UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIMBERLY-CLARK CORPORATION,

Plaintiff,

v.

THE DISTRICT OF COLUMBIA *et al.*,

Defendants.

Civil Action No. 1:17-cv-01901-JEB

UNOPPOSED MOTION OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND THE WATER ENVIRONMENT FEDERATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' OPPOSITIONS TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The National Association of Clean Water Agencies and the Water Environment Federation (collectively, "*Amici*") respectfully move under Local Civil Rule 7(o) for leave to file a brief as *amici curiae* in support of Defendants' oppositions to Plaintiff Kimberly-Clark Corporation's motion for a preliminary injunction (ECF No. 14). Defendants consent to the filing of *Amici*'s proposed brief, and Kimberly-Clark does not oppose the proposed brief's filing. A copy of *Amici*'s proposed brief is attached to this motion.

The National Association of Clean Water Agencies ("NACWA") is a non-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include nearly 300 municipal clean water agencies that own, operate, and manage publicly owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge.

The Water Environment Federation ("WEF") is a not-for-profit technical and educational organization of 34,000 individual members and 75 affiliated Member Associations representing water quality professionals around the world. Since 1928, WEF and its members have protected public health and the environment. As a global water sector leader, WEF's mission is to connect water professionals; enrich the expertise of water professionals; increase the awareness of the impact and value of water; and provide a platform for water sector innovation.

This case concerns the District of Columbia's Nonwoven Disposable Products Act of 2016 ("Act"), which establishes a flushability standard for "nonwoven disposable products," or wipes, that are manufactured "for sale in the District." *See* D.C. Law 21-220. Kimberly-Clark claims the Act violates the dormant Commerce Clause, the First Amendment, and the Due Process Clause. As organizations dedicated to clean water and public works issues, *Amici* have direct, real-world experience regarding the effects on municipal sewer and wastewater systems of wipes marketed as "flushable." Since 2008, when their members began reporting problems with flushed wipes, *Amici* have been studying the issue and exploring possible solutions. Numerous jurisdictions in the United States are currently considering and working to address the same problem targeted by the District's law.

Amici have a strong interest in the Court rejecting the current challenges to the authority of state and local governments to decide which products may safely enter their own sewer and wastewater systems and to create mechanisms to enforce those standards. *See* D.D.C. Local Civ. R. 7(o)(2) (requiring proposed *amicus* to "state the nature of the movant's interest"). Indeed, illustrating the strength of NACWA's interest in this case, NACWA Director of Regulatory Affairs Dr. Cynthia Finley testified in support of the Act while it was being considered by the D.C. Council. Plaintiff Kimberly-Clark discussed and characterized past statements and positions by

NACWA and Dr. Finley in its complaint and preliminary-injunction motion. *See, e.g.*, Compl. ¶¶ 33 & n.3, 56-59, 70, 76, 82; Pl.'s Mem. in Support of Mot. for Prelim. Inj. 8 & n.2, 13, 14 & n.5, 25. NACWA and Dr. Finley disagree with Plaintiff's characterizations, and seek to correct the record through the proposed *amicus* brief. Dr. Finley also signed a declaration cited in the preliminary-injunction opposition of Defendant District of Columbia Water and Sewer Authority (ECF No. 24-1).[*] An injunction prohibiting the Act from taking effect would cause significant harm to both the District and its citizens, and would have far-reaching consequences for other states, municipalities, and utilities seeking to address the problem of flushed wipes.

Because *Amici* have members throughout the country—and in WEF's case, throughout the world—*Amici* can provide a broader perspective than the parties regarding the harms posed by flushed wipes and the inadequacy of current industry standards to address the problem. *Amici*'s proposed brief discusses the significant costs borne by municipalities, utilities, and ratepayers in handling wipes that end up in sewer and wastewater systems. As explained in the brief, the significant government interests at stake in this case undermine Kimberly-Clark's claims, especially its claims under the dormant Commerce Clause and First Amendment. *Amici*'s proposed brief is thus "desirable" and "relevant to the disposition of the case," and *Amici*'s nationwide and international perspective would not otherwise be "adequately represented" by any party. D.D.C. Local Civ. R. 7(o)(2); *see also Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d

[*] The mere fact that an organization's employee provides testimony in a case does not bar the organization from later participating as an *amicus* in that case. *See, e.g.*, Mot. of Direct Selling Ass'n et al. for Leave to File Br. Amicus Curiae at 4 n.*, No. 14-90004 (5th Cir. Feb. 3, 2014) (opposed motion for leave to file appellate *amicus* brief noting that proposed *amicus*'s president "submitted an expert report and provided deposition testimony at Defendants' request in the district-court proceedings"); Order, No. 14-90004 (5th Cir. Mar. 5, 2014) (granting motion for leave to file *amicus* brief). Indeed, the advisory committee notes to the 2010 amendments to Federal Rule of Appellate Procedure 29 make clear that "coordination between the amicus and the party whose position the amicus supports" is permissible.

615, 617 (7th Cir. 2000) (noting that *amicus* briefs can properly provide "unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do"); *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002) (recognizing that *amici* can properly assist the court by "explain[ing] the impact a potential holding might have on an industry or other group" (citation omitted)).

As explained above, this motion for leave to file *Amici*'s proposed brief is unopposed. The filing of the brief will not affect the current briefing schedule on Kimberly-Clark's preliminary-injunction motion. Therefore, *Amici*'s brief will not delay the Court's proceedings.

For the foregoing reasons, *Amici* respectfully request that the Court grant this motion for leave to file their *amicus* brief. A proposed order and copy of the proposed brief are attached.

Dated: November 13, 2017

Respectfully submitted,

VINSON & ELKINS LLP

By: */s/ Jeremy C. Marwell*

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served today, November 13, 2017, with a copy of this document via the Court's CM/ECF system.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIMBERLY-CLARK CORPORATION, *Plaintiff*, v. THE DISTRICT OF COLUMBIA *et al.*, *Defendants*.	Civil Action No. 1:17-cv-01901-JEB

PROPOSED ORDER

The Motion of the National Association of Clean Water Agencies and the Water Environment Federation for Leave to File Brief *Amicus Curiae* in Support of Defendants' Oppositions to Plaintiff's Motion for a Preliminary Injunction is GRANTED.

