No. 18-304

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

The Ninth Circuit held in the decision below that a consumer can allege a "real and substantial threat" that she will be misled by a purported misrepresentation, and thus establish Article III standing to seek injunctive relief, even where that consumer is *already* aware of the facts that allegedly make the representation misleading. Respondent does not dispute that the Ninth Circuit is the only federal court of appeals ever to allow such a claim to proceed; nor does she dispute that three circuit courts have expressly *refused* to find standing in similar circumstances. *See McNair v. Synapse Grp., Inc.*, 672 F.3d 213 (3d Cir. 2012); *Camasta v. Joseph A. Bank Clothiers, Inc.*, 761 F.3d 732 (7th Cir. 2014); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220 (2d Cir. 2016). Instead, respondent insists that the decision below is "fact-bound." Opp. 1. And she claims the decision can be reconciled with the contrary decisions of other circuits because "in those cases, particular plaintiffs had failed to allege the possibility of future injury from a defendant's false advertising," *id.* at 2—a deficiency supposedly not present here.

This characterization of caselaw outside the Ninth Circuit is squarely refuted by the very cases on which respondent relies. Most notably, the Third Circuit rejected the argument that *McNair*, which held that consumers "who [a]re already aware of [allegedly misleading] advertising practices" cannot plausibly allege "any future injury . . . as a result of th[ose] advertising practices," should be "limit[ed] . . . to instances when plaintiffs do not allege an intention to make purchases in the future." *In re Johnson & Johnson Talcum Powder Products Mktg., Sales*

Practices and Liability Litig., 903 F.3d 278, 292–93 (3d Cir. 2018). The holdings of the other courts of appeals to address this issue likewise conflict with the decision below.

The Ninth Circuit's decision also conflicts with the decisions of this Court. Although this Court has made clear that injunctive relief is available only where the potential future harm is similar to the past harm, here they are polar opposites: respondent contends that she was injured in the past when she *purchased* flushable wipes because she *believed* the wipes were "suitable for flushing," but alleges future harm consisting only of "ongoing uncertainty over whether to purchase" wipes now that she knows that Kimberly-Clark uses the term "flushable" in a manner different than she would prefer. Opp. 10. Even if respondent could overcome this obstacle, she cannot establish that such hypothetical future harm is concrete or imminent.

Respondent's attempts to minimize the impact of the Ninth Circuit's decision fall flat. Whether her claim for injunctive relief can proceed in *some* court does not (and cannot) justify an expansion of Article III. And while the Ninth Circuit reasoned that comity requires the exercise of federal jurisdiction over respondent's claim for injunctive relief, the effect of the Ninth Circuit's decision will be to *limit* state courts' ability to interpret state law by increasing the opportunities for plaintiffs and defendants alike to force such claims into a federal forum.

This Court should grant the petition for certiorari to clarify the scope of Article III and restore uniformity to the law of standing in the federal courts.

I. The Decision Below Conflicts With The Decisions Of Other Federal Courts Of Appeals.

Respondent does not dispute that every court of appeals (save for the court below) to consider whether a consumer has standing to seek to enjoin an allegedly misleading representation—despite already knowing the allegedly misleading nature of the representation—has answered in the negative. Nevertheless, she insists that these decisions are limited to "the facts alleged in those cases," in which "particular plaintiffs had failed to allege the possibility of future injury from a defendant's false advertising." Opp. 2. Because respondent purportedly "*has* alleged an ongoing injury," *id.*, she contends that those cases are "fully consistent with the outcome here," *id.* at 14.

Respondent's attempt to reduce this circuit split to "fact-specific" pleading differences finds no support in the caselaw. Opp. 10. In fact, the Third Circuit rejected such a characterization of the law in *In re Johnson & Johnson*, which issued on the day Kimberly-Clark filed its petition for certiorari. The plaintiff in that case purchased talcum powder that was allegedly connected to an increased risk of ovarian cancer. 903 F.3d at 281–82. Among other things, she sought "injunctive relief in the form of 'corrective advertising' and 'enjoining Defendants from continuing the unlawful practices' of selling Baby Powder without properly warning consumers of the alleged health risks." *Id.* at 292. The Third Circuit noted that its earlier decision in *McNair* had rejected such claims because "[t]he premise that former customers could again be deceived by the very sort of advertising practices over which they were

already pursuing equitable relief was a premise unmoored from reality." *Id.*

Like respondent here, the plaintiff in *In re Johnson & Johnson* asked the court to "limit *McNair* to instances when plaintiffs do not allege an intention to make purchases in the future," arguing that "[b]ecause [she] desires to purchase Baby Powder in the future, . . . her case can be distinguished from *McNair*." *In re Johnson & Johnson*, 903 F.3d at 293. But the Third Circuit "decline[d] to so limit *McNair*." *Id.* Because *McNair* itself recognized that the consumers there "'may accept a Synapse offer in the future,'" *id.* (quoting *McNair*, 672 F.3d at 225), "it would require a strained reading of the case to conclude that the former customers' failure to allege a desire to subscribe in the future played a key role in our analysis," *id.* The "holding in *McNair* was instead more focused on the crucial fact that the former customers were already aware of the allegedly deceptive business practices from which they sought future protection." *Id.*

