that the plaintiff was not entitled to injunctive relief. *Id.* at 741. As in *Conrad*, the court held that injunctive relief was not available because the allegations in the complaint failed to show the likelihood of future harm—not because injunctive relief is by its nature unavailable in deceptive advertising cases. Here, by contrast, it is undisputed that Kimberly-Clark continues to market its wipes as "flushable," and Ms. Davidson has specifically explained how she is injured as a result.

Kimberly-Clark gives more attention to the facts in the Third Circuit case *McNair v. Synapse Group, Inc.*, 672 F.3d 213 (3d Cir. 2012). There, the plaintiffs sought injunctive relief against the practices of a company that sold magazine subscriptions. They alleged that the company sent its customers renewal notices disguised as

new subscription offers, which caused customers to allow their subscriptions to be automatically renewed when they would have preferred to cancel. But the plaintiffs were "not Synapse customers and [were] thus not currently subject to Synapse's allegedly deceptive techniques for obtaining subscription renewals." *Id.* at 224. Accordingly, they could not be injured by those techniques unless they subscribed in the future, and then were again fooled by the renewal techniques, "which would require them to ignore their past dealings with Synapse." *Id.* at 225 n.15. Failing to allege any intention to subscribe again, but only that they "may, one day, become Synapse customers once more because 'Synapse's offers are compelling propositions,'" *id.* at 225, they failed to "establish[] any reasonable likelihood of future injury" and, therefore, "no basis for seeking injunctive relief," *id.* at 225–26. Nothing in *McNair* conflicts with the decision below, where Ms. Davidson alleged facts to show a likelihood of injury under the very different circumstances present here.

In a later case discussing *McNair*, the Third Circuit explained that the court assumes that people "act rationally, in light of the information that they possess." *In re Johnson & Johnson Talcum Powder Prods. Mkting., Sales Prac. & Liab. Litig.*, 903 F.3d 278, 293 (3d Cir. 2018) (quoting *McNair*, 672 F.3d at 225). There, the plaintiff challenged the defendant's practice of marketing baby powder without disclosing that the product is associated with an increased risk of ovarian cancer in women. Because the plaintiff did not allege that she risked future harm of any kind, the court held that she lacked standing to seek injunctive relief. There is no basis for petitioner's suggestion that the Ninth Circuit would disagree with that holding. Again, here, the court applied the same standards as did the Third Circuit and held, based on the

facts before it, "[a]t this motion to dismiss stage," Pet. App. 25a, that Ms. Davidson has alleged future harm that can be redressed by injunctive relief.

Surprisingly, Kimberly-Clark also highlights the Second Circuit's decision in *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016), as in conflict with the decision below. There, the plaintiff sought an injunction against Amazon's sale of a weight-loss supplement product that contained a dangerous controlled substance. Holding that the plaintiff lacked standing, the court explained that he had "not shown that he [was] likely to be subjected to further sales by Amazon of products containing sibutramine, because Amazon [had] ceased selling" the product that he had bought, and because he had "failed to allege that he intends to use Amazon in the future to buy any products" at all. *Id.* at 239.

In contrast here, Ms. Davidson has made the sort of allegations that the Second Circuit identified as lacking in *Nicosia*: She has alleged that Kimberly-Clark continues to sell the products at issue using the same "flushable" representation and that she desires and intends to buy flushable wipes, including those of Kimberly-Clark, if she could rely on the "flushable" representation—which she cannot now but could if the requested injunction were in place.[1]

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[1] The petition also cites to the non-precedential decision in *Kommer v. Bayer Consumer Health*, 710 Fed. App'x 43 (2d Cir. 2018). There, the plaintiff expressly stated that "he is no longer likely to purchase another pair of" the shoe inserts at issue "ever again." *Id.* at 44. In light of this admission, the court held that, "[a]ccordingly, he has no standing under Article III to enjoin the defendants' sales practices." *Id.*

In sum, each of the court of appeals decisions cited by Kimberly-Clark states the same legal standard as the decision below and reaches results fully consistent with the outcome here. That in some cases, unlike here, the standard was not met does not manifest a conflict among the circuits. As in every area of law, courts considering standing will reach different decisions based on the different facts before them in different cases.

II. The decision below faithfully applies this Court's precedents.

A. Kimberly-Clark claims that the decision below conflicts with this Court's statement in *Lyons* that, to establish standing to seek injunctive relief, a plaintiff must show a likelihood that he will again be wronged in a "similar way." *Lyons*, 461 U.S. at 111, *quoted in* Pet. 16. Kimberly-Clark can make this claim only by reframing Ms. Davidson's allegations of harm and elevating dicta in a footnote to a holding. Reasonably read, the complaint easily satisfies *Lyons*.