IT IS THEREFORE ORDERED that the Brief of *Amici Curiae* National Association of Clean Water Agencies and Water Environment Federation is deemed filed in the above-captioned proceeding.

IT IS SO ORDERED.

Dated: November 13, 2017

_____
The Honorable Judge James E. Boasberg
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIMBERLY-CLARK CORPORATION, *Plaintiff*, v. THE DISTRICT OF COLUMBIA *et al.*, *Defendants*.	Civil Action No. 1:17-cv-01901-JEB

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND WATER ENVIRONMENT FEDERATION IN SUPPORT OF DEFENDANTS' OPPOSITIONS TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Clean Water Agencies ("NACWA") is a non-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include nearly 300 municipal clean water agencies that own, operate, and manage publicly owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment, and discharge.

The Water Environment Federation ("WEF") is a not-for-profit technical and educational organization of 34,000 individual members and 75 affiliated Member Associations representing water quality professionals around the world. Since 1928, WEF and its members have protected public health and the environment. As a global water sector leader, WEF's mission is to connect water professionals; enrich the expertise of water professionals; increase the awareness of the impact and value of water; and provide a platform for water sector innovation.

This case concerns the District of Columbia's Nonwoven Disposable Products Act of 2016 ("Act"), which establishes a flushability standard for "nonwoven disposable products," or wipes, that are manufactured "for sale in the District." *See* D.C. Law 21-220. Plaintiff Kimberly-Clark Corporation claims the Act violates the dormant Commerce Clause, the First Amendment, and the Due Process Clause. As organizations dedicated to clean water and public works issues, NACWA and WEF (collectively, "*Amici*") have direct, real-world experience regarding the effects on municipal sewer and wastewater systems of wipes marketed as "flushable." Since 2008, when their members began reporting problems with flushed wipes, *Amici* have been studying the issue

[1] *Amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amici*, their counsel, and their members contributed money intended to fund the brief's preparation or submission.

and exploring possible solutions. Numerous jurisdictions in the United States are currently considering and working to address the same problem targeted by the District's law.

Amici have a strong interest in the Court rejecting the current challenges to the authority of state and local governments to decide which products may safely enter their own sewer and wastewater systems and to create mechanisms to enforce those standards. An injunction prohibiting the Act from taking effect would cause significant harm to both the District and its citizens, and would have far-reaching consequences for other states, municipalities, and utilities seeking to address the problem of flushed wipes.

INTRODUCTION

The District of Columbia's Act addresses a growing problem: flushed wipes in municipal wastewater systems. The increased popularity of wipes marketed as "flushable" has been accompanied by a rise in costly burdens associated with handling flushed wipes—burdens borne directly by municipalities, utilities, and ratepayers. Although a number of products are inappropriately flushed into sewer and wastewater systems all over the world, wipes are unique because they are the only major product widely labeled, marketed, and advertised as "flushable." District Defs.' Opp'n, Ex. B, Committee Report 2, ECF No. 23-3 ("Committee Report").

Wipes that do not readily degrade can combine with fats, oils, greases, and other debris to cause major clogs in sewer and wastewater systems. These so-called "fatbergs" create significant problems for municipalities and utilities.[2] Although clogs can develop at numerous points in a sewer system, the problem is particularly pronounced at the site of mechanical pumps used to propel wastewater through the system. Wipes can accumulate in pumps' impellers, reducing

[2] *See, e.g.*, Carrie Wells, *'Fatberg' of Congealed Fat, Wet Wipes and Waste Discovered Under Baltimore's Streets, Causing Sewer Overflows*, The Baltimore Sun (Sept. 26, 2017, 12:20 PM), https://goo.gl/4VaGLq.

efficiency, increasing the electrical power used by pumps, and potentially even causing pumps to malfunction and stop working completely. Workers must then perform the costly, time consuming, and hazardous task of physically unclogging the pumps. New York City alone spent more than $18 million on wipe-related equipment problems between 2010 and 2015.[3] Every man-hour and dollar spent on removing wipe-related clogs is time and money that can no longer be devoted to other crucial projects, such as improving wastewater infrastructure. The following photos of workers removing wipe-related clogs during normal cleanings illustrate the clogs' impact on wastewater systems:

Frederick County, MD

City of Bakersfield, CA

City of Bakersfield, CA

City of Vancouver, WA

Orange County, CA

[3] *See* Matt Flegenheimer, *Wet Wipes Box Says Flush. New York's Sewer System Says Don't.*, N.Y. Times (Mar. 13, 2015), https://goo.gl/jxyCy4.

The District has significant experience with wipe-related clogs. As explained below, *infra* p. 15, the District recently incurred significant costs to remove this wipe-related clog at the Upper Anacostia Pumping Station:

Although the Upper Anacostia clog was costly, it could have been worse: If not removed in time, the clog could have caused a spill of raw sewage and wastewater. Such spills are a common byproduct of wipe-related clogs. *See infra* pp. 15-16.

In the Act at issue, the District exercised its unquestionable regulatory authority to decide which products are appropriate to be disposed of through its sewer system. The Act provides that a "nonwoven disposable product"—i.e., a wipe—that is offered "for sale in the District" can be labeled as "flushable" only if it: "(A) Disperses in a short period of time after flushing in the low-force conditions of a sewer system; (B) Is not buoyant; and (C) Does not contain plastic or any other material that does not readily degrade in a range of natural environments." D.C. Law 21-220, § 2(1); *see also* Compl. ¶¶ 1, 22, ECF No. 1. Wipes "for sale in the District" not satisfying this standard must bear a label notifying consumers the product "should not be flushed." D.C. Law 21-220, § 3(b). The Act's definition of "flushable" tracks the recommendation of the District of Columbia Water and Sewer Authority ("DC Water"), the entity responsible for managing the District's sewer systems and wastewater facilities, and is based on consensus principles endorsed by over 200 wastewater organizations and utilities worldwide. Committee Report 4. The District's Department of Energy and Environment is currently formulating rules implementing and interpreting the Act, including its flushability standard. *See* D.C. Law 21-220, §§ 2(2), 5; Nielsen Decl. ¶¶ 3-12, ECF No. 23-5. Members of the public, including Kimberly-Clark, will have an opportunity to comment on the proposed rules before they are finalized. *See* Nielsen Decl. ¶¶ 8-9. The Department also expects to provide a phase-in or grace period for compliance after the final rules are promulgated. *Id.* ¶ 11.