Although respondent discusses *In re Johnson & Johnson*, she makes no mention of any of the above. Instead, she states only that "[b]ecause the plaintiff did not allege that she risked future harm of any kind, the court held that she lacked standing to seek injunctive relief"—a result with which the Ninth Circuit would purportedly agree. Opp. 12. But this ignores the *reason* the plaintiff in that case "did not allege that she risked future harm." As the Third Circuit explained, "*[b]ecause [the plaintiff] makes clear in this very lawsuit that she is well aware of health risks associated with using Baby Powder*, we readily conclude that she is not likely to suffer future economic injury." *In re Johnson & Johnson*, 903 F.3d

at 292 (citing *McNair*, 672 F.3d at 223) (emphasis added). The Ninth Circuit clearly rejects *that* proposition. *See* Pet. App. 20a–21a ("Knowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future.").

Respondent's attempt to distinguish the Seventh Circuit's caselaw is similarly unavailing. Once again, respondent insists that the Seventh Circuit's decisions "w[ere] specific to the[ir] facts" and "d[id] not reject the possibility that a plaintiff can seek injunctive relief in a false advertising case." Opp. 10. But nothing in the language of those decisions suggests that this is the case. *See, e.g.*, *Conrad v. Boiron, Inc.*, 869 F.3d 536, 542 (7th Cir. 2017) (concluding that plaintiff "does not have standing to request injunctive relief" where he "knows about [defendant's] refund program and . . . is fully aware of the fact that Oscillo is nothing but sugar water"); *Camasta*, 761 F.3d at 741 ("Since Camasta is now aware of JAB's sales practices, he is not likely to be harmed by the practices in the future."). Tellingly, respondent cannot identify a single case in the Seventh Circuit in which a consumer had standing to seek injunctive relief despite being aware of an alleged misrepresentation.

Laurens v. Volvo Cars of North America, LLC, 868 F.3d 622 (7th Cir. 2017), is certainly not such a case. *See* Opp. 10. There, plaintiffs purchased a plug-in car in reliance on the manufacturer's allegedly false representations about the car's battery range. *Laurens*, 868 F.3d at 623–24. The district court held that the plaintiffs lacked standing to pursue *any relief* because, *inter alia*, the manufacturer "had offered complete relief for [plaintiff] *before* she filed suit." *Id.*

at 624. On appeal, the Seventh Circuit noted that, in addition to seeking damages, the plaintiffs' "complaint also includes a request for injunctive relief, but it is premature for us to say whether they do or do not have standing for this part of the case." *Id.* at 625. The court acknowledged that there were numerous situations in which injunctive relief might be appropriate—for example, "if the [plaintiffs'] real dispute is that Volvo engages in misleading advertising more generally, then the fact that one lie has been uncovered may not, in fact, resolve the dispute." *Id.* But "[t]hese matters were not explored in any detail in the district court" because that court held that the plaintiffs did not have standing to pursue any claims. *Id.* Thus, "[i]f either named plaintiff has a live damages claim . . . , further proceedings will be necessary, and that would be the best time to explore whether either [plaintiff] also has standing to pursue any type of injunctive relief." *Id.*

In short, respondent's contention that "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," Opp. 14, is contradicted by those very decisions. Respondent's insistence that those cases turned on pleading deficiencies in the particular plaintiffs' complaints is a *post hoc* rationalization that is not supported by the reasoning of any of those cases, and was expressly rejected by the Third Circuit. Because respondent's claim for injunctive relief would have been dismissed had she brought her suit in these other jurisdictions, the Court should grant the petition for certiorari.

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

Respondent acknowledges that she may pursue injunctive relief only if there is "a sufficient likelihood that [s]he will again be wronged *in a similar way*" to how she was harmed in the past. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (emphasis added); *see* Opp. 14–16. She claims that her alleged past and future injuries are similar because "[j]ust 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." Opp. 14–15. But while respondent accuses Kimberly-Clark of "reframing" her allegations, *id.* at 14, it is in fact respondent who has changed tack in an effort to cast her disparate past and future harms as one and the same.

Respondent's complaint alleges that she was injured in 2013 when "*she believed* that the [wipes] had been specially designed to be suitable for flushing down toilets" and therefore "*purchased* the Scott Wipes for a few dollars." Pet. App. 104a (emphases added). Now, however, she alleges only that she is subject to "ongoing *uncertainty* over *whether to purchase* the product." Opp. 10 (emphases added). This "ongoing uncertainty," while perhaps a result of her prior mistaken belief concerning the wipes' attributes, is an entirely distinct form of harm from that suffered in the past, which was not borne out of uncertainty at all.