As the complaint alleges, Ms. Davidson wants to purchase wipes that can be safely flushed and has been misled by Kimberly-Clark's packaging that advertised as "flushable" and "sewer and septic safe" wipes that were not safe to flush. She learned that she was misled only by buying the wipes, seeing how they performed, and doing research. The complaint also alleges that Ms. Davidson wants to purchase wipes that can be safely flushed and continues to shop for them, but that she cannot know whether Kimberly-Clark wipes labeled "flushable" and "sewer and septic safe" can be safely flushed and thus cannot compare among products for sale. She can find out the truth only by, again, buying the wipes and seeing how they perform. Just as she could not rely on Kimberly-Clark's representation when she bought the wipes in the

past, she cannot rely on it in the future, absent an injunction.

The petition tries to downplay the allegations of future harm by mischaracterizing the complaint as boiling down to a claim that "the wipes' label, including their 'flushable' designation, does not convey all the information that [Ms. Davidson] finds relevant in making a purchasing decision." Pet. 18. The problem, however, is not that Ms. Davidson lacks "relevant" information, but that Kimberly-Clark is, to date, continuing to provide *false* information. And Ms. Davidson's injuries, past and future, are caused by Kimberly-Clark's false advertising: Just as the "flushable" label misled her in the past, she risks being misled every time she sees Kimberly-Clark's "flushable" label when shopping for wipes in the future. Thus, Ms. Davidson faces the threat of a repeated "similar injury" to the injury already suffered. Pet. App. 26a (quoting *Lyons*, 461 U.S. at 111).

Kimberly-Clark refers repeatedly to a footnote in the court of appeals' opinion in which the court questioned whether Circuit precedent requires that prospective injunctive relief must always be premised on a realistic threat of a "similar" injury recurring and expressed the view that a "sufficiently concrete prospective injury is sufficient." Pet. 3, 9, 21 (discussing Pet. App. 26a n.7). Regardless of whether the statement in the footnote is correct, that dicta has no bearing on the holding below. Rather, the court held that, "[a]s necessary where standing for prospective injunctive relief is premised entirely on the threat of repeated injury, Davidson has also shown 'a sufficient likelihood that [s]he will again be wronged in a similar way.'" Pet. App. 26a (citing *Lyons*, 461 U.S. at 111).

Lyons requires no more. Kimberly-Clark has cited no case in which this Court, or another, defined "similar' as narrowly as it seeks to do here, effectively construing "similar" as "the same." *See also Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 195 (D.D.C. 2013) ("To the extent the named plaintiffs purchased the products strictly because of the 'salon-only' misrepresentations, the risk of future harm may not be identical to that suffered in the past. … But they will be harmed—without an injunction—by not being able to rely on the 'salon-only' label with any confidence.").

B. After arguing that the future injury alleged in the complaint is not sufficiently similar to the past injury to support a claim for injunctive relief, Kimberly-Clark argues that the future injury is no injury at all. On this point, the case is not complicated: The complaint alleges that Kimberly-Clark's false advertising injures Ms. Davidson because she wants to buy flushable wipes if they are available, including Kimberly-Clark's wipes, but is unable to rely on the information advertised by Kimberly-Clark:

> Without purchasing and opening a package, Plaintiff cannot feel the thickness of the paper or see if it degrades in her toilet. Plaintiff knows that the design and construction of the Flushable Wipes may change over time, as Defendants use different technology or respond to pressure from legislators, government agencies, competitors or environmental organizations. 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.

First. Am. Compl. ¶ 57. An order enjoining Kimberly-Clark from advertising and labeling its wipes as "flushable" unless they are in fact flushable would eliminate the false advertising, eliminate the likelihood that Ms. Davidson will be misled now and in the future, and redress her injury.

Importantly, there is nothing novel in the court's conclusion that consumers have a legally protected interest in receiving from sellers truthful, non-misleading information on which they can rely. This principle reflects the consumer protection law of California (and every other state) and the common-law tort of fraud. More broadly, the deprivation of information is an injury that courts have long held is sufficient to establish Article III standing. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (holding that plaintiff had standing based on "injury to her statutorily created right to truthful housing information"); *Am. Canoe Ass'n, Inc. v. City of Louisa Water & Sewer Comm'n*, 389 F.3d 536, 542 (6th Cir. 2004) (holding that plaintiff had standing based on allegations "that the lack of information deprived him of the ability to make choices about whether it was 'safe to fish, paddle, and recreate in this waterway'"). The injury alleged satisfies Article III.

III. The consequences hypothesized by petitioner are overblown.

Invoking concern about the integrity of our constitutional structure, the First Amendment, and, on a more mundane level, the hassle to Kimberly-Clark of complying with an injunction against false advertising, the petition seeks to transform a straightforward false advertising case into a significant constitutional moment. Kimberly-Clark's purported concerns are misplaced.

First, Kimberly-Clark invokes the courts' constitutional role and the limits of judicial power. But while standing is a prerequisite to federal jurisdiction in every case, not every case presents an important standing question meriting this Court's review. Here, there can be no serious doubt that the parties have an actual case or controversy, for the reasons pleaded in the complaint and discussed above, and because Kimberly-Clark itself is not contesting federal court jurisdiction over the damages claim. Thus, here, the pendency of this case poses no threat to "the constitutional limitation of federal-court jurisdiction to actual cases or controversies." Pet. 21.