Rather than regulate conduct occurring wholly outside the District, the Act merely regulates the labeling of wipes manufactured "for sale in the District." D.C. Law 21-220, § 3.

Because wipe manufacturers are best positioned to determine whether their products meet the Act's flushability standard—a problem Kimberly-Clark concedes involves "a significant engineering puzzle," Prelim. Inj. Mem. 3, ECF No. 15 ("Mem.")—the District reasonably imposed on manufacturers the obligation of ensuring proper labeling of products "for sale in the District."

In asking this Court to take the extraordinary step of enjoining the implementation of the Act in its entirety, Kimberly-Clark significantly downplays the financial costs and other risks associated with the entry of wipes, even those labeled as "flushable," into municipal sewer and wastewater systems. In fact, an injunction prohibiting the Act from taking effect would impose significant burdens on both the District and its citizens, and would have far-reaching consequences for other municipalities, utilities, and ratepayers across the United States who are seeking to address this problem. The District's labeling regulations for products sold in the District that pose a significant threat to the District's sewer and wastewater system are constitutional and should not be enjoined. That is particularly true at this early stage of the Act's implementation and in the context of Kimberly-Clark's broad facial challenge, which seeks to enjoin applying the Act in *any* context and as to *any* products—even those Kimberly-Clark agrees present a serious problem. *See* DC Water Opp'n 22-23, ECF No. 24 (discussing demanding standard for facial challenges).

ARGUMENT

I. Kimberly-Clark's Dormant Commerce Clause and First Amendment Claims Require Careful Attention to the Significant Government Interests Furthered by the Act.

Kimberly-Clark asserts claims under the dormant Commerce Clause, First Amendment, and Due Process Clause. Defendants' briefs persuasively detail the fatal flaws in those claims. *See* District Defs.' Opp'n 10-40, ECF No. 23; DC Water Opp'n 17-41. *Amici* focus here on sharing their expertise and national perspective on the harms posed by flushed wipes and the inadequacy of current industry standards to address the problem. But before proceeding with that discussion,

it is helpful to pause briefly to explain why, doctrinally, the significant government interests at stake undermine Kimberly-Clark's claims, especially its claims under the dormant Commerce Clause and First Amendment. Of course, the harms from flushed wipes discussed in this brief are also relevant to the balance-of-equities and public-interest prongs of the preliminary-injunction standard. *See Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

A. The Act Does Not Constitute Extraterritorial Legislation in Violation of the Dormant Commerce Clause; Instead, It Falls Within the District's Traditional Police Powers.

Kimberly-Clark contends that the Act is *per se* invalid as an unconstitutional extraterritorial regulation. Mem. 19-23. But as the defendants explain, *see* District Defs.' Opp'n 12-17; DC Water Opp'n 24-32, Kimberly-Clark misapplies the extraterritorial doctrine. It is an open question whether that doctrine even applies to legislation, like the Act, that "set[s] non-price standards for products sold in-state." *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1173-75 (10th Cir. 2015) (Gorsuch, J.); *see also Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1146 (9th Cir. 2015). In any event, a statute is extraterritorial, and thus *per se* invalid under the dormant Commerce Clause, only if it "directly controls commerce occurring *wholly outside* the boundaries of a State."[4] *Healy v. Beer Inst. Inc.*, 491 U.S. 324, 336 (1989) (emphasis added).

Courts consistently have upheld state laws, like the District's, that impose "product labeling requirements for in-state sales, even when the product is produced out-of-state." *Legato Vapors, LLC v. Cook*, 847 F.3d 825, 832 (7th Cir. 2017); *see also Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 311-12 (1st Cir. 2005) (rejecting challenge to Maine disclosure law because it did not give the state the "power to determine whether a transaction in another state could occur"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 110-12 (2d Cir. 2001) (Vermont labeling

[4] The District is treated as a state for purposes of the dormant Commerce Clause. *See Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 198 (D.C. Cir. 1996).

law did "not inescapably require manufacturers to label all lamps wherever distributed"); *Philip Morris, Inc. v. Reilly*, 267 F.3d 45, 63-64 (1st Cir. 2001) (Massachusetts disclosure law "impose[d] no mandates or restrictions on other states"). The Act falls squarely within this line of cases. In an effort to protect the District's sewer and wastewater systems, the Act regulates only the labeling of wipes "for sale in the District." D.C. Law 21-220, § 3. That the Act may affect Kimberly-Clark's "participation in interstate commerce" does not control the analysis, because the Act is "indifferent" to conduct outside the District. *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 794 (8th Cir. 1995); *see also Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 647 (6th Cir. 2010); *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 110-12. The Act "requires only that in-state commerce be conducted according to in-state terms." *Rowe*, 429 F.3d at 312. Kimberly-Clark's labeling of wipes "for sale in the District" has "no bearing on how [it is] required to label [its] products in other states," and compliance with the Act does not "raise the possibility that [Kimberly-Clark] would be in violation of the regulations of another state." *Boggs*, 622 F.3d at 647.

Because the Act is not *per se* invalid as an unconstitutional extraterritorial regulation, Kimberly-Clark's dormant Commerce Clause claim is governed by the familiar *Pike* standard, which requires the Court to consider "whether the [District's] interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

As detailed below, the Act substantially furthers the traditional government interest of protecting health, safety, and welfare through the effective treatment of wastewater, and it does so through the minimally restrictive means of labeling, rather than mandatory product standards or an outright ban on sales. The Commerce Clause does not eviscerate the District's "authority under

[its] general police powers to regulate matters of legitimate local concern." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) (citations and internal quotation marks omitted). Dormant Commerce Clause jurisprudence expressly acknowledges "the autonomy of the individual States within their respective spheres." *Healy*, 491 U.S. at 336; *see also Legato Vapors*, 847 F.3d at 827 (Constitution leaves states with "ample authority to regulate in-state commerce . . . to protect the health and safety of [their] residents"). Moreover, "state safety regulations are accorded particular deference in Commerce Clause analysis." *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984) (citations omitted); *see also Reilly*, 267 F.3d at 62 (state power is "particularly strong when a state acts in the interest of health and consumer protection"). As long as the District does not "needlessly obstruct interstate trade . . . , it retains broad regulatory authority to protect the health and safety of its citizens." *Maine v. Taylor*, 477 U.S. 131, 151 (1986).