Even if respondent's recharacterization of her alleged harms could be indulged, respondent does not face the threat of "'actual or imminent injury' that [this Court's] cases require." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992). Although

respondent claims that she "risks being misled every time she sees Kimberly-Clark's 'flushable' label," Opp. 15, respondent's own complaint leaves no doubt that she knows exactly what the term "flushable" means when it appears on a Kimberly-Clark label. As she explains, Kimberly-Clark uses the term "flushable" to identify products that "'meet or exceed the current industry guidelines for assessing the flushability of non-woven products'" articulated by the Association of the Nonwoven Fabrics Industry. Pet. App. 97a. Respondent even identifies the specific tests that a product must pass before Kimberly-Clark will label it "flushable." *See, e.g.*, *id.* at 98a (describing "test 'FG502,'" which "requires that after three hours of agitation in the slosh box, more than 25% of the wipe passes through a 12.5 millimeter . . . sieve 80% of the time"); *id.* at 101a (describing "test FG507," in which "Defendants feed one wipe into [a] pump every ten seconds" to determine whether it causes clogs).

There are only two ways respondent could possibly be misled by Kimberly-Clark's label in the future. First, Kimberly-Clark might create and market as "flushable" wipes that satisfy respondent's higher standards *without disclosing that fact to consumers*—a contingency so implausible that it cannot possibly be concrete or imminent. *See* Pet. App. 97a. Second, respondent could choose to repurchase flushable wipes in the mere *hope* that they have been redesigned to meet her standards. *See* Opp. 14 ("She can find out the truth only by, again, buying the wipes and seeing how they perform."). Even if the possibility that respondent will repurchase the wipes could be considered concrete and imminent (especially when she has not purchased flushable wipes since 2013), it still would not establish standing because this Court has rejected attempts to "manufacture" standing by

creating the opportunity to be harmed. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

Respondent falls back on her "legally protected interest in receiving from sellers truthful, non-misleading information on which [she] can rely," the deprivation of which "is an injury that courts have long held is sufficient to establish Article III standing." Opp. 17. But the problem here has nothing to do with the particular *right* at issue—after all, there is no dispute that respondent can pursue her damages claim in federal court. Rather, the question is whether respondent is under a "real and immediate threat of repeated" future violations of that right. *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974). Because respondent knows how Kimberly-Clark uses the term "flushable," she faces no "real and immediate threat" that she will be misled by that representation in the future. Respondent's cases are not to the contrary. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 374 (1982) (concluding plaintiff had standing where, "*[i]rrespective of the issue of injunctive relief, respondents continue to seek damages* to redress alleged violations of the Fair Housing Act" (emphasis added)).

III. The Decision Below Has Far-Reaching Consequences.

Respondent downplays the implications of the Ninth Circuit's decision concerning the scope of the federal judicial power because Kimberly-Clark "is not contesting federal court jurisdiction over the *damages* claim," Opp. 18 (emphasis added), and "because the

claim for injunctive relief would proceed in state court anyway if [respondent] were held to lack Article III standing," *id.* at 19. But Article III is not a mere rule of thumb that yields to the policy concerns of individual cases. On the contrary, "[t]he Framers adopted the formal protections of Article III for good reasons, and 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1950 (2015) (Roberts, C.J., dissenting) (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983)).

Even if a court could overlook the constitutional limits on its jurisdiction where it is convenient to do so, the decision below is not limited to the facts of this case. Rather, a consumer in the Ninth Circuit may now deploy state law to pursue *federal* injunctions of speech simply by claiming that she could be confused by the speech in the future. And of course, it is not only plaintiffs who can invoke the expansive jurisdiction of federal courts in the Ninth Circuit; under the decision below, a defendant could remove a state-law claim for injunctive relief to federal court if it believes a federal forum will be more sympathetic to its interpretation of state law. Thus, while the Ninth Circuit assumed that declining to exercise jurisdiction here would constitute "'an unnecessary affront to federal and state comity [and] . . . an unwarranted federal intrusion into California's interests and laws,'" Pet. App. 23a (quoting *Machlan v. Procter & Gamble Co.*, 77 F. Supp. 3d 954, 961 (N.D. Cal. 2015)), the effect of its decision in this case is to *deprive* state courts of the opportunity to interpret and apply their own laws and transfer this power to federal tribunals.

Finally, respondent urges this Court to deny certiorari because "this case [is] in an interlocutory posture" and "factual determinations made at [later] stages of the case . . . 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." Opp. 20–21. But as this Court has held, "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. And of course, the question here is whether *any* "particular set of facts" could give rise to federal jurisdiction over respondent's claim for injunctive relief. The Second, Third, and Seventh Circuits have each either held or strongly suggested that the answer to this question is "no." Pet. 9–16; Part I, *supra*. The Ninth Circuit has disagreed. The Court should grant certiorari to resolve this question of law.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Ninth Circuit reversed.

Respectfully submitted,

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