Second, Kimberly-Clark appeals for this Court's intervention to protect against an infringement of its First Amendment rights by a potential injunction against its speech. *Id.* 22. But no actual First Amendment issue is presented by the case in its current posture, and Kimberly-Clark does not even attempt to include such an issue in its question presented. *See id.* i. Moreover, the only speech at issue is *false* commercial speech—which receives no First Amendment protection. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980). Kimberly-Clark cannot contest falsity at this stage, because on a motion to dismiss the facts alleged in the complaint are taken as true. *See Hernandez v. Moss*, 137 S. Ct. 2003, 2005 (2017). And if Ms. Davidson prevails in obtaining an injunction, it will be because she has proven that Kimberly-Clark's speech was likely to deceive reasonable consumers. Accordingly, this case presents no possibility of restricting protected speech.

Third, Kimberly-Clark suggests that, if it is found liable for false advertising in this case, it may as a business judgment decide to cease that advertising in other states. That possibility, however, does not weigh in favor of

review. A company could say the same in an array of cases under state false advertising statutes, yet this Court's review is not warranted every time a defendant company loses a motion to dismiss. Moreover, Ms. Davidson's claims for damages based on Kimberly-Clark's false advertising pose the same possibility—that if the company is found liable for false advertising, it may as a business judgment decide to cease that advertising in other states. The outcome of the standing issue raised in Kimberly-Clark's petition, which is limited to only one form of relief sought by Ms. Davidson and the putative class, will do nothing to avoid that possibility.

Kimberly-Clark's concern about the "realities of the marketplace" is particularly inapposite, because the claim for injunctive relief would proceed in state court anyway if Ms. Davidson were held to lack Article III standing. *See McGill v. Citibank, N.A.*, 393 P.3d 85, 92 (Cal. 2017) (confirming that a "private individual who has 'suffered injury in fact and has lost money or property as a result of' a violation of the UCL or the [FAL]—and who therefore has standing to file a private action"—may seek "public injunctive relief in connection with that action"). Indeed, Ms. Davidson initially brought her suit in state court, and Kimberly-Clark removed it to federal court—which it then argued lacked subject matter jurisdiction based on lack of standing. *See* Pet. App. 7a. If Ms. Davidson were held to lack Article III standing to seek injunctive relief, her claims for injunctive relief would either be severed and remanded to state court, or dismissed without prejudice for lack of subject matter jurisdiction, which would allow refiling in state court. *See Abernathy v. Wandes*, 713 F.3d 538, 558 (10th Cir. 2013) (stating that a dismissal for lack of subject matter jurisdiction is a dismissal without prejudice); *Kelly v. Fleetwood Enters., Inc.*, 377 F.3d 1034, 1036 (9th Cir.

2004) (applying the same principle); *see, e.g.*, *Machlan v. Proctor & Gamble Co.*, 77 F. Supp. 3d 954, 961 (N.D. Cal. 2015) (remanding portions of UCL, FAL, and CLRA claims that sought injunctive relief to state court, while claims for damages proceeded in federal court); *Price v. Synapse Grp., Inc.*, 2017 WL 3131700, *15 (S.D. Cal. 2017) (dismissing claims for injunctive relief under UCL, FAL, and CLRA for lack of standing, but retaining jurisdiction over damages claims).

In either event, Kimberly-Clark would be barred from removing the claim a second time, after having established that the federal courts lack jurisdiction over the claim. *See Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1197 (9th Cir. 2016) (noting that, after remand for lack of Article III standing, "there is no danger of a jurisdictional ping-pong game in this case: this rally has concluded"). In the end, then, after this journey from state to federal court and back, the company would still face the possibility of an injunction against its false advertising and would still face the decision whether to continue its false advertising in other jurisdictions. For this reason, too, Kimberly-Clark's concern is misplaced, and its petition should be denied.

Finally, the court of appeals' decision leaves this case in an interlocutory posture, with nothing yet established except that Ms. Davidson has adequately pleaded claims for monetary and injunctive relief. *See* Pet. App. 24a ("We are required at this stage of the proceedings to presume the truth of Davidson's allegations and to construe all of the allegations in her favors."). The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J.,

concurring). Following that policy is especially appropriate here because assertions of standing sufficient to survive at the pleading stage must later be supported in a manner satisfying the evidentiary requirements of subsequent phases of the litigation—summary judgment and, if necessary, trial—before relief may be awarded. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The factual determinations made at those stages of the case, and the nature of any injunctive relief ultimately awarded, would provide a much more solid basis for any pronouncement by this Court on the adequacy of a particular set of facts to support a plaintiff's entitlement to obtain specific prospective relief against false advertising. In addition, as is typically the case, subsequent developments could also avoid altogether any call to consider Ms. Davidson's standing.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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