It cannot be disputed that the Act represents an exercise of the District's traditional police powers to regulate health and safety matters within the District. Operating a sewer system is a traditional function of state and local governments and a necessary component of modern life. The Act defines what products are acceptable for disposal through the District's own sewer and wastewater system and provides a mechanism for informing consumers of what products do not satisfy that definition. Further, the District reasonably determined that manufacturers, who have control over labeling and the information relating to the flushability of their products, should be subject to the Act's labeling requirements. *See, e.g.*, *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 110-12 (rejecting dormant Commerce Clause challenge to Vermont labeling law that imposed obligation on lamp manufacturers).

Although the District is the first jurisdiction to enact legislation specifically addressing the labeling of non-degradable wipes, states and municipalities regularly exercise their broad authority

to regulate and protect their sewer and wastewater systems. To take just one example, a number of states have passed legislation banning the sale of personal care products that contain plastic microbeads, which enter the nation's waterways after washing down the drain.[5] Similar to the Act, Maryland's law banning microbead products defines "biodegradable" by reference to the product's ability to decompose in wastewater treatment systems. *See* Md. Code Ann., Envir., §§ 9-2001(b), 9-2003(a). Further, numerous jurisdictions across the country are working to address the same problem targeted by the District's Act,[6] and a number of states, including Maryland and New York, already have proposed similar legislation.[7] The Act here is thus just one example of the ubiquitous phenomenon of local regulation of sewer and wastewater systems.

B. The Act is a Valid Commercial-Speech Labeling Requirement Subject at Most to Review Under *Central Hudson* or *Zauderer*.

Regarding Kimberly-Clark's First Amendment claim, the Act merely establishes the District's standards for what products may be safely added to its own sewer and wastewater system, and requires products offered for sale in the District to be labeled in accordance with those standards. Although Kimberly-Clark may disagree with the flushability standards the District has adopted, whether a product satisfies those standards is a factual matter about which there cannot be opposing viewpoints in a constitutionally relevant sense. *See United States v. Philip Morris USA Inc.*, 855 F.3d 321, 327 (D.C. Cir. 2017) (discussing the government's ability to require

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[5] *See* Nicholas J. Schroeck, *Microplastic Pollution in the Great Lakes: State, Federal, and Common Law Solutions*, 93 U. Det. Mercy L. Rev. 273, 274-76, 286 (Spring 2016).

[6] *See, e.g.*, Liz Sawyer and Mary Lynn Smith, *MPCA to Seek Label Restriction on Flushable Wipes*, The Star Tribune (Feb. 24, 2016, 9:30 PM), https://goo.gl/yvFAUw (Minneapolis Pollution Control Agency requested state legislature to ban "flushable" labels on wipes sold in Minnesota); Mick Akers, *Clark County Laments Sewage Clog from Flushable Wipes*, Las Vegas Sun (Oct. 31, 2017 2:00 AM), https://goo.gl/hcHHuU (Clark County Water Reclamation District looking at "legislative remedies" to combat clogs resulting from wipes labeled as flushable).

[7] *See* S. 280, 2017 Sess. (Md. 2017), https://goo.gl/rNzQrq; H.D. 1239, 2017 Sess. (Md. 2017), https://goo.gl/J164Mz; 2014-15 NY Reg. Sess. S. Bill 5307-A (May 13, 2015), https://goo.gl/Y3BEpS.

reasonably crafted disclosure mandates that seek to inform consumers about product traits (citing *Am. Meat Inst. v. Dep't of Agric.*, 760 F.3d 18, 26 (D.C. Cir. 2014) (en banc))).

As the D.C. Attorney General's brief explains, *see* District Defs.' Opp'n 21-36, the Act governs quintessential commercial speech—namely, product labeling. As a result, it is subject to review under the less exacting standards of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), or *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).[8] Both standards require careful consideration of the significant government interests in protecting health, safety, and welfare at issue here. *See Zauderer*, 471 U.S. at 651; *Cent. Hudson*, 447 U.S. at 563-66.

II. Flushed Wipes, Even Those Labeled as "Flushable," Impose Significant Costs and Burdens on Municipalities, Utilities, and Ratepayers.

Although Kimberly-Clark attempts to downplay the costs associated with flushed wipes, including wipes marketed as "flushable," in municipal sewer and wastewater systems, the data tells a different story. The increased popularity of purportedly "flushable" wipes over the last decade has been accompanied by an increase in clogs and other problems in municipal sewer and wastewater systems across the United States. While wipes manufacturers are realizing increased profits, municipalities, utilities, and ratepayers are bearing the costly burdens.

It is undisputed that flushing wipes and other consumer products into sewer systems causes significant problems for municipalities and wastewater utilities across the United States. *See, e.g.*, Compl. ¶ 41; District Defs.' Opp'n, Finley Testimony (Oct. 24, 2016), Ex. A 12, ECF No. 23-2

[8] To the extent Kimberly-Clark contends that *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), altered the commercial speech doctrine, *see* Mem. 26, that argument fails. *See Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 841, 846-50 (9th Cir. 2017); *Nicopure Labs, LLC v. FDA*, ___ F. Supp. 3d ___, 2017 WL 3130312, at *40-41 (D.D.C. 2017); *see also Sorrell*, 564 U.S. at 579 (noting that "commercial speech can be subject to greater governmental regulation than noncommercial speech" (citation and internal quotation marks omitted)).

("Finley Testimony"); District Defs.' Opp'n, Hawkins Testimony (Oct. 24, 2016), Ex. A 55-57, ECF No. 23-2 ("Hawkins Testimony"). Kimberly-Clark, therefore, focuses its argument on its claim that "nonflushable" wipes are the real problem. *See, e.g.*, Compl. ¶ 56; Mem. 9. This argument, however, ignores that there is no "uniform and nationally applicable definition" of the term "flushable." *Kurtz v. Kimberly-Clark Corp.*, Nos. 14-cv-1142 et al., 2015 WL 8481833, at *1 (E.D.N.Y. Dec. 10, 2015). Given the absence of mandatory rules, any manufacturer can market its wipes as "flushable." Committee Report 2. For example, one test revealed that a "flushable" wipe manufactured by NicePak, Inc., remained completely intact after being flushed 100 times. *See* Finley Testimony on Md. H.B. 1239, at 1-2 (Mar. 15, 2017), https://goo.gl/ND52xw.

Exacerbating the problem is the fact that manufacturing a truly flushable wipe presents "a significant engineering puzzle." Mem. 3-4. Further, wipes are the only major product widely labeled and marketed as "flushable," leading consumers to believe that any wipe labeled "flushable" will disperse when flushed. *See* Committee Report 2; *see also Davidson v. Kimberly-Clark Corp.*, 873 F.3d 1103, 1110-11 (9th Cir. 2017).

The Act was designed to address the "significant and costly clogs and requisite clean-ups" that result from wipes entering the District's sewer and wastewater systems. Committee Report 2. The data confirms the enormous costs and risks faced by municipalities and utilities, like the District and DC Water, associated with purportedly "flushable" wipes entering sewer and wastewater systems. The presence of wipes and other products in municipal sewer and wastewater systems results in the clogging of pipes and pump stations, causing significant infrastructure damage and delays in the treatment process.[9] *See* Hawkins Testimony, Ex. A 54-56. Wipes that

[9] Kimberly-Clark's focus on the number of flushable wipes found in municipal sewer and wastewater systems does not tell the whole story. *See* Mem. 8-11. The percentage of the wipes

do not break down in wastewater systems must be physically removed and taken to landfills for disposal. *See id.* at 56; Finley Testimony, Ex. A 12. The municipal and utility workers who clean out the wastewater systems are placed at risk of physical injury, as well as illness from their exposure to the pathogens and contaminants in raw sewage.[10] Finley Testimony, Ex. A 12.

As a result of wipes and other products being flushed into sewer systems, municipalities and utilities must, among other things, devote extra staff time to the difficult and hazardous work of unclogging equipment, expend significant sums to dispose of waste removed from equipment, and deal with the additional wear that reduces the useful life of equipment. These costs are borne by municipalities and utilities and are ultimately passed on to residents. *See* Hawkins Testimony, Ex. A 55, 57.

The available data suggests that municipalities and utilities spend between $500 million to $1 billion per year to address these problems. Finley Testimony, Ex. A 12. The following examples, taken from news articles and NACWA's and WEF's own research and discussions with their members, highlight the costs of flushed wipes:

- Between 2010 and 2015, New York City spent more than $18 million on wipe-related equipment problems. *See* Flegenheimer, *supra* n.3.
- Between 2008 and 2013, the City of Vancouver, Washington, expended approximately $1.86 million on removing and disposing clogs involving wipes and other debris,

relative to an entire clog is not the only consideration, because wipes, even those labeled as "flushable," bind with fats, oils, greases, and other debris to create larger clogs, or "fatbergs." *See* Hawkins Testimony, Ex. A 55; Committee Report 5-6.

[10] There may be a misconception that water-treatment workers are regularly exposed to sewage. That is not the case. Usually, tools such as vacuum-cleaning trucks allow wastewater agencies to minimize employees' exposure. The level of exposure to raw sewage associated with manually cleaning wipe-related clogs is atypical.

retrofitting pumps, and paying for additional electrical power due to wipe-related inefficiency in the operation of pumps.

- Wastewater utilities in the Detroit, Michigan, area have spent millions on repair projects addressing problems caused by flushed wipes and other products. *See* Christina Hall, *Flushable Wipes Clogging Sewer Pumps and Pipes in Metro Detroit*, Detroit Free Press (Apr. 16, 2017, 11:09 PM), https://goo.gl/gQjzHB.

- The Department of Public Works of the City of Keene, New Hampshire, has decided to spend over $1.1 million on a new pumping-station filtration system to address issues related to wipes and other non-biodegradable solids. *See* Xander Landen, *Flushed Out: Bathroom Wipes Clogging Up Keene's Sewer System*, Sentinel Source (Feb. 13, 2017), https://goo.gl/huwbXX.

- Over a five-year span, the Orange County Sanitation District in California spent $2.4 million on new equipment to address wipe-related issues, and over $300,000 in one year to unclog pumps.

- Clean Water Services, a water resources management utility in Oregon, spends approximately $120,000 each year on removing and disposing of clogs involving wipes.

- Columbus Water Works in Georgia spent $550,000 in two years on new in-line grinding equipment to shred wipes and other debris, and it spends $250,000 each year on additional operations and maintenance costs due to wipes and other inappropriately flushed products.

- The Clark County Water Reclamation District in Las Vegas, Nevada, estimates that it spends tens of thousands of dollars each year to clear buildup of items, "with a large portion of that being flushable wipes." Akers, *supra* n.6.

The District also has experienced significant costs and burdens in handling flushed wipes. DC Water estimates that it spends tens or hundreds of thousands of dollars each year on regular maintenance activities involving wipes and other fibrous products. *See* Hawkins Testimony, Ex. A 56-57; Kharkar Decl. ¶ 7, ECF No. 24-2. Those costs can rise precipitously when clogs result in major incidents. For example, DC Water recently spent over $4 million on clean-up efforts after clogs involving wipes and other debris caused flooding around the Kennedy Center in 2014. *See* Melsew Decl. ¶¶ 10-20, ECF No. 24-3. At the District's Upper Anacostia Pumping Station, wipes bonded with fats, oils, greases, and other debris to clog all of the pumps, shutting down the station. Hawkins Testimony, Ex. A 56. The District was fortunate the clog did not result in a spill of raw sewage and wastewater. *Id.* at 56-57. But the clog still imposed significant costs on the District. *See id.*

As the 2014 flooding around the Kennedy Center starkly illustrates, *see* Melsew Decl. ¶¶ 10-20, the blockage of wastewater systems can result in sewage and wastewater overflows, which pose significant risks for communities and waterways. Hawkins Testimony, Ex. A 54-55. Overflows occur when untreated or partially untreated sewage is released from municipal sewer systems. In addition to expensive clean-up and equipment repair costs, these overflows, which carry bacteria, viruses, and other harmful elements, can cause serious illnesses and pose environmental risks to waterways and communities. *See* EPA, *Sanitary Sewer Overflow (SSO) Frequent Questions*, https://goo.gl/esKjEP (last visited Nov. 12, 2017).

The Kennedy Center incident was far from an anomaly; the risk of wipe-related sewer overflows is an increasing problem for municipalities and utilities across the United States. This September, the Baltimore Department of Public Works determined that a "fatberg"—"[a] massive lump of congealed fat, wet wipes and other detritus"—in the city's sewer system caused an

overflow that resulted in around 1.2 million gallons of sewage entering the Jones Falls. *See* Wells, *supra* n.2. The City of Keene, New Hampshire, has attributed recent sewer overflows to flushed wipes, *see* Landen, *supra* p. 14, as has the City of Raleigh, North Carolina, which has experienced at least three large wipe-related sewage overflows in 2017.[11]

III. The Industry Standards Touted by Kimberly-Clark are Insufficient.

Kimberly-Clark asserts that "flushable wipes do not cause clogs of municipal water systems." Mem. 8. But because there are no mandatory laws defining "flushable," *see Kurtz*, 2015 WL 8481833, at *1, the nonwovens industry can self-define the term when they label their products. Committee Report 2, 5. Kimberly-Clark touts voluntary guidelines developed by the International Nonwovens and Disposable Association ("INDA"), a trade association comprised of nonwoven-product manufacturers. *See* Compl. ¶¶ 49, 53-54; Mem. 5-7. The INDA-created voluntary guidelines are insufficient because, among other things, they do not accurately reflect the conditions found in sewer systems across the United States.

A. INDA Created the *Guidelines* Without Input From Wastewater Utility Professionals.

In the mid-2000s, manufacturers began flooding the market with wipes labeled as "flushable." Compl. ¶ 48. As a result, the nonwovens industry began to develop guidelines "to help assess whether manufacturers' products should be flushed down toilets." *Id.*; *see also* Mem. 5. In 2008, INDA issued its first set of flushability guidelines, titled, *Guidance Document for*

[11] *Vandalism, Flushed Wipes to Blame for 181,000 Gallon Sewer Overflow, Raleigh Says*, CBS North Carolina (May 31, 2017, 2:05 PM), https://goo.gl/1qZtnn (May 2017 sewer overflow released around 181,000 gallons of sewage into creek tributary); Richard Stradling, *Raleigh Says 'Flushed Wipes' Clogged Pipe, Sending Sewage into Walnut Creek*, The News & Observer (Mar. 6, 2017, 11:49 AM), https://goo.gl/YBq1zL (March 2017 wipe-related spill dumped about 22,650 gallons of sewage into creek); *City of Raleigh Blames Sewage Overflows on 'Flushable Wipes'*, CBS North Carolina (Feb. 7, 2017, 12:23 PM), https://goo.gl/xGJP3W (wipes caused February 2017 overflow of approximately 39,000 gallons of sewage into creek tributary).

Assessing the Flushability of Nonwoven Consumer Products ("*Guidelines*"). Compl. ¶ 50; Mem. 5-6. INDA published the third edition of the *Guidelines*—the current edition—in 2013. *See* Villèe Decl. ¶ 10, ECF No. 24-5. In March 2009, INDA also published the *Manufacturers' Code of Practice on Communicating Disposal Pathways for Personal Hygiene Wet Wipes*. Compl. ¶ 52.

Notably absent from the conversations over the *Guidelines* and the *Code of Practice* were representatives from wastewater associations. Although wastewater utility professionals understand the conditions of real sewer systems, INDA published its *Guidelines* without meaningfully considering any input from these professionals. *See* Finley Testimony, Ex. A 13; DC Water's Opp'n, Finley Decl. ¶¶ 11-13, ECF No. 24-1. Moreover, INDA published the third edition of the *Guidelines* over criticism from the wastewater community that the *Guidelines* were inadequate. Finley Testimony, Ex. A 13; Finley Decl. ¶ 12; Committee Report 2; *see also* INDA & EDANA, *Code of Practice* 4 n.5 (2d ed. 2017), https://goo.gl/TkYwhJ (acknowledging that "there is not yet agreement between the wastewater associations and the wipes industry on appropriate flushability assessment criteria"). INDA did not begin a meaningful dialogue with the wastewater community on flushability issues until after the third edition of the *Guidelines* had been published. *See* Compl. ¶ 56; Finley Testimony, Ex. A 13; Committee Report 2.

B. INDA *Guidelines* Rely on Inadequate Tests That Provide Insufficient Benchmarks for Flushability.

Kimberly-Clark does not dispute that there are currently no mandatory laws governing the use of the term "flushable" for wipes; instead, as explained above, it relies on INDA's *Guidelines* as a benchmark for flushability. *See* Compl. ¶¶ 53-54; Mem. 5-7. But the nonwovens industry and the wastewater associations both agree that the *Guidelines* are insufficient.

In 2013, *after* the third edition of the *Guidelines* was published, representatives from INDA and wastewater agencies and associations, including NACWA and WEF, created a "Technical

Workgroup" to examine the issue of "flushable" wipes. *See* Compl. ¶ 56. The Technical Workgroup reached a consensus that the seven tests used in the third edition to assess flushability "*with modifications* … have the potential to produce an accepted basis for a claim of flushability."[12] Technical Workgroup on Flushability, Final Findings, Finding 12 (July 11, 2014), https://goo.gl/2wraH6. Therefore, the Technical Workgroup's findings demonstrate that the current flushability guidelines, the same ones touted by Kimberly-Clark to substantiate its flushability claims, require modifications.

A number of wastewater associations, including NACWA and WEF, recently examined two of the tests used in the *Guidelines*—the Municipal Pump Test and the Slosh Box Test—and concluded they are insufficient benchmarks for flushability. The Technical Workgroup also recognized that these two tests require modifications. *See id.*, Findings 12, 18.

1. Municipal Pump Test

The Municipal Pump Test assesses power increases in a pump system to determine whether a product is compatible with a municipal pump. *See* Finley Testimony, Ex. A 21. As explained above, *see supra* pp. 2-3, wipes can decrease pumps' efficiency by accumulating in pumps' impellers, so increased power use indicates that a wipe has not substantially dispersed. To better understand wipes' effect on the operation of a typical pump used in wastewater collection systems, several wastewater associations, including NACWA and WEF, performed pump tests on a number of wipes labeled and marketed as "flushable." Finley Testimony, Ex. A 13, 21. Rather than passing completely through the pump, the tested wipes frequently accumulated in it, which could contribute to costly clogs. *Id.* at 13.

[12] Unfortunately, this process ended after INDA failed to respond to the wastewater associations' proposals. *See* Finley Testimony, Ex. A 13; Committee Report 2.

The Municipal Pump Test is in need of significant modifications to better protect pumps. The current version of the Municipal Pump Test calls for wipes to be soaked in water for one hour, *id.* at 21, but a pre-test soak time of 30 minutes is more indicative of the amount of time that a wipe would travel through household plumbing and the municipal sewer system before reaching a pump in many wastewater collection systems, *see id.* at 24-25. The wastewater associations' tests conducted with the reduced soak time of 30 minutes resulted in higher power draws. *Id.* Further, the pass/fail criteria set forth in the *Guidelines* are far too lenient. The acceptable level of increase in pump-power draw under the *Guidelines* should be substantially reduced, and to qualify as "flushable," a wipe should not result in any material accumulation in the pump. *See id.* at 24. If the pre-soak time was reduced to 30 minutes and the pass/fail criteria were appropriately modified, the wastewater associations' testing indicates that no wipe currently on the U.S. market would pass the Municipal Pump Test. *Id.* at 21.

2. Slosh Box Test

The Slosh Box Test fails to represent the physical conditions of a typical municipal sewer system. Finley Decl. ¶ 13. It requires at least one-quarter of a wipe agitated in water to be dispersed into pieces small enough to pass through a sieve. *Id.* Wipes tested under the *Guidelines*' parameters are subjected to turbulence so high that it creates a wave-like motion in the slosh box. *Id.* Such conditions would rarely, if ever, occur in a sewer system. *Id.* To simulate real-world conditions, the turbulence in the *Guidelines* version of the Test should be reduced by increasing the amount of water in the box and reducing the speed of the sloshing. In addition, the test's pass/fail criteria are insufficient because they do not require adequate dispersion to avoid clogging or other operational problems. Because the Slosh Box Test does not adequately represent conditions in typical wastewater collection systems, it must be modified before being used by manufacturers to support flushability claims.

C. The Act Is Based on Flushability Standards Endorsed by Wastewater Utility Professionals from Around the World.

Contrary to Kimberly-Clark's assertion that the Act "does not adopt any existing standard" of flushability, Mem. 15, the Act is based on international consensus principles. In September 2016, before the D.C. Council passed the Act, *see* Compl. ¶ 25, an international group of more than 200 wastewater organizations and utilities from 14 countries released a position statement on products labeled as "flushable." Finley Testimony, Ex. A 13, 27-33. According to these international water industry professionals, a product should not be labeled "flushable" unless it: (a) "breaks into small pieces quickly"; (b) is not buoyant; and (c) "does not contain plastic or regenerated cellulose and only contains materials which will readily degrade in a range of natural environments." *Id.* at 13, 27. Those standards closely resemble the flushability standards in the District's Act. *See* D.C. Law 21-220, § 2(1). Because the District adopted the "key requirements" for flushability recognized by a diverse group of water industry professionals worldwide, Finley Testimony, Ex. A 13, 27, it cannot be argued that the Act's flushability standard broke new ground or failed to consider existing standards.

D. Studies of Sewer and Wastewater Systems Demonstrate the Costs Associated with Flushed Wipes.

The studies of sewer and wastewater systems on which Kimberly-Clark purports to rely, *see* Compl. ¶¶ 23, 60-61; Mem. 8-11, do not advance its position. Defendants' briefs explain the flaws in Kimberly-Clark's reliance on the tests performed in California and New York City. *See* District Defs.' Opp'n 3-4; DC Water Opp'n 3-4, 35 n.2. Further, a thorough analysis of the studies conducted by the cities of Portland, Maine, and Vancouver, Washington, demonstrates the harms caused by flushed wipes.

1. Maine Studies

In 2011 and 2012, the City of Portland, Maine, conducted three field studies, with input from both wastewater and nonwovens-industry personnel, that examined materials removed from a bar screen in the city's sewer and wastewater systems. *See* Compl. ¶ 60; Mem. 10; Committee Report 3. The purpose of the studies was to determine whether it was possible to identify root causes for pump clogging in the city's sewer and wastewater systems. *See* Powling Decl., Ex. G 1, ECF No. 17-7 ("2012 Maine Study"); Powling Decl., Ex. F 1, 6, 11, ECF No. 17-6 ("2011 Maine Study"). A number of wipes labeled as "flushable" on their packaging were found intact in the Maine studies. *See* 2011 Maine Study 2, 6; 2012 Maine Study 3-4.

Kimberly-Clark emphasizes that the Maine studies found that purportedly "flushable" wipes ranged from 8-17% of the materials found in the systems, less than paper products, baby wipes, and feminine hygiene products. *See* Mem. 10; *see also* Powling Decl. ¶ 29, ECF No. 17; 2011 Maine Study 2, 9; 2012 Maine Study 3-4. But while wipes labeled as "flushable" make up only 7% of the nonwoven disposable products industry, Mem. 13, purportedly "flushable" wipes constituted 35% of the total wipes collected in the Maine pump stations. Committee Report 3; Villèe Decl. ¶ 4. In any event, merely looking at the percentage of wipes relative to an entire clog is misleading, because—as explained above—wipes, even those labeled as "flushable," can bind with fats, oils, greases, and other debris to create larger clogs, which create significant and costly problems for municipalities and utilities.[13] *See* Hawkins Testimony, Ex. A 55; Committee Report 5-6.

[13] *See, e.g.*, Justin Moyer, *This 20-foot Congealed 'Fatberg' that Clogged a Maryland Sewer Has Been Removed*, Wash. Post (Oct. 19, 2017), https://goo.gl/wgaTve ("A 20-foot 'fatberg' of congealed grease, *flushable wipes* and other unsavory stuff was removed Monday from a sewer pipe in Baltimore." (emphasis added)); Flegenheimer, *supra* n.3 ("Often, the wipes combine with other materials, like congealed grease, to create a sort of superknot.").

2. Vancouver Studies

While alluding to them, *see* Mem. 13-14 & n.5; Compl. ¶ 33 & n.3, Kimberly-Clark does not directly address the results of the "in-sewer" tests conducted by the City of Vancouver, Washington, which sought to assess the adverse conditions in the city's sewer systems caused by the presence of wipes labeled as "flushable." *See* Finley Testimony, Ex. A 13, 16; Villèe Decl. ¶ 7. The tests conducted by the city demonstrated that the vast majority of purportedly "flushable" wipes currently on the market in the United States cannot be safely disposed of in sewer systems.

Between June and August 2016, the city conducted a series of in-sewer tests near the Vancouver westside treatment plant and in a residential neighborhood.[14] *See* Finley Testimony, Ex. A 13, 16. The tests occurred over multiple days and used three different sections of sewer—South Interceptor, West Interceptor, and Sewer main (an eight-inch pipe diameter sewer main in a residential neighborhood). The "Interceptor" tests subjected the wipe samples to greater turbulence than the "Sewer main" tests due to the larger pipes in the "Interceptor" sections of the sewer system. The 2016 test results demonstrated that most, if not all, of the "flushable" wipes currently on the market in the United States travel through real sewer systems intact, meaning that they should not be considered safe to flush.[15] *See* Finley Testimony, Ex. A 13, 16. In the "Sewer main" tests, which occurred on July 20, August 4, and August 10, almost all of the wipes currently on the market in the United States were fully intact when retrieved at the collection point.

[14] The complete results of the 2016 Vancouver tests can be found at: https://goo.gl/mmMsw4 (June 9, 2016); https://goo.gl/UFVxKM (June 14, 2016); https://goo.gl/C4pVHa (June 16, 2016); https://goo.gl/YBBGTL (July 20, 2016); https://goo.gl/vpGWXy (August 4, 2016); and https://goo.gl/BHk5aS (August 10, 2016).

[15] Several wipes that are not currently on the market in the United States performed relatively well. *See* Villèe Decl. ¶ 7.

Likewise, the wipes that passed through the "Interceptor" sections were nearly completely intact when retrieved, despite the increased turbulence in those sections of the sewer system.

On January 4-5, 2017, the city conducted an in-sewer test of 18 different substrates of wipes marketed as "flushable"—15 from Japanese companies and 3 from American companies.[16] 2017 Vancouver Study 1, 8. The tests were designed to assess the dispersion capabilities of these purportedly "flushable" products in "real world sewer conditions." *Id.* at 2-3. In general, "the American brands performed very poorly in comparison to the Japanese samples." *Id.* at 9, 11. Based on the January 2017 tests, the city concluded that "American manufactured wipes need to break down faster and easier in order to keep municipal sanitary sewer systems running efficiently and effectively." *Id.* at 11.

Kimberly-Clark notes that Dr. Cynthia Finley of NACWA explained that the Vancouver studies demonstrated that there was "one possible exception" to the general conclusion that flushable wipes currently on the market in the United States do not adequately disperse when traveling through real sewer systems. Compl. ¶ 33. The "one possible exception," as Kimberly-Clark notes, was Kimberly-Clark's Cottonelle® flushable wipe. *Id.* ¶ 33 n.3. But there are important caveats to Dr. Finley's statement that Kimberly-Clark ignores.

First, while Kimberly-Clark's wipe "dispersed adequately" in the August 2016 "Sewer main" test, it traveled intact through the system during the July 2016 trial of the same test. Finley Testimony, Ex. A 13, 16-18. Second, during the 2016 "Interceptor" tests, Kimberly-Clark's wipe performed well in the more turbulent South Interceptor, but only partially dispersed in the West Interceptor. Third, in the January 2017 test, the Kimberly-Clark sample performed "the best out

[16] The complete results of the 2017 Vancouver study can be found at: https://goo.gl/ZzPvgJ ("2017 Vancouver Study").

of the group," but it showed only "some major tears." 2017 Vancouver Study 9. Thus, while Kimberly-Clark's wipe performed better than the other inappropriately labeled American wipes, *see id.* at 9, 11, the wipe did not fully disperse, *see id.* at 16.

In any event, the proper question here is not whether Kimberly-Clark's wipes satisfy some Platonic ideal of flushability. The immediate question instead is whether the District must rely on the nonwovens industry's self-policing rather than adopting its own flushability standards. The generally poor performance of U.S. wipes in the Vancouver studies highlights the problems associated with using voluntary, industry-created guidelines as the benchmark for flushability claims.

CONCLUSION

Exercising its unquestioned authority to regulate what products may safely be placed into its sewer and wastewater systems, the District created a flushability standard and imposed a labeling requirement on those manufacturers that do not meet that standard. Far from imposing unconstitutional restraints on Kimberly-Clark's business, the Act fills a gap in the regulatory framework to address a costly and burdensome problem for the District. For the foregoing reasons, the Court should deny Kimberly-Clark's motion for a preliminary injunction.

Dated: November 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served today, November 13, 2017, with a copy of this document via the Court's CM/ECF system.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KIMBERLY-CLARK CORPORATION, *Plaintiff*, v. THE DISTRICT OF COLUMBIA *et al.*, *Defendants*.	Civil Action No. 1:17-cv-01901-JEB

Certificate Required by LCvR 7.1 of the Local Rules of the United States District Court for the District of Columbia

I, the undersigned, counsel of record for the National Association of Clean Water Agencies ("NACWA") and the Water Environment Federation ("WEF"), certify that to the best of my knowledge and belief, NACWA is a not-for-profit, non-stock trade association, and WEF is an Illinois non-stock, tax-exempt educational and charitable organization. They have no parent companies or subsidiaries which have any outstanding securities in the hands of the public. NACWA and WEF in the aggregate have many members and affiliates, some of which are public companies.

These representations are made in order that judges of this Court may determine the need for recusal.

Dated: November 13, 2017